IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 19726/2010

DATE: 2 NOVEMBER 2011

In the matter between:

DEO GRACIAS KATSSHINGU Applicant

and

THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEES AFFAIRS 1st Respondent

THE REFUGEES STATUS DETERMINATION OFFICER, V E MAVUYO N.O. 2nd Respondent

THE MINISTER OF HOME AFFAIRS, RSA 3rd Respondent

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS, RSA 4th Respondent

---

J U D G M E N T

BOZALEK, J:

This is an application to review a decision taken by the first and second respondents, who are the Standing Committee for Refugee Affairs and the Refugee Status Determination Officer,

V E Mavuyo respectively, refusing to grant refugee status and asylum to the applicant, a young man born in the DRC who entered South African in May 2009. The third and fourth respondents are the Minister of Home Affairs and the director-General of the Department of Home Affairs. All the respondents initially opposed the application in which the relief sought by the applicant is the following:

1. Declaring that the decision of the Standing Committee for Refugee Affairs (first respondent) taken on 27 October 2009, upholding the decision of the second respondent, namely the Refugee Status Determination Officer, in terms of section 25 of the Refugees Act 130 of 1996, to be inconsistent with the Constitution, unlawful and invalid.

2. Reviewing and setting aside the aforesaid decision of the first respondent, upholding the decision of the second respondent to decline to grant the applicant refugee status and asylum.

3. Declaring the decision of the second respondent made in terms of section 24(3)(b) of the Refugees Act on 18 May 2009, to be inconsistent with the Constitution, unlawful and invalid.

4. Reviewing and setting aside the aforesaid decision rejecting the applicant's application for refugee status and asylum.

5. Declaring the applicant is a refugee who is entitled to asylum in South Africa as contemplated by section 3 of the Refugees Act.

At the hearing, counsel for the respondent, Mr Papier, advised that his clients no longer opposed the above relief being granted, save for prayer 5 which they continue to oppose, namely the declaration that the applicant is a refugee entitled to asylum in South Africa as contemplated by the Refugees Act. In addition the applicant seeks the costs of this application.

Set down at the same time as this application, was a related application for contempt arising out of the respondents' failure to furnish the record of proceedings timeously in terms of Rule of Court 53. Those proceedings have, however, been postponed. The main application was launched in early September 2010. Notwithstanding this and the respondents' ongoing opposition, by the time the matter was argued on 25 October 2011, the respondents had failed to file any heads of argument or any opposing affidavits, with the result that the

issues fall to be determined on the applicant's version alone.

The only explanation offered for this somewhat extraordinary state of affairs is that all along the said respondents had not opposed the primary relief sought on behalf of the applicant, which is still not opposed. However, this statement is belied by the notice of opposition and furthermore, there is no explanation why this alleged concession by the respondents to most of the relief sought by the applicant is nowhere reflected in the papers.

This situation in which no opposing affidavits are filed, despite the application being opposed, is one which this court has previously encountered in matters in which the third respondent and officials of that department were brought to court. It reflects, in my view, a disturbing tendency to oppose litigation up till the door of the court, but without ever putting a version before the court. The implications of such an approach, particularly as regards the use of public funds and the office of the state attorney, are a matter of concern and indicate the need of the courts to be vigilant to ensure that such action does not become a norm and go unchecked.

I turn to a brief background to the application. The applicant, who considers himself to be a refugee, was a student activist

at the University of Goma in the North Kivu Province of the Democratic Republic of Congo, the DRC, until early 2009 when he fled Goma, apparently fearing for his life. He arrived in South Africa in May of that year, aged 21 years. The applicant's case is that he qualifies as a refugee in terms of section 3 of the Refugees Act, both because he has been persecuted, he claims, by reason of his political opinion and because events seriously disturbing the public order compelled him to leave his country of origin. Section 3 of the Refugees Act provides, *inter alia*, as follows:

> "A person qualifies for refugee status if that person:
>
> (a) Owing to a well founded fear of being persecuted by reason of his or her race... political opinion or a membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country...
>
> (b) Owing to external aggression... or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere."

