Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 8830/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

HUSSEIN RADJABU Applicant

And

THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS First Respondent
THE REFUGEE STATUS DETERMINATION OFFICER, Z MZINYATI N.O. Second Respondent
THE MINISTER OF HOME AFFAIRS Third Respondent

JUDGMENT: DELIVERED: 4 SEPTEMBER 2014

BINNS-WARD J:

[1] The applicant, who claims to originate from Uvira, in the South Kivu province of the Democratic Republic of the Congo, has applied for the review and setting aside of a decision taken under the Refugees Act 130 of 1998 to refuse his application for asylum. The application is brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He also seeks, in terms of s 8(1)(c)(i)(aa) of PAJA, an order substituting the impugned administrative decision with one by the court granting him asylum in South Africa. The Department of Home Affairs, which is responsible for the administration of the Refugees Act, abides the decision of the court in respect of the first mentioned relief, but contends that if it is granted, the court

should not accede to the applicant's prayer for a substituting order, but should rather remit the matter to the Department for consideration afresh.[1]

[2] It is convenient to outline the applicable statutory framework before dealing with the peculiar facts of the case.

[3] According to its long title, the Refugees Act, which came into operation on 1 April 2000, is an Act to 'give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith'. The preamble to the Act records that 'South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law'.

[4] Section 2 of the Refugees Act incorporates the international law principle of *non-refoulement*.[2] The principle is articulated in Article 33 of the 1951 Convention as follows: '*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*'. In the 1969 OAU Convention, the principle is

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[1] The applicant cited three respondents, namely the Chairperson of the Standing Committee for Refugee Affairs, the Refugee Status Determination Officer who dealt with his application for asylum, and the Minister of Home Affairs. They were cited as the first, second and third respondents, respectively.

[2] Section 2 of the Refugees Act provides:

> **General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances**
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> Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-
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> (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
>
> (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

expressed thus in Article 11(3): '*No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2*'. Paragraph 2 of Article I of the 1969 OAU Convention provides: '*The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality*'. Paragraph (a) of Section 2 of the Refugees Act is plainly predicated on Article 33 of the 1951 Convention and paragraph (b) on the aforementioned provisions of the OAU Convention.[3]

[5] Section 3 of the Refugees Act provides for three categories of qualification for 'refugee status'. Although, for reasons that will become apparent, the position is not altogether clear, the current case appears to engage the second category of refugee, defined in s 3(b) as '*a person* [who] – *owing to external aggression, occupation, foreign domination 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 definition of the category of refugee in issue is, with only very slight modification, based on the aforementioned provisions of the 1969 OAU Convention.

[6] Determining whether a person qualifies for refugee status under this category appears to me to require (i) an assessment by the relevant authority of the existence of objectively ascertainable circumstances in the person's country of origin, and (ii) assuming that it is satisfied upon such assessment that such circumstances correspond with any of those stipulated in the definition, a decision whether their effect on the individual concerned has been such as to force him or her to leave the place where he or she ordinarily resided. The qualifying criteria thus posit refugee status in the category concerned being determined with regard to the causative effect of a given situation on an individual. The test is predominantly objective in character, but the required consideration by the relevant authority of the causative effect of the circumstances involved on the person concerned introduces a subjective element that

[3] Sections 2(b) of the Act has been substituted in terms of A33/2008, which is not yet in operation.

demands that the individual's personal circumstances be taken into account. It is through a determination of the causative effect of the given circumstances on the particular applicant for refugee status that the authority decides whether he or she has been 'compelled' on account of their existence to leave his or her place of habitual residence. Thus it is conceivable that the existence of the same set of given circumstances might sustain a conclusion that they compelled A to leave, but not B.[4] The ultimate determination involves making a finding of fact concerning the existence of the qualifying circumstances in the country of origin and their effect on the individual concerned and making a value judgment based on those factual findings as to whether the individual concerned was forced by them to leave his or her habitual place of residence. The notion that the refugee was forced by circumstances to leave his or her home that is inherent in the definition means that where volition rather than compulsion is the predominant factor in the person's decision to leave his or her home, he or she does not qualify as a refugee in terms of s 3(b) of the Refugees Act. It is in drawing the distinction that a value judgment is called for. The facts of many cases will make identifying the predominant factor difficult. The assessed credibility of the person claiming refugee status will be an important determinant in the decision-making.

[7] The provisions of s 6 of the Refugees Act, which regulate how the statute must be interpreted and applied enjoin a humanitarian approach to decision-making concerning refugee status; that is one which gives weight to the promotion of human welfare and the alleviation of human suffering. This follows, I think, because the Act must be interpreted and applied with regard to the various conventions and declarations on human rights and refugees referred to in paragraphs (a) to (e) of the section. Thus, in interpreting and applying s 3(b) of the Act, premised as it is on the

[4] Thus the fact that the applicant's counsel was able to direct attention to the existence of a number of previous matters in which persons from the Uvira area of the Democratic Republic of Congo had been recognised as refugees (*Katabana v Chairperson SCRA and others* WCC case no. 25061/11, unreported judgment of Davis J, dated 14 December 2012; *Amissi v Chairperson SCRA and others* WCC case no. 10969/13, unreported judgment of Mantame J dated 22 October 2013; and *Mubala v Chairperson SCRA and others* WCC case no. 10971/13, unreported judgment of Fourie J, dated 29 October 2013) is of limited assistance in determining whether the applicant should have been granted asylum. The applicant in *Katabana* appears, in any event, to have been categorised as a refugee within the meaning of s 3(a) (i.e. persecution by reason of religion), rather than s 3(b). In *Mubala*, the judgment recorded that '[i]t is not disputed that the applicant…was compelled to flee his country of birth'. The necessary causative link between the well known serious disruption to public order in the area and the applicant's departure from his ordinary place of residence there was thus taken to have been established in that case. Counsel did not provide me with a copy of the unreported judgment in *Amissi*.

