IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A287/2015

In the matter between:

LIBAN ABDI MOHAMED	Appellant
And	
THE MINISTER OF HOME AFFAIRS	1st Respondent
THE DIRECTOR GENERAL DEPARTMENT	
OF HOME AFFAIRS	2nd Respondent
THE DIRECTOR: REFUGEE RECEPTION	
OFFICE, DEPARTMENT OF HOME AFFAIRS	3rd Respondent
THE CHIEF IMMIGRATION OFFICER, DEPARTMENT	
OF HOME AFFAIRS	4th Respondent
THE REFUGEE STATUS DETERMINATION OFFICER	5th Respondent
THE CHAIRPERSON, THE STANDING	
COMMITTEE FOR REFUGEE AFFAIRS	6th Respondent

JUDGMENT: 12 FEBRUARY 2016

ALLIE, J:

1. For the purpose of this judgment, the Standing Committee of Refugee Affairs will hereinafter referred to as ["SCRA"] and the Refugee Status Determination Officer will hereinafter be referred to as ["RSDO"].

2. This is an appeal against the decision of the court *a quo* which found that the decision of the SCRA taken on 28 October 2011, namely, that the appellant's application for asylum is manifestly unfounded was a final decision and the SCRA was *functus officio* at the time when the appellant's further submissions were sent to the SCRA.

3. On behalf of appellant, it was submitted that the court *a quo* was incorrect in holding that the SCRA was prevented