IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 13427/2012

DATE: 17 AUGUST 2015

In the matter between:

J M	Applicant
And	
THE REFUGEE APPEAL BOARD	1st Respondent
M J CHIPU N.O.	2nd Respondent
THE REFUGEE STATUS DETERMINATION OFFICER, M NXELEBA N.O.	3rd Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	4th Respondent
THE MINISTER OF HOME AFFAIRS	5th Respondent

J U D G M E N T

DAVIS, J:

This is an application to review and set aside a decision of the second respondent, acting on behalf of the first respondent, upholding the decision of the third respondent's refugee status determination officer (RSDO), who determined that applicant's

application for asylum refugee status was unjustified. In addition to the prayers in the notice of motion for the review and setting aside of these decisions, applicant also seeks relief by way of substitution and has asked this Court for an order declaring that she is refugee as contemplated by the Refugees Act 130 of 1998 ("the Refugees Act") as well as an order directing fourth respondent to issue her with a document concerning her status as a refugee in terms of section 27(a) of the Refugees Act.

FACTUAL BASIS FOR THIS APPLICATION:

According to applicant's founding affidavit, she is a citizen of Rwanda. During the genocide in that country she remained at a boarding school in Rwanda while the rest of her family fled to Uganda. Her father was a teacher. She also qualified as a teacher in Kigani in 2009. After graduation she obtained a teaching post in Rurenge in the Nyagatare District in the Eastern part of Rwanda from where her family came.

Her father had met Fausdon Kayumba Nyamwasa ("Nyamwasa") while in exile in Uganda. Later he became a member of the Rwanda National Congress ("RNC"). It appears that applicant also became a member in 2010. Nyamwasa fled Rwanda in February 2010 and sought asylum in South Africa.

I should add that, although there was some dispute raised in the papers, it appears from the judgment in Consortium for Refugees and Migrants in South Africa v President to the Republic South Africa and Others (Case number 30123/2011: unreported judgment of the North Gauteng High Court) that Nyamwasa was granted refugee status in South Africa on 22 June 2010.

Applicant's father then fled to Uganda in July 2011 as he feared for his safety as a result of his involvement in opposition politics. After her father and later her uncle had left for Uganda, members of the local defence unit came looking for applicant. It appears from this narrative, which I have summarised from applicant's founding affidavit, that she avers that she was subjected to rumours that her father had fled because of his political views and that she shared these views, which in her affidavit she confirms she indeed did.

In September 2011 the Executive of the sector in Rurenge sent the principal of the school, where she taught, a letter demanding that the applicant report to the local police. The purpose of this report is to explain why she was "*trying to organise people for the opposition*". Applicant did not report to the police, although she told her principal that she would do so. She then phoned her father who advised her to leave the

country. The applicant also came to the independent conclusion that she was unsafe. Her fear was based on the experience of others who were active in opposition politics. Applicant's father advised her that Rwanda exiles are not entirely safe in Uganda and that she should rather proceed to South Africa, where a former colleague of his had sought asylum.

Applicant arrived in South Africa on 4 October 2011. She applied for asylum on 10 October 2011. She has spoken, according to her affidavit, to her father on a few occasions since her arrival in South Africa, the last occasion being in July 2014. Her father informed her of the difficulties in Uganda and the fear of being under surveillance and of his wish to come to South Africa. In October 2014 she was informed that her father was no longer in Uganda but in custody in Ruwanda. Subsequent thereto she has not obtained any further information.

The applicant did not speak English when she entered South Africa. She was thus assisted to conclude the Eligibility Determination Form. Her lack of English was confirmed by the Refugee Reception Office and is evident at para 9A of the Eligibility Determination Form.

The applicant's hearing before the RSDO took place on 11 October 2011 when she was assisted by an interpreter from Burundi. She was handed the RSDO's rejecting her claims as unfounded on the same day. The RSDO found that there were no threats to her life and that she could not demonstrate a reason of further persecution. It was also found that she was not entitled to international protection because her government could protect her.