1969 OAU Convention, due regard must be had to the objects that inspired the adoption of the Convention, as set forth in the preamble. Paragraph 2 of the preamble records the signatories' recognition of 'the need for an essentially humanitarian approach towards solving the problems of refugees'.

[8] The applicant submitted an application for asylum status to the refugee reception office at Cape Town in terms of s 21(1) of the Refugees Act. The applicant's application was set out in the statutory form. I shall treat of its content presently.

[9] Section 21(2) of the Act required the relevant refugee reception officer to ensure that the application form had been properly completed and that the applicant received the necessary assistance for this purpose. The refugee reception officer was also required to conduct whatever enquiry he considered necessary to verify the information furnished in the application. In terms of the statutory provisions the application was then passed on to a refugee status determination officer.

[10] In terms of s 24 of the Refugees Act, the refugee status determination officer was required, amongst other matters, to ensure that the applicant fully understood the procedures, his rights and responsibilities and the evidence presented. The officer involved in the current case conducted a 'hearing' in the form of an interview with the applicant on 3 March 2010.[5] In terms of s 24(3) of the Act, the officer was required,

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[5] Regulation 10 of the Refugee Regulations (Forms and Procedure), promulgated in terms of s 38 of Act 130 of 1998 and published under GN R366 in GG 21075 of 6 April 2000 as amended by GN R366 in GG 21075 of 6 April 2000 provides:

> ***Hearing before Refugee Status Determination Officer***
> *(1) In complying with the provisions of section 24 of the Act, the Refugee Status Determination Officer will conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.*
> *(2) The Refugee Status Determination Officer may-*
> > *(a) verify the identity of any interpreter present;*
> > *(b) verify the identity of any dependants seeking refugee status based on their relationship to the applicant;*
> > *(c) receive evidence; and*
> > *(d) question the applicant and any witness.*
>
> *(3) The applicant must respond to any questions asked by the Refugee Status Determination Officer, including-*
> > *(a) information regarding his or her identity and the identity of any dependants seeking refugee status based on their relationship to the applicant;*
> > *(b) reasons for seeking asylum; and*
> > *(c) any grounds that might exclude the applicant from refugee status under section 4 of the Act.*
>
> *(4) The applicant may-*

at the conclusion of the hearing, to make one of the decisions contemplated in terms of s 24(3). The decision that was made was of the nature contemplated in terms of s 24(3)(b), that is to 'reject the application as manifestly unfounded'. In terms of s 1 of the Act, a 'manifestly unfounded application' is defined to mean 'an application for asylum made on grounds other than those on which such an application may be made under this Act'.

[11] Section 24(4) of the Refugees Act requires that when an application for asylum on the grounds is rejected for being 'manifestly unfounded', (a) written reasons have to be furnished to the applicant within five working days after the date of the rejection or referral and (b) the record of proceedings and a copy of the reasons have to be submitted to the Standing Committee for Refugee Affairs, established by section 9 of the Act, within 10 working days after the date of the rejection or referral. The reasons provided to the applicant stated as follows in the relevant parts:

> Claim
>
> You claim that you left your country because you had family problems with your uncle after the death of your mother due to natural causes. You were born in UVIRA and claim your mother who was married to a Burundian had passed away due to natural causes. And you claim you had to leave as your uncle were referring you to Burundi and you had no father as he also died f (sic) such same natural causes. You don't want t (sic) go back to work here and say (sic) her (sic) and fear to face your family.
>
> Reason for decision
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> Our application for asylum has been made on grounds other than those on which an application may be made under the Act.

[12] The refugee status determination officer reported to the Standing Committee as follows on 23 March 2009:

> The applicant is a male born in DRC he left his country because of family problems. He claim (sic) he was discriminated (sic) by his uncle because his father was from Burundi and after the death of his mother who was from DRC. His uncle was asking him to go to Burundi because

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> *(a) have counsel or a representative present, at no cost to the government, and subject to the conditions of subregulation 6;*
> *(b) present witnesses; and*
> *(c) submit affidavits of witnesses and other evidence.*
>
> *(5) At the end of the initial hearing, the applicant's counsel or representative shall have an opportunity to make a statement or comment on the evidence presented, subject to the Refugee Status Determination Officer's discretion regarding the length of such statement or comment. Comments may also be submitted in writing.*
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> *(6) At the conclusion of the initial hearing, the Refugee Status Determination Officer will advise the applicant of the date and time to return to the Refugee Reception Office to conclude the hearing and receive the decision on the application.*

> his father was from there. He decided to leave in fear of his uncle. That is the only reason he came to SA.