The Act establishes institutions or mechanisms to receive refugees and to evaluate the applications for asylum. In terms of section 8, a refugee must report to a refugee reception office, where a refugee reception officer assists him to apply for asylum. As refugees by their nature often speak languages foreign to South Africans, the Act and regulations make the necessary provision for interpretation services. In terms of section 24, a refuge status determination officer considers the application, in so doing that officer may request information or clarification he deems necessary from an applicant or refugee, reception officer, or consult with a United Nations High Commission on Refugees representative.

That organisation can, for example, provide up to date country reports to assist in determining whether, for instance, events in a particular region are indeed so severely disturbing to the public order as to warrant asylum status for those fleeing that area. In terms of section 25, if the Refugee Status Determination Officer refuses the application for asylum, that decision goes on appeal or review to the Standing Committee of Refugee Affairs. As far as the procedure is concerned regarding applications for asylum by refugees, section 24(2) of the Act provides as follows:

"When considering an application, the Refugee

> Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution and in particular ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented."

Section 33 of the Constitution provides, *inter alia*, that everyone is entitled to administrative action that is lawful, reasonable and procedurally fair. Finally in this regard, Regulation 4 and 5 of the regulations framed pursuant to the Act, provide, *inter alia*, that a refugee reception officer must:

(a) Ensure that the applicant is provided adequate interpretation according to Regulation 5 and any guidelines established by the Department of Home Affairs. Regulation 5 in turn provides that:

> "Where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process."

(b) When it is not practicable for the Department of Home Affairs to provide an interpreter and interpretation is needed, the applicant will be required to provide an interpreter and he/she must, in terms of Regulation 5(3),

be given at least seven days advance notice that he or she is required to bring an interpreter to the interview.

In his founding affidavit, the applicant describes how he applied for refugee status and asylum, commencing on 11 May 2009 at the Nyanga Refugee Reception Centre. At that stage he was required to complete a B1-15904, entitled "Eligibility Determination Form for Asylum Seekers". The particular form he was required to complete is nine pages long and was in English. As appears from the manner in which he filled out his application form, the applicant was not properly assisted. He could not adequately express himself in English, yet he was not provided with an interpreter. He appeared not to properly understand all the questions asked or their import. He states that he did not know or understand his rights or the criteria in terms of which his application would be adjudged.

The applicant states that despite his repeated requests, he was required to complete the form and was interviewed without the assistance of an interpreter. Instead he was assisted by a fellow asylum seeker who spoke some English but who was simultaneously attempting to assist some 20 other desperate persons. The applicant's claims in this regard are borne out by a perusal of his completed form. It is completed partly in French and partly in poor English. Where he was required to

give a substantive answer, for example to the critical question "why are you applying for asylum", his answer appears to miss the point of the question and provides instead much irrelevant detail of his journey from the DRC to South Africa. Similarly his answer to the question "which measures did you take to solve your problem", apparently a reference to the problems giving rise to the application for asylum, does not address the question nor correlate with his case for refugee status and asylum as made out in his founding affidavit.

That case, in a nutshell, is that while a university student in Goma in the Northern Kivu Province of the DRC, he was a student activist and part of a group whose anti-government/CNDC activities attracted the attention of the CNDP security forces active in that area in 2008/2009. One leading member of this group was murdered, whilst the applicant and several of his colleagues were abducted and badly beaten and tortured by members of the CNDP forces, who were seeking information on the political activities of these students. Believing that he was very fortunate to escape with his life from this ordeal and that he and his colleagues were again being sought by the security forces, the applicant dropped out of university, left Goma and eventually fled the country. I might add here that when I refer to security forces, it is a little unclear and they may in fact have been, at that

stage, more akin to an armed militia group operating in that part of the DRC.

On 18 May 2009 the second respondent, without complying with the provisions of section 24 of the Act, rejected the applicant's application as "manifestly unfounded", giving as reasons the following:

> "You claim that you left your country because of family matters. You stated that your father passed away and you were having a stepfather that accused you of being a witch."

Needless to say these reasons bore no relation to the applicant's actual circumstances or to his application for an asylum even as imperfectly set out in his B1-1594. In the letter advising him of his failed application, the applicant was given a notice written in English advising him of his right to make representations to the first respondent in its review of the second respondent's decision. Again, however, no translation of the notice or interpreter services were provided or offered and the letter was unhelpful regarding the mechanisms of how he could exercise this right. On 5 May 2010, the first respondent purportedly upheld the "manifestly unfounded" decision on review. The applicant's asylum seeker

permit was accordingly withdrawn on the same day.