She appealed the decision of the third respondent. The second respondent upheld the decision of third respondent. The critical findings, in justification of upholding this appeal are the following:

> "The appellant failed to explain the blood relation between his father and the leader of the RNC, it appeared that the father was a member of the RNC and there was no blood relation as alleged in her claim. The appellant had stated that she is a member of RNC and it appeared in the appeal hearing that she was not a member of RNC. The appellant claim (sic) is not credible. As it has appeared during the appeal hearing at Cape Town on 2 February 2012 that is only his father (sic) who was an ordinary member of RNC, not

the entire family as claimed. It is difficult to believe that the appellant was affected by the father's activities since her mother and siblings are in Rwanda (sic).

The reasons that made the appellant to leave Ruwanda are not accommodated in terms of section 3 of The Refugees Act 130 of 1998. The appellant never experienced any reasonable risk of harm or persecution while in Rwanda except the talks of her colleagues which does not amount to persecution. It is trite law that persecution has to be accumulative or systematic which find no expression in the appellant's claim (sic). The fact that the father is a member of RNC cannot be persecution to the appellant (sic). There is no evidence presented by the appellant to show that those associated with RNC are persecuted in Rwanda."

By contrast the applicant insisted that at no stage did she say that she was related to Nyamwasa as in "*family*". She stated that she asserted that her father was connected to him and with a member of the party which he had formed. The interpreter Ms Mpawenimana deposed to an affidavit in which she said the following:

> "There was no communication problems at all through the applicant. I have interpreted on countless occasions for Rwanda asylum applicants. What I communicated to the RSDO was not inaccurately conveyed by me. I had had no reason to give the incorrect interpretation. In particular I highlight that the applicant told me that her father was related to Kayumba Nyamwasa (sic). I would not have mistaken the meaning between on the one hand the idea that her father knew Kayumba and on the other that they were related. I invite the applicant to state the exact phrase that she used to convey what she meant so that I can respond with my interpretation understanding. What she said was clear to me namely, that her father and Kayumba Nyamwasa were related."

In response to this challenge to specify the words used, applicant stated in her replying affidavit that she had used the word "*ubunwe*" which is similar to the French word "*unite*". Significantly on page 2 of NGC1, which is the content of the notes taken by the first respondent, applicant said that her father was a friend of Mr Nyamwasa. To the comment in the

findings of the first respondent that "it is difficult to believe that the appellant was affected by the father's activities since the mother and siblings are in Ruwanda" it is significant that in the document entitled Appeal against the decision by the Refugees Status Determination Officer, it is stated in the section "Give reasons and detail why you disagree with the decision of the Refugee Determination Officer":

> "As members of the RNC we were victimised and as the educated person of my family I was next in the family to face this persecution".

Second respondent's affidavit also stated that the applicant could not give details about the RNC. Applicant responded that she could not recall being asked about the party. She did make a comment that, in the absence of any reference this exchange in second respondent's contemporaneous notes, it was unlikely that he would remember this detail. Significantly, applicant draws the Court's attention, in her replying affidavit, to the fact that the various deponents on behalf of the respondents' are seeking, after three years, to reconstruct the interview. In the second respondent's notes he wrote that the applicant said that her father was a friend of Nyamwasa. Later in his notes he recorded that he asked her to explain the relation between her father and Nyamwasa.

Ms Mpawenimana's contention that the applicant only admitted that she was not a blood relative towards the end of the interview, is somewhat incongruous in the light of these averments. So much for the case put up by the applicant. I turn now to the question of who is a refugee.

THE RELEVANT LAW:

Section 3(a) of The Refugees Act which states that a person qualifies for refugees status for the purpose of that if that person "owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to evade himself or herself of the protection of that country will not having a nationality and being outside the country of his or her former habitual residence, is unable or owing to such fear unwilling to turn to.

This definition follows upon Article 1(A)(2) of the 1951 United Nations Convention Relating to the Status of Refugees ("The 1951 Convention") to which South Africa is a party. Further, section 2 of the Refugees Act sets out the fundamental principle of non-refoulment which is a basic principle of refugee protection. The section headed "*General Prohibition*

of Refusal of Entry, Expulsion and its Condition will return to another country in certain circumstances" provides:

> "Notwithstanding any provisions of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, expedited or returned to any other country or be subject to any similar measure if as a result of such refusal, expulsion, return or other measure such person is compelled to return or remain in the country where 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."