[13] The applicant failed to make any submissions to the Standing Committee. This was hardly surprising because he was informed of his rights before the Standing Committee by way of a pro forma document, which was in English, a language that he barely understood. He also does not appear to have been informed of the date and place at which the Standing Committee would consider his application. On 14 July 2009, the Standing Committee confirmed the rejection of the applicant's application. In so doing, it purported to act in terms of s 25(3)(a) of the Refugees Act. The applicant was informed of the Standing Committee's decision by letter dated 26 March 2010. The letter was handed to him in person when he came to the Cape Town Refugee Office to renew his asylum seeker permit.

[14] The applicant thereafter instituted the current judicial review proceedings on 30 April 2010. The grounds of review advanced in the founding papers were that the decision was –

1. materially influenced by errors of law;
2. not rationally connected to the information before the decision maker;
3. taken because irrelevant considerations were taken into account and relevant factors were not considered;
4. so unreasonable that no reasonable decision maker could come to the same decision;
5. unconstitutional and unlawful; and because

he had not been afforded an opportunity to deal with information that the Standing Committee and the refugee status determination officer had at their disposal that was prejudicial to his application.

[15] In his founding affidavit *jurat* 30 April 2010, the applicant described the circumstances of his departure from the DRC as follows:

> 30. I lived in Uvira with my Father, Mother, two brothers and two sisters. My mother is originally from Burundi and my father is Congolese. At no point have I ever lived in Burundi or any part of the DRC other than Uvira.

31. My father worked as a taxi driver in the city and my mother sold food produce at the local market. At the time when I fled the DRC I was in secondary school at the Institut Mwanga D'Uvira.
32. My father was politically active in our area, often engaging with the local police to determine how they could stop the Banyamulenge group from bringing cows into the city. This was characteristic of the ethnic, cultural and political tensions in my area.
33. In the summer of 2008 fighting between the Banyamulenge and the police started because it was perceived that the police were stealing the Banyamulenge's cows. In addition there was a great deal of fighting between the Congolese army, the Rebel forces and the Rwandese army in and around my area.
34. Soon the fighting in the city escalated into armed conflict in the streets. My father, while driving his taxi, was pulled over and killed by rebel combatants who wanted to s[t]eal his car.
35. On the day my father was killed I was attending school. One of our neighbours came to the school to see me and to inform me that my father was dead. My neighbour further advised me to should (sic) flee the city as so many others were at that time. I initially attempted to return to my home to find my family but the intensity of the fighting in the streets of the city prevented me from reaching my home. I therefore made my way to the edge of the city from where I fled the country, I initially made my way to Tanzania and then eventually found my way to South Africa.
36. While in South Africa I heard from other refugees who fled Unvira that my brothers are now living in Tanzania and that my sisters are with our aunt in Burundi. I have no knowledge of what happened to my mother.
37. I truly believe that elements of the Banyamulenge are still active in Uvira and they will identify me as my father's son. I further believe that because I am of mixed descent I will be associated with the invading foreign forces in the Eastern DRC.
38. Furthermore, the intensity of the fighting that I witnessed and experienced, while resident in Uvira leads me to strongly believe that I cannot return so long as this type of serious disturbance of the peace persists in my area.

At para 47-48 of the affidavit he averred:

47. I further respectfully submit that it appears from the Record of Decision that the Second Respondent either chose to ignore alternatively failed to take account the seriousness of the disturbance of the peace in my area and the treatment of individuals hailing from mixed ethnic descent.
48. In the periods prior and following the decisions of the First and Second Respondents there have been a number of reports generated by the United Nations Security Council detailing the extent of the problems which persist in the Eastern DRC. I attach hereto the *Twenty-seventh report of the Secretary-General* on *the United Organisation Mission in the Democratic Republic of the Congo*, marked as **Annexure "HR5"**, and the *Report of the United Nations High Commissioner for*

Human Rights on the Situation of human rights and the activities of her Office in the Democratic Republic of the Congo, marked as **Annexure "HR 6"**.

Annexure HR 5 to the affidavit was a copy of the 'Twenty-seventh report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo', dated 27 March 2009. The report to the UN Security Council covered the period 21 November 2008 to 24 March 2009. Paragraph 17-18 of the document reported on the situation in South Kivu province as follows:

> 17. Overall, the situation remained calm in South Kivu during the reporting period. In the Hauts Plateaux region, MONUC [the United Nations Organization Mission in the Democratic Republic of the Congo] assisted the authorities of the Democratic Republic of the Congo in negotiating with the leadership of the Forces Républicaines Fédéralistes (FRF) the release of two Congolese officials, a provincial minister and an Amani programme senior manager, who had been abducted by the armed group at Kamombo on 22 January. The two men were released on 20 February.
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> 18. The continued presence of FDLR in key areas remained a source of concern. The joint FARDC-RDF operation against FDLR was not extended to South Kivu. FDLR elements are present in Mwenga territory and control the area both militarily and economically. FDLR also controls the mined and collects taxes from civilians in the territory.