In regard to the first decision, that of the second respondent, the applicant seeks its review on a range of procedural and substantive grounds, notably that:

1. The second respondent acted unlawfully in failing to ensure that the applicant understood his rights, the procedures and the evidence presented.

2. That he failed to arrange for competent interpretation in circumstances where it was plain that this was necessary.

3. That he failed to conduct a proper hearing or to apply his mind to the applicant's circumstances.

4. That he abused his discretion by taking into account irrelevant considerations and ignoring relevant ones.

5. In the alternative, that he negligently confused the applicant's application with that of someone else.

On applicant's account, and this is the only version before the court, he did not enjoy the hearing to which he was entitled in

terms of the relevant provisions of the Refugees Act, the regulations framed pursuant thereto and the provisions of the Constitution. The most egregious shortcoming in this regard, was the second respondent's failure to provide an interpreter competent in English and French, in the absence of which no fair hearing or process, it seems to me, could ever have taken place.

As far as substantive grounds of review are concerned, in the light of the complete disjuncture between the applicant's case, either as set out in his B1-19504 or in his founding affidavit and the reasons for refusing the application given by the second respondent, it is clear that either the official question, failed to apply his mind and/or confused the applicant's application with that of someone else, that is presuming that he did not simply invent the reasons given for rejecting the applicant's application. In the absence of an explanation from the respondents, and more particularly the second respondent, it is clearly not possible to determine what happened. Whatever the case, the decision falls to be set side aside for unreasonableness or more accurately, complete irrationality.

Turning to the decision of the first respondent, again the applicant advances a range of grounds, both procedural and substantive why its decision of 18 May 2010 should be

reviewed and set aside. In the first place it too is tainted by the same irrationality or unreasonableness as affected the second respondent's decision. The most perfunctory reading of the record should have revealed to the first respondent that this juncture between the applicant's reasons for seeking refugee status and asylum and the grounds upon which the second respondent purported to hold that it was "manifestly unfounded".

There are good reasons to believe that the first respondent in fact did not review the decision of the second respondent as it was required to do in terms of the Act. Firstly, had it done so, it would have immediately have become apparent that the original decision was completely irrational and could not be upheld. Secondly, a perusal of the brief record eventually prised out of the respondents, reveals no objective evidence that the first respondent took any decision at all. Where a B1-1691 submission to the first respondent, i.e. the Standing Committee, is made by the second respondent regarding the matter, and where it provides a space for the date and decision of the first respondent to be inserted, there are only blank spaces. Notwithstanding a challenge by the applicant's legal representatives to the respondents' to furnish proof that the second respondent did not simply purport to take that decision on behalf of the first respondent, i.e. rubberstamping

his own prior decision, no response was forthcoming. Again, needless to say, this is a most unsatisfactory state of affairs.

In the light of these glaring defects in the decision and decision-making process, it is unnecessary for the court to consider the further procedural grounds advanced by the applicant for the setting aside of the first respondent's decision. Quite clearly then, the applicant is entitled to the relief sought in prayers 1 to 4 of his notice of motion, in terms whereof the second and then the first respondent rejected his application for refugee status and asylum. That leaves only the relief sought by the applicant which is opposed by the respondents, i.e. a declaration that the applicant is a refugee entitled to asylum in South Africa, as contemplated by section 3 of the Refugees Act. It is well established that when setting aside the decision of a functionary on review, a court will usually refer the matter back to the functionary or the body concerned for the power to be exercised afresh. Only in exceptional cases will the reviewing court substitute its own decision for that of the functionary.

In Gambling Board v Silver Star Development Limited & Others 2005 (4) SA 67 (SCA), the Supreme Court of Appeal summarised the position regarding this aspect of administrative law as follows at page 75d-f:

"The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is "exceptional": Section 81C(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2002. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached, is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair."