The question which third respondent, in particular, was required to answer was whether, on the facts of this case there is a reasonable possibility that the applicant be persecuted if returned to Rwanda and whether the reason for the risk of persecution is included in the definition on the convention. The phrase "well-founded fear" contains both a subjective and objective requirement. There must be a state of mind, fear of being persecuted, and a basis which was well-founded for this particular fear. See, for example, Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 (T) at paras 97 to 98.

Protection is restricted to persons who can demonstrate a present or prospective risk of persecution. Therefore, what is required is an assessment of the risk going foward. In R v Secretary for the Home Department *ex parte* Sivakumaran [1988] 1 ALO ER 193 (HO) the House of Lords held that a well-founded fear of persecution meant that if the applicant was returned to his or her own country, there was a reasonable degree of likelihood that he or she would be so persecuted.

In this case in deciding with the applicant who made out his claim that his fear of persecution was well-founded, the Secretary of State, the House of Lords found that. Account had to be taken of facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant to determine whether the applicant's fear was objectively justified. Since the Secretary of State had before him information which indicated that there would be no persecution of Tamils generally or any other particular group of Tamils or the applicant in Sri Lanka, he had been entitled to refuse the application on the ground that there existed no real risk of persecution.

Of equal relevance is Regulation 11(2) of the Regulations in South Africa Refugee (6 April 2000) which provides that:

> "In the absence of documentary evidence, an applicant's credible testimony and considerations or conditions in the country of fear of persecution or harm may suffice to establish eligibility for refugee status."

These regulations follow the recommendations of paragraph 196 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status:

> "It is a general legal principle that the burden of proof lies in the person submitting the claim. Often however an applicant may not be able to support his statements by documentary proof or other proof. Even [if] such independent research ...[is] not ... successful and [the applicant] may ... [have made] statements [which are] not susceptible to proof. In such cases if the applicant's account appears credible he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

THE APPLICATION OF THESE LEGAL PRINCIPLES

Applicant's claim for asylum and refugee status is based on

grounds that owing to a well-founded fear of persecution on account of her political opinions or imputed opinions and the social group, to which she belonged, she was forced to flee Rwanda. Whether or not her fear was well-founded must be considered in the light of the objectively ascertainable facts regarding the human rights situation in Rwanda. So much is clear from the law which I have outlined.

Of particular interest are reports generated by the United States Department of State regarding the political conditions in Rwanda, which reports were attached to the answering affidavit of second respondent. To the extent that these are relevant and were supplied not by the applicant but by the respondent, the following suffices to give an indication of the findings:

> "The Freedom March 2010 Freedom in the World report declared Rwanda 'not free', with particularly low political rights and civil liberties scores. In 2008 the Economist stated that the Kagame government 'allows less political space and press freedom at home and [does] Robert Mugabe."

This is a most disturbing claim given claims about the

egregious abuses of civil liberties in Zimbabwe which have been heard in our Courts. See for example National Commissioner of the Southern African Police Service v Southern African Human Rights Litigation Centre 2015 (1) SA 315 (CC). The report continues of this, "In spite of this donors have remained broadly supported of the government, and largely ignored the violation of citizen's human rights. Kugame defends his regime from criticism over its human rights record by saying "this is not about criticism or debate or opposition. It is a line drawn on the basis of what is right and wrong for us." In the government's view their suppression is legitimate as they are protecting society from a resurgence of ethnic tensions of the 1990's, although critics and opposition groups see their efforts as ways to shore up RPF political dominance.

These accounts, which form part of the answering affidavit finds support in documentation which the applicant provided to this Court. For example, a report of United States Department of State of 25 June 2015 documents a depressing litany of human rights abuse in Rwanda. I shall but refer to certain claims which reflect the nature of the report:

> "The most important human rights problems in the country where discrepancies, government harassment, arrest and abuse of political

> opponents, human rights advocates and individuals perceived to pose a threat to government control and social order: disregard for the rule of law amongst security forces and the judiciary: and restrictions on civil liberties. Due to restrictions on the registration and operation of opposition parties and non-transparent vote counting practises, citizens do not have the ability to change their government through fair and free elections."

In the report the following was documented:

> "On April 23 Rwandan SSF reportedly detained Norbit Manirafashao, a refugee under United Nations High Commissioner for refugees ... protection in Goma, the DRC and forcibly repatriated him into Rwanda. Manirafashao reportedly was held *in cumnunicado* until his appearance in Court on May 19 when authorities charged him in Ruvavu District for crimes against state security while 50 other defendants connected to the January to May arrests of alleged FDLR agents."