Annexure HR 6 to the applicant's founding affidavit was a copy of the 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo'. The report to the UN General Assembly was distributed on 28 January 2010. Its content speaks to a sorry state of governance in the DRC generally, with widespread human rights abuse, an ineffectual legal system and areas of general instability. North Kivu was expressly mentioned as a place where rebel militia movements were active and government forces (FARDC) were guilty of rape, murder and pillaging. The failure of the DRC government to pay its armed forces had led to mutinous uprisings and associated extortion by soldiers of money from local residents. An uprising at Lubarika, 66 kilometres north of Uvira in South Kivu was singled out for mention.[6]

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[6] The courts' approach to reports of this nature enjoyed attention in *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T), at para 19, where Murphy J noted: 'Courts are generally reluctant to rely upon the opinion or findings of a court in a foreign jurisdiction about factual issues not ventilated, tried or tested before them. All the same, it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights. In *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4)

[16] Conformably with rule 53(1)(b) of the Uniform Rules of Court, the applicant's notice of motion in the review application called upon the respondents to file the administrative record of proceedings with the registrar. The respondents delivered a notice of opposition to the review application, but failed to file the administrative record or deliver their answering affidavits. When the matter was first called before me on 17 April 2014 the respondents were represented by counsel. The respondents' position, as conveyed by their counsel, was that they were prepared to concede the review, but insisted that the applicant's asylum application be remitted for reconsideration. I made it clear that I was not willing to deal with the matter until the record of the administrative decision had been filed. The review application was thus postponed on the basis of directions given to render the matter ready for hearing on the basis contemplated in terms of rule 53.

[17] The administrative record included a copy of the Form BI -1590 completed in respect of the applicant's application for asylum. This is a document completed at the stage that an applicant for asylum is interviewed by a refugee reception oficer. The completed form reflected that the applicant had been born in Uvira, Burundi. This was manifestly incorrect as Uvira is in the DRC on the western shores of Lake Tanganyika, whereas Burundi borders the eastern shore of the Lake. In addition, the particulars given of the applicant's 'country background' were those of Burundi, not the DRC. These particulars included the name of the capital city, Bujumbura, the other major cities, Gitega, Bururi and Ngozi, the Burundian currency, the national anthem and the description of the national flag of Burundi. The information provided in the form included the names of the applicant's parents (Sada Musa, mother, and Rajab Isa, father) and gave his father's nationality as 'Burundi' and that of his mother as 'Congo'. It stated the applicant's highest educational qualification as 'Form 6',

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SA 235 (CC) ([2004] 10 BCLR 1009) in para 123 Chaskalson CJ, commenting on reports by Amnesty International and the International Bar Association on the human rights situation in Equatorial Guinea, said as follows:

> Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.

These dicta have relevance beyond the narrow inquiry into whether it is permissible to rely on the findings of the SIAC [Special Immigration Appeals Commission] in relation to the activities of the LIFG. They sanction reliance upon the decision of the SIAC, and the reports referred to in the decision, when assessing the general human rights situation in Libya, which I do later in this judgment.'

which is a classification of school grade well known to be peculiar to certain schools in England and in the former British colonies.

[18] In answer to the pro forma question 'Why are you applying for asylum?' in section 4f of the Form BI-1590, the following answer was provided:

> I was born in Congo when my parents fled the wars and genocide in Burundi as I grew up in Congo, the Congolese said that all Rundi's should go back to Burundi it was so hostile that they even killed some Rundi who did not want to go to Burundi for all there (sic) life was in Congo.
>
> During the heated war by the Congolese they came to our house ready to kill. There (sic) I fled, Congo immediately

The question in the same section 'Which measures did you take to solve your problem?' was answered as follows:

> The both govt of Congo + Burundi tried to resolve the matter through dialogue. But the Congolese kept attacking

The answer given on the form to the question as to why he did not wish to return to his home country was: '*All my parents and family were killed during the genocide in Burundi. Those left are also fled* (sic) *to other country'*.

[19] According to the tenor of the Form BI-1590, it was signed by the applicant on 25 February 2009. He declared in the form that he was a national of Burundi. An endorsement, purportedly made by N. Nkani, qua refugee reception officer, dated 4 March 2010, at section 9 of the form recorded '*He needs an Interpreter*'. Anomalously, the decision reflecting the rejection of the application by the refugee status determination officer at section 10 of the form bears the previous day's date, 3 March 2009.

[20] In a supplementary affidavit in his judicial review application, delivered after the filing of the administrative record by the respondents, the applicant disavowed much of the content of the BI-1590 form submitted in support of his application for asylum. He stated that it had been completed on his behalf by a Kenyan woman whom he had encountered in the queue at the refugee reception centre. He said that she had spoken a different form of Swahili to his and that she appeared to have made up some of the information entered on the form

[21] The record of the administrative decision also contained a copy of the refugee status determination officer's 'recording form', which appears to set out the officer's

note of an interview with the applicant on 3 March 2009. The form correctly reflects the applicant's name and date of birth. The dates recorded on the form for the applicant's departure from his country of origin and his arrival in South Africa are also consistent with the narrative given by the applicant in a supplementary founding affidavit in which he describes his journey from the DRC to South Africa, which included spending a month or so at refugee camps in Tanzania and Malawi, respectively. The form also records that an interpreter was used. The interpreter's name and address are given on the recording form as Mduvimama Papy of 27 Santos Street, Rugby. The form reflects the applicant's address and telephonic contact details as being the same as those of the interpreter. If the information is correct it would suggest that the so-called interpreter must have accompanied the applicant to the hearing. In his first supplementary founding affidavit the applicant averred that the respondents had not provided him with any interpretation services. The applicant did say that he had been assisted by his local friend, Richard, who also hailed originally from Uvira. Regulation 5(3)(c) of the Refugee Regulations would suggest that a person closely identified with an applicant's interests should not be used for interpretation purposes.[7] In the further supplementary affidavit delivered after the