The court then quoted, with approval, the following passage from its judgment in Competition Commission v General Counsel of the Bar of South Africa & Others 2002 (6) SA 606 (SCA):

"The remark in Johannesburg City Council v

> Administrator Transvaal & Another 1996 (2) SA 72 (T) at 76d-e, that "the Court is slow to assume a discretion which has, by statute, been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties."

As Holmes, AJA observed in Livestock & The Meat Industries Control Board v Garda 1961 (1) SA 342 (A) at 349G:

> "... the court has a discretion to be exercised judicially upon a consideration of the facts of each case and ... although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."

The court also, i.e. in the Johannesburg City Council case, quoted the following passage from Baxter's Administrative Law:

> "The mere fact that a court considers itself as qualified to take the decision as the administrator, does not of itself justify usurping that administrator's powers ...; sometimes, however, fairness to the applicant may demand that the court should take such a view."

The Court then observed:

> "This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself, provided it is able to do so."

Ms Harvey, on behalf of the applicant, urged the court for considerations of fairness not to remit the matter back to the second respondent and/or first respondent, but to exercise the relevant powers itself and declare applicant a refugee entitled to asylum in South Africa in terms of the Refugees Act. She referred also to a UNHCR 2010 country report on the situation in the DRC and argued that using the information therein would place the court in as good a position as the second respondent who considered the applicant's application for refugee status and asylum. She also referred to that UNHCR report in her heads, giving the website upon which it could be accessed.

For the respondents, Mr Papier submitted that a more sensible approach would be for the court to require the UNHCR or its representative to file an affidavit setting out the present position, presumably in the Northern Kivu Province of the DRC and only then make a decision on the applicant's application. Ms Harvey handed up a copy of the UNHCR 2010 country report on the DRC. The report forms part of the UNHCR Global Report 2010. In addition Ms Harvey relied on a range of factors which she submitted placed the present matter into the category of exceptional cases where the court should substitute its own decision for that of the functionary.

The question of what may constitute "exceptional circumstances" was discussed in the case of the University of the Western Cape & Others v Member of the Executive Committee for Health & Social Services & Others 1998 (3) SA 124 (C), where at page 131c-h, Hlophe, J, as he then was, stated as follows:

> "Over the years South African courts have recognised that in exceptional circumstances, the court will substitute its own decision for that of a functionary who has a discretion under the Act. Where the end result is in any event a foregone

conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts have not hesitated to substitute their own decision for that of a functionary... The courts have also not hesitated to substitute their own decision for that of a functionary who, at further delay, would cause unjustifiable prejudice to the applicant... Our courts have further recognised that they will substitute a decision of a functionary, where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again... It would also seem that our courts are willing to interfere, thereby substituting their decision for that of a functionary where the court is in as good a position to make the decision itself. Of course the mere fact that a court considers itself as qualified to take the decision as the administrator does not *per se* justify usurping the administrator's powers of functions. In some cases, however, fairness to an applicant may demand that the court should take such a view."

In my view, the present case is an exceptional case and one where, *inter alia*, considerations of fairness and practicality

justify the court in not remitting the matter back to the functionary and substituting its own decision. The following factors commend the court to adopt such an approach:

1. To date the first and second respondent have demonstrated complete incompetence, if not bad faith, in dealing with the applicant's application. Neither has furnished any explanation for their botched handling of the case, nor have they sought to allay the applicant's or the court's concerns regarding whether, on a rehearing of the case, the applicant can expect a proper hearing in accordance with the requirements of the Act and the regulations.

2. It is now two and a half years since applicant made his original application and without the additional relief he seeks, he is effectively back to square one. Nothing has been put in front of me to suggest how long a rehearing will take place. In the meantime the applicant, albeit now protected by a temporary asylum seeker permit, has been unable to access the protection and general rights he would enjoy if successful, including access to health services, employment and an identity document, which he would be able to acquire if he is granted refugee status and asylum.

3. Having had the benefit of a very full account in the form of sworn affidavits of the circumstances and factors which caused the applicant to travel to South Africa and to seek refugee status and asylum here, the court is in as good a position to determine the applicant's application. This knowledge is supplemented by the content of the UNHCR 2010 report on the DRC, to which I shall revert in due course. It is not suggested, furthermore, that the second respondent has specialist or firsthand knowledge of conditions in the DRC which would place him in a better position to determine the application.