In the light of these facts, applicant contends that she is unwilling to return to Rwanda as there is more than a reasonable possibility that, having lived in South Africa as an asylum seeker of some years, she will draw particular attention to herself on her return. The fact that the applicant has lost contact with all of her family has resulted in her having a heightened fear of consequences of return. While her mother is not educated, her father had been able to contact her. Although this information was not before the RSDO or the second respondent, should her father have indeed returned to Rwanda and he is in jail, whether he returned on his own accord or was abducted, she will quite be all the more vulnerable, given her connection to him.

In its decision the first respondent committed a number of egregious errors. I shall document the key ones. Applicant was entitled to the services of a competent interpreter at all stages of the process. As the RRO noted on 10 October 2011 applicant could not speak English. It was clear that a competent interpreter was required. The applicant puts up a plausible case regarding the question of whether she said Nyamwasa was her relative. It appears probable that what she said was that they were related in a political, as opposed to a blood sense. If these were mistakes, which were made by the interpreter, provided by the fifth respondent, they resulted in

the second respondent making a most damaging credibility finding against the respondent, a mistake which I might add was a primary source of the reasons for the adverse finding against the applicant.

By refusing to allow the applicant to use the assistance of a competent interpreter in the status determination hearing, it follows that the second respondent could have not adopted the procedure that it was fair or proper and accordingly the applicant did not have a meaningful opportunity to be heard. Further, the fact that the second respondent stated in his reasons "*it is difficult to believe that the appellant was affected by the father's activities since her mother and siblings are in Ruwanda*" indicates an improper appreciation of the conspectus of facts in Rwanda.

If she is the only person in the family apart from her father who is educated and holds a prominent position as a teacher, that, in the context of the political context described by both applicant and respondents' permits a plausible inference to be drawn, that she would be targeted and that given her status she would have a real apprehension of being so targeted.

The applicant did not present evidence regarding a political historical social context of Rwanda. It is also true that this

evidence is fundamental to the claim for asylum. But then she was not properly informed of the onus which had been deposed upon her at the hearing. Secondly in this connection, both the second and third respondents should have considered her claim within this political context, a context, given the papers put up by the respondents, should have been well known to them. It does not appear from the written reasons provided by the second and third respondents that did so. Hence this Court is not able to disregard the political description set out of the situation in Rwanda, as provided in the first respondent's own papers.

When all of these mistakes are taken together, I cannot but agree with Ms de la Hunt, who appeared on behalf of the applicant, that a reasonable decision maker would not have come to the decision that the applicant did not have a well-founded fear of persecution. On this basis the decisions which were taken to refuse her asylum stand to be set aside.

SUBSTITUTION:

In the light of these findings applicant now seeks an order declaring that she is a refugee in terms of section 3 of the Refugees Act and a further order which in regard to refugee status and asylum. In effect, she asks this Court to substitute

its decision for that of Refugee Status Determination Officer RSDO and the Refugee Appeal Board.

Ms Mangcu Lockwood, who appeared on behalf of the respondents, urged this Court not to substitute its decision for that of the first respondent, if the Court were to come to the conclusion which it has namely, that the decision stands to be set aside.

She submitted that, even if the respondents had shown incompetence or indeed bias, there are a number of officials involved in the determination of asylum applications. There is not only one designated functionary who operates at the RRO or the RSDO stage. Thus, even if the applicant's application had not been properly handled by the particular individuals who dealt with applicant, her case could now be dealt with by other officials.

Further, the complaint regarding the interpreter could be cured by remitting the matter to the respondents' and for provision to be made for another interpreter or to allow the applicant to be accompanied by her own interpreter. In Ms Mangcu Lockwood's view another factor which should be taken into account was that applicant relies on new information which she failed to mention in her application for asylum, including the

claim that her family has fled Rwanda and that her father may now be jailed in Rwanda.

Accordingly respondents' have not had the opportunity to investigate these claims. It would be appropriate if the matter was remitted back to the respondents' for a fresh determination. In support of these submissions Ms Mangcu Lockwood referred to the decision of Rogers, J in Mayemba v Chairperson of the Standing Committee for Refugee Affairs [2015] ZAWCHC 86; 10 June 2015).