[7] Regulation 5 of the Refugee Regulations provides:

> 5 ***Interpretation***
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> *(1) Where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process.*
>
> *(2) 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. The interpreter may not be a representative or employee of the country in which the applicant fears persecution or harm.*
>
> *(3) In cases where subregulation 5(2) applies, the applicant will be given at least 7 days' advance notice that-*
>
> *(a) the applicant is required to bring an interpreter to the interview before the Refugee Reception Officer or Refugee Status Determination Officer;*
>
> *(b) the interpreter must be competent to translate a language spoken and understood by the applicant, to a language spoken and understood by the Refugee Reception Officer or Refugee Status Determination Officer and visa versa;*
>
> *(c) the interpreter cannot be the applicant's attorney or representative, a witness testifying on the applicant's behalf, or a representative or employee of the country in which the applicant fears persecution or harm;*
>
> *(d) failure without just cause to provide a competent interpreter may constitute a violation of terms of the asylum seeker permit, but will not prejudice adjudication of the claim to refugee status once interpretation is obtained; and*
>
> *(e) any delays caused by failure to provide a competent interpreter, after the 7-days' advance notice required by this subregulation 5(3) has been given, will not count toward the 180-days' adjudication period for purposes of eligibility for employment or study authorisation.*

record of decision had been filed, he did not deal with the indication in the record that an interpreter had been used in the interview.

[22] The body of the notes made on the interview recording form, which are illegible in part, read as follows:

> Claim that he was born in Uvira. Her (sic) mother Congolese went with [???] to Burundi at 6 yrs. She left country ~~during war~~ [???] to follow her husband [???] they had a problem with her husband. [???] after 3 years they went back to Uvira.
> UVIRA
> He stayed and studied and her (sic) mother in 2008/08/ died of natural causes.
> After the death as he was staying with his uncle were asking him to go to Burundi as he is not from Congo. He claim he couldn't ask the government as they are still occupied by Nkunda.[8]
> Is it the only reason you left the country was your family. Yes.
> What is your father? Deceased.
> Do you have any problem with the people around?
> No only my family.
> What was your mother's ethnicity?
> HUTU.
> Do you wish to go back?
> No, there is suffering. I need to work also.
> What will happen if going back
> I will [?]find the same problem.

[23] A hearing before a refugee status determination officer is meant to be inquisitorial in nature. In this respect I agree with the observations made by Murphy J in *Tantouch* supra,[9] at para 97-98. It is immaterial that the learned judge was there dealing with the nature of proceedings before the Refugees Appeal Board. Murphy J noted that his comments were premised on the following provisions of the UNHCR

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[8] The content of the Secretary-General's report, dated 27 March 2009, a copy of which was annexed as annexure HR5 to the applicant's founding affidavit makes reference to a 'Laurent Nkunda' as the former head of an apparently militant group known as the CNDP. The report notes that Nkunda was ousted as leader of the group on 5 January 2009. The report states that the Congolese authorities announced on 22 January 2009 that Nkunda had been arrested in Rwanda. The report also mentions that as at 26 January 2009 5800 of a declared total of 7000 CNDP 'elements' had been integrated into the Congolese armed forces (FARDC). Para 7 of the report stated that '*On 4 February, CNDP issued a statement which reaffirmed the end of hostilities and announced the transformation of CNDP into a political movement. The statement called for the resumption of talks with the Government, the granting of amnesty for CNDP members and the establishment of a new ministry for internal security and intercommunity relations. Separately, at a meeting of the bilateral "Four plus Four" Commission held on 6 and 7 February, the Democratic Republic of the Congo and Rwanda agreed to establish a technical team to elaborate the modalities for the extradition of Mr. Nkunda to the Democratic Republic of the Congo.*'

[9] See note 6 above.

Handbook, which I consider to be equally applicable to a hearing before a refugee status determination officer:

> 196. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should be given the benefit of the doubt.
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> 197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

[24] It is striking that the record of the interview contains no indication of an appreciation by the status determination officer of the obvious differences between the account given in the BI-1590 Form and that in the interview. These called out for exploration in the context of the inquisitorial approach required in such hearings. It is plain that the refugee status determination officer's decision was premised entirely on what seems to have been a very superficial interview, with no attention whatsoever to the report apparently given by the applicant to the refugee reception officer.

[25] No reasons were given for the decision of the Standing Committee to uphold the decision of the refugee status determination officer. It is significant, however, in my view, that notwithstanding the aforementioned obvious defect in proceedings before the refugee status determination officer, the Committee did not exercise its powers to, of its own accord, make such further enquiry and investigation into the matter being dealt with as it might deem appropriate, or request the applicant to appear before it and to provide such other information as it might deem necessary.[10]

[26] After the record of the administrative decision had been filed in the judicial review proceedings, the applicant supplemented his founding papers, as he was entitled to do in terms of rule 53(4). In his further supplementary founding affidavit he averred:

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[10] See s 25(2)(c) and (d) of Act 130 of 1998.