4. There is no suggestion either that the respondents dispute the version given by the applicant of how he came to flee to South Africa or what motivates his application, and more specifically his fears for his safety should he be forced to now return to the DRC.

5. As I understand the respondents' position, second and first respondent did not insist upon exercising their statutory powers in relation to the applicant's application. They simply want the court to obtain more direct information from the UNHCR before it exercises its power and substitutes its decision for that of the relevant

functionary.

In this regard I do not consider the suggestion made by Mr Papier as worth pursuing. The UNHCR report is before the court and, although strictly speaking hearsay, is, I consider, from a reputable source, if not the best available source and it is one which must be given due weight. The report, as I shall attempt to show, contains sufficient information on the situation in the DRC and in particular the Kivu Province, to enable the court to make a reasonably informed decision on this aspect of the applicant's application for asylum. The UNHCR is not a party to this litigation and the respondents' suggestions omits to set out how precisely the court will procure a specific report from this body, or indeed whether it will respond positively to any such request.

Turning to the merits of the decision. In my view it is clear that the applicant falls within that category of person who qualify for refugee status, regard being had to the provisions of section 3 of the Act:

> "A person qualifies for refugee status for the purpose of this Act, if that person:
>
> (a) Owing to a well founded fear of being persecuted by reason of his... political

opinion... is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country.

(b) Owing to... events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere."

The applicant's account of the social turmoil in the DRC as a whole, and in particular in the North Kivu Province in which he lived and from which he fled fearing for his safety as a result of his political activity, establishes that he falls within the categories which I have just outlined. A map was placed before the court which indicates that Goma is in the Northern Kivu Province, which in turn is close to the eastern border of the DRC and thus that country's borders with Uganda, Rwanda and Burundi. The UNHCR report to which I referred earlier states, *inter alia*, under the headings working environment, that:

"Violence in the eastern and western parts of the country characterised by atrocities committed by

various armed groups, including sexual and gender based violence, has resulted in the displacement of more than 1.7 million people. The continuing instability hampered UNHCR's programmes by reducing access to certain areas."

Under the head "basic needs and services", it is recorded that:

"Over 100 000 IDP's, (internally displaced persons) living in 42 spontaneous camps in North Kivu, were assisted by the UNHCR, which was responsible for camp management and security."

Under the heading "favourable protection environment", the report states:

"Through its protection monitoring mechanism, the office was able to record and report some 19 900 violations of human rights related to sexual violence, arbitrary detention, abduction and the usurpation of land and property."

In a table headed "persons of concern", the report lists 2.3 million such persons in the DRC, comprising refugees, asylum seekers, IDP's and returnees, either from the DRC itself or

from neighbouring countries. Under the heading "constraints", the report states:

> "Rampant violence and continuing human rights violations remain major sources of concern, while access to affected populations was hampered by poor infrastructure."

And:

> "Moreover, weak administrative and judiciary structures make it difficult for people to seek justice."

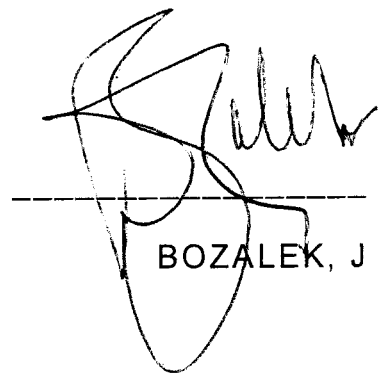
These few extracts alone indicate the scale of the social and political turmoil and refugee problem in the DRC in general and in the Kivu Province in particular. As such, this supports the account given by the applicant of what led him to seek refugee status in South African, an account which the respondents have not chosen to dispute nor indicated that they do so.

In the result, I consider that a declaration should be made that the applicant is a refugee entitled to asylum in the Republic of South Africa as contemplated by section 3 of the Refugees Act

130 of 1998.

Finally, having succeeded in obtaining all the relief he sought in these opposed proceedings, the applicant must be awarded his costs.

For these reasons, there will be an order in terms of prayers 1 to 5 of the applicant's amended notice of motion and ordering that the applicant's costs in the application be paid by first to fourth respondents jointly and severally, the one paying, the others to be absolved.



BOZALEK, J