In that case Rogers, J took into account the fact that four years had elapsed since the asylum application had been made. He decided that the adjudication of an asylum application was concerned with the current state of affairs in the country of origin. In this connection he referred to section 5 of the Refugees Act, while the circumstances in relevant parts of Rwanda may have changed, Rogers J was of the view that it was preferable for such information in the first instance to be dealt with in terms of the statutorily prescribed procedures contained in sections 21 and 24 of the Refugees Act. Rogers J also noted (ar par 38):

> "The power of substitution confirmed by s8(1)(c)(ii)(aa) is one to be exercised only in

> exceptional circumstances and when, upon a proper consideration of all the relevant facts, a court is persuaded that the decision to exercise the power should not be left to the designated functionary ... Circumstances which may favour substitution or where a further delay would cause unjustifiable prejudice or the original decision maker has exhibited bias or incompetence or the outcome is a foregone conclusion."

The only consideration in this case which should give the Court pause as to whether exceptional circumstances as described by Rogers, J exist, is whether the outcome is a foregone conclusion in the light of the political context which has been set out by both parties in the papers presented to this Court. However, substitution can only take place in exceptional circumstances. The fact that one designated function has failed to perform in terms of the statutorily prescribed functions set out in the Refugees Act, is not on its own, sufficient to justify a finding of exceptional circumstances Ms Mangcu Lockwood is correct that there are other functionaries who will perform their duties with greater care and consideration of the evidence, context and with the aid of a proper interpreter.

In my view, all of these facts dictate that, in this case, a similar conclusion to that arrived at by Rogers, J in Mayenba *supra* should be followed. Accordingly it is appropriate to remit the applicant's asylum application for determination for a fresh RSDO within strict time limits so that the matter can be decided expeditiously with the benefit of accurate interpretation and the further benefit of consideration of the political context, which is set out in both applicant's and first respondent's papers.

For these reasons therefore the following order is made:

(1) THE SECOND RESPONDENT'S DECISION OF 31 JANUARY 2012 DISMISSING THE APPLICANT'S APPEAL AGAINST THE THIRD RESPONDENT'S DECISION AND REJECTING APPLICANT'S APPLICATION FOR REFUGEE STATUS AND ASYLUM IS UNFOUNDED, IS REVIEWED AND SET ASIDE.

(2) THE THIRD RESPONDENT'S DECISION OF 26 JANUARY 2006 REJECTING THE APPLICANT'S APPLICATION FOR REFUGEE STATUS AND ASYLUM AS UNFOUNDED, IS REVIEWED AND SET ASIDE.

(3) THE APPLICANT SHALL WITHIN TWO MONTHS OF THIS COURT ORDER OR WITHIN SUCH FURTHER PERIOD AS THE PARTIES MAY AGREE IN WRITING

SUBMIT FRESH APPLICATION FOR ASYLUM IN ACCORDANCE WITH SECTION 21 OF THE REFUGEES ACT 130 OF 1998 AND THE FURTHER PROVISIONS OF SECTION 21. 26 (OR AS THE CASE MAY BE OF THE ACT) SHALL APPLY TO SUCH APPLICATION. THE REFUGEE STATUS DETERMINATION OFFICER ASSIGNED TO DEAL WITH THE FRESH APPLICATION SHALL NOT BE THIRD RESPONDENT. THE DETERMINATION BY THE REFUGEE STATUS DETERMINATION OFFICER SHALL BE COMPLETED WITHIN TWO MONTHS AFTER THE APPLICATION HAS BEEN SUBMITTED OR ANY FURTHER PERIOD THAT THE PARTIES MAY AGREE BETWEEN THEMSELVES IN WRITING.

(4) **THE RSDO ASSIGNED IN THE CASE SHALL COMMIT THE APPLICANT TO APPOINT AN INTERPRETER OF HER OWN CHOICE TO ASSIST HER AT THIS PERIOD.**

(5) **APPLICANT'S COSTS SHALL BE PAID BY THE RESPONDENTS' JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED. THE APPLICANT'S COSTS INCURRED IN RESPECT TO THE APPLICATION FOR RELIEF IN PART A SHALL BE PAID BY THE FOURTH RESPONDENT.**

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DAVIS, J

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