4. I deposed to the founding affidavit in 2010. I now supplement that affidavit in light of the additional documents given to my legal representatives in April 2014. I am advised, also, that Respondents' representative has asked in papers filed with the Court that I provide more detail about my background and circumstances.
5. My mother, Sada Zena, is Burundian. My father, Radjabu Issa, is Congolese. I have two older sisters: Asiya and Mwavuwa. I am the last-born.
6. Growing up, I lived with my mother, father and two sisters in Kavimvira, a village on the outskirts of Uvira, close to the northern shores of Lake Tanganyika and the border with Burundi. I attach a map. Kavimvira is somewhat rural. We had chickens. People grow vegetables. They fish.
7. My only other family is my aunt Zena Musa (my father's sister) who has four children. By 2008, when I left my homeland, she and her children were no longer in DRC. I believe they had already fled to Burundi or to Tanzania.
8. In 2008 I was 18 years old and still at school. I had two more years to go before matriculating. My two older sisters had finished school, and were at home, unemployed. My mother was also unemployed; she made some money selling food in front of our house.
9. My father worked as a taxi driver. He was a well-known person, because he was the *nyumba10* – the person in charge ten houses, the DRC equivalent of a South African pre-1994 civic 'street committee'.
10. I was young when I fled my country, but what I understand of the political troubles in my area is this: for years the rebel militia were everywhere, and they were killing people. Many of our fathers were killed. Young men in their twenties were afraid and concerned, because the government did nothing to protect us. They armed themselves and formed the mayi-mayi. Later they were chased out and the Banyamulenge rebels took effective control.
11. The Banyamulenge rebels targeted my father because he was the street leader, and they believed that he had information about the mayi-mayi which they wanted. When my father refused to assist them, they killed him.
12. I do not know exactly how my father was murdered. On the day of the murder I came home from school to find that nobody was there, and the house had been ransacked. The head of household in a neighbouring house, a man whom I know as Juma, came to me when he saw that I had returned from school. He was the person who told me that my father had been killed, and that my mother had fled with my two sisters. I do not recall exactly which month this was in 2008.
13. I recall that I stayed with Juma for about two weeks. However, I was deeply unhappy living in his house. His wife did not treat me well. I heard that it was probable that my mother and sisters had fled over the water to Tanzania, and so I decided to follow.

14. I left Juma's house and travelled by boat, for one full day and one full night. When I reached the Tanzanian shore I went straight to the Nyarugusu refugee camp.

15. I searched for my mother and sisters but they were not there.

[27] The applicant also pointed out some inaccuracies in his founding affidavit. He said that his founding affidavit had incorrectly stated that his neighbour came to find him at school to tell him of his father's death, whereas in fact the neighbour had only informed him of the event when he arrived home to find the house deserted. He also stated that his founding affidavit had incorrectly stated that he had left the city of Uvira immediately, whereas in fact he had stayed with the neighbour, Juma, for two weeks before leaving. Yet another error was the suggestion in his founding affidavit that he had brothers; whereas he does not. He stated that he was unable to 'definitively account' for how these errors occurred. He ascribed it as possibly having been due to the difficulty of having to communicate with the law clinic staff without the benefit of an interpreter.

[28] The Department delivered an answer in the form of an affidavit deposed to by Mr. Nyangane Elija Mathebula, the Acting Office Manager of the Cape Town Temporary Refugee Facility.

[29] He explained the failure of the respondents to timeously produce the administrative record as required in terms of rule 53. It would appear that the Department's officials are reliant on prompting from the State Attorney in this regard. The implication in the answering affidavit is that the attorney in the State Attorney's office dealing with the current matter had been under the misapprehension that an extract from the administrative record provided to the applicant's legal representatives before the institution of the judicial review proceedings had comprised the entire record. Mr Mathebula's affidavit was supported by a confirmatory affidavit from an attorney in the office of the State Attorney, Cape Town. I must say that there is no excuse for any such misapprehension by the attorney of record of the respondents because it was obvious that the documents provided by some unknown person before the institution of proceedings could not have comprised the entire record. The failure to provide the full record timeously is to be deprecated. According to the applicant's attorney, who is engaged in many similar cases, it has been a commonly encountered omission in such matters. So much so, that the University of Cape Town Law Clinic

has taken to instituting review applications in matters such as this availing of rule 6, rather than the ordinarily indicated rule 53.

[30] I have taken note of Mr Mathebula's explanation. He was not the incumbent of his current position during the period that non-compliance by his office with its obligations to provide the administrative records for judicial review purposes appears to have been endemic. He has given the court to understand that the problem will not continue under his management of the Cape Town office. It is to be hoped that this undertaking will be reflected in reality. It does not seem to me that the reaction to the historic problem by the Law Clinic in the use of rule 6 instead of rule 53 is well-advised. A court will in most cases be severely handicapped from dealing properly with the judicial review of an administrative decision in the absence of the administrative record of decision. In the event that the failure by an administrative authority to produce such records when required is an entrenched course of conduct, it is a matter that should be addressed by obtaining appropriate directions from the court and by reporting the conduct to the Public Protector and the Public Service Commission.

[31] The answering affidavit further drew attention to the numerous inconsistencies in the information provided by the applicant. I have inferred that this was done to support the submission that the matter of the applicant's refugee status was not one that the court should determine, but rather a question best dealt with by remittal to the statutory authority.

[32] There is no doubt that the decisions made by the refugee status determination officer and the Standing Committee fall to be set aside. The proceedings before the status determination officer were unlawful because a proper interpreter was not used and because the officer plainly did not effectively undertake the inquisitorial role that the statute contemplates. He also manifestly did not have regard to the information set out in the BI-1590 form and thus did not take obviously relevant considerations into account. These shortcomings should have been apparent to the Standing Committee. Its failure in the circumstances to make further enquiry and investigation into the matter, or request the applicant to appear before it was manifestly unreasonable. Its decision to uphold the determination of the refugee status determination officer without such further investigation was one that a reasonable decision-maker could not have made.

[33] As mentioned, the applicant has asked this court to make a decision granting him asylum. That course, as s 8(1)(c)(ii)(aa) of PAJA confirms, is indicated only in exceptional circumstances. The relevant principles were summarised by Heher JA in *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at para 28-29:

> [28] 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': s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. 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. Hefer AP said in *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA):
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> > '[14] . . . (T)he remark in *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (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 and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G
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> > > ". . . 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".
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> > [See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999 (1) SA 104 (SCA) at 109F - G.]
> >
> > [15] I do not accept a submission for the respondents to the effect that the Court a quo was [not] in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter *Administrative Law* at 682 - 4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:
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> > > "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."
>
> 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.'
>
> [29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47] - [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] - [49]. That is why remittal is almost always the prudent and proper course.

As noted in *Ntshangase v MEC for Finance, KwaZulu-Natal, and Another* 2010 (3) SA 201 (SCA), at para 22, 'The facts of each case will determine whether it is fair and practical to remit the matter to the original functionary, or for the court to substitute its own decision for that of the original functionary'.

[34] Ms *Harvey*, who appeared for the applicant, referred me to a number of judgments, including several given in this court, in which orders reviewing and setting aside decisions refusing applications for asylum had been accompanied by orders directing the Department of Home Affairs to grant the applicants refugee status. I have considered some of those cases. As to be expected, their determination turned on the peculiar facts of each case. In each of them the court was satisfied that the applicant was lawfully entitled to asylum. Issues such as the prejudice occasioned by delay (cf. *Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C), 2003 (8) BCLR 920, at 65C-H (SALR)) cannot justify the granting of asylum in circumstances in which it is not sufficiently clear that an applicant qualifies for refugee status in terms of s 3 of the Refugees Act. In *Tantoush*¸ for example, the substitution order sought was granted for a number of reasons; demonstrated bias by the decision-maker and prejudicial uncertainty occasioned by delay were mentioned in the judgment. But, 'most importantly', as the learned judge noted, he was able on the evidence before him to determine that the applicant had 'a well-founded fear of persecution' by reason of his political opinions, and therefore also able to determine that the applicant qualified for refugee status in terms of s 3(a) of the Act.[11]

[11] See *Tantoush* supra, at para 125-128.

[35] In the current case, as I have illustrated earlier in this judgment, various materially inconsistent versions of the circumstances of his departure from his habitual place of residence have been given by the applicant. I do not think that he can necessarily be criticised for this because he has testified more than once that he has been prejudiced by a lack of interpreter facilities, not only in his communication with the relevant authorities in terms of the Refugees Act, but also in his dealings with his legal representatives at the University of Cape Town Law Clinic. It is not clear to me on any of the versions apparent on the papers that the applicant has made out a case that would qualify him for refugee status in terms of s 3(a) of the Act.

[36] On one of the versions given he claims to fear victimisation at the hands of the Banyamulenge, but it is not clear that this is well-founded. In that version the applicant testified that his father had been killed by Banyamulenge rebels who thought he had information about the Maï Maï (sometimes spelled 'Mayi Mayi') militia. He said nothing that would give reason to suppose that the Banyamulenge might think he also possessed such information. In another version he stated that his father had taken issue with the Banyamulenge bringing cattle into the town. The situation with the Banyamulenge and their effect on the applicant is quite obscure. I could find no mention of the Banyamulenge in either of the United Nations reports annexed to the applicant's founding papers, or indeed in the 179 Oxfam Briefing Paper, dated 27 January 2014 handed in by counsel from the bar. In the respondents' answering affidavit, Mr Mathebula indicates that his research into the Banyamulunge indicates that the word is a term used to describe ethnic Tutsis who live predominantly in the High Plateau region of South Kivu Province. It is not clear to me that this would include Uvira, which is on the shores of Lake Tanganyika. Mr Mathebula says that the Tutsis are a minority ethnic group in South Kivu. The applicant has described himself as a Hutu in the form BI-1590, and elsewhere as being of mixed ethnicity.

[37] It would be quite improper for a court to decide a case like this on the basis of its own research into the situation in South Kivu. Such an undertaking would be quite distinguishable from the sort of reliance on position papers put before the court as annexures to the papers mentioned earlier in this judgment.[12] Clarification of the apparent inconsistencies in the applicant's description of the circumstances of his

[12] Note 6.

departure from Uvira is an exercise properly to be undertaken in the context of the hearings contemplated by ss 24 and 25 of the Refugees Act. Such investigation is also appropriate to determine whether changed circumstances in South Kivu in the nearly six years since the applicant left the area might qualify him as a *sur place* refugee.[13] (That the latter aspect also be investigated follows in my view on the *non-refoulement* provisions entrenched in terms of s 2 of the Regugees Act, mentioned earlier.[14]

[38] I think this court is entitled to accept it as notorious that the political situation in the eastern parts of the Democratic Republic of the Congo is unstable and that the attendant unrest has caused serious disturbance or disruption to public order. The contradictory factual accounts of the effect of the situation on the applicant personally make it unclear, however, whether it can be found that it compelled him to leave in the sense required for him to qualify as a refugee in terms of s 3(b) of the Refugees Act.

[39] The defective character of the proceedings before the refugee status determination officer and Standing Committee are in large part to blame for the lack of clarity. But the manner in which the applicant's story was related in the papers before court did not improve matters.

[40] In the result I have concluded that the applicant's application for asylum will have to be remitted to be considered afresh by a different refugee status determination officer. It is evident that directions should be given to ensure that further delay and bureaucratic inefficiency is minimised and that the Department of Home Affairs ensures that the applicant is assisted at any hearing before the status determination officer and, if necessary, thereafter before the Standing Committee or Refugee Appeals Board, by an interpreter proficient in the French and English languages.

[41] The following order is made:

1. The decisions made by the refugee status determination officer (Zamuxolo Mzinyati) on or about 3 March 2009 to refuse the applicant's application under the Refugees Act 130 of 1998 for asylum in South Africa and by the

[13] A *sur place* refugee is a person who was not a refugee when they left their country, but who becomes a refugee due to changes in circumstances in their home country or as a result of their actions while in the foreign country; Kahn and Schreier, *Refugee Law in South Africa*, Juta (2014) at pp.29-30..
[14] At para [4].

Standing Committee for Refugee Affairs on 14 July 2009 confirming that refusal are reviewed and set aside.

2. The applicant's application for asylum is remitted for determination afresh in terms of the Refugees Act after a hearing of the nature contemplated in terms of s 24 of the said Act, read with regulations 5 and 10 of the Refugee Regulations (Forms and Procedure), before a different refugee status determination officer.

3. The third respondent is directed to extend the applicant's asylum seeker permit in terms of s 22 of the said Act on the same terms and conditions as currently applicable pending the final determination of the applicant's application for asylum pursuant to this Order.

4. The hearing contemplated in terms of paragraph 2 of this Order shall take place at Cape Town within 30 days of the date of this Order, and on not less than 10 days prior written notice to the applicant at his residential address and at the offices of the University of Cape Town Law Clinic marked for the attention of Mr. Justin de Jager.

5. The deponent to the respondents' answering affidavit, Mr. Nyangane Elija Mathebula, alternatively, the Office Manager for the time being of Cape Town Temporary Refugee Facility, is directed to ensure -

   (i) that the refugee status determination officer assigned to hold the hearing contemplated in terms of paragraph 2 of this Order is furnished with a complete copy of the papers in the judicial review application in High Court case no. WCC 8803/10, as well as a copy of this judgment at least five days before the hearing; and

   (ii) that an interpreter proficient in the English and French languages is available for the purpose of assisting the applicant at the aforementioned hearing before a refugee status determination officer.

6. Without derogating in any way from the duty of the refugee status determination officer to conduct a fair and non-adversarial enquiry at the hearing, he or she is directed, in particular, to investigate the nature of the Banyamulenge and their activities in the South Kivu province of the Democratic Republic of the Congo at or about the time of the applicant's

departure from his habitual place of residence and migration to South Africa and to permit the applicant to make submissions on the officer's *prima facie* findings in that regard.

7. The aforementioned Mr. Nyangane Elija Mathebula, alternatively, the Office Manager for the time being of Cape Town Temporary Refugee Facility, is directed to file a copy of the record of the hearing together with a copy of the decision at the office of the Registrar of the High Court, Cape Town, clearly marked to indicate the court's case reference number in the judicial review proceedings (Case no. 8803/10), within 10 days of the date of the decision to be made in terms of s 24(3) of the Refugees Act.

8. The State Attorney, Cape Town, is directed to serve a copy of this judgment and Order on the aforementioned Mr. Nyangane Elija Mathebula, alternatively, the Office Manager for the time being of Cape Town Temporary Refugee Facility within 5 days of the date of this Order and to file proof of compliance with this direction at the office of the Registrar and within the same period deliver a copy of such proof to the applicant's attorneys of record.

9. The third respondent is directed to pay the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

Dates of hearing:	17 April and 19 June 2014
Date of judgment:	4 September 2014
Before:	Binns-Ward J
Applicant's counsel:	Suzanna Harvey
Applicant's attorneys:	University of Cape Town Law Clinic
Respondents' counsel:	Kevin Warner
Respondents' attorneys:	State Attorney, Cape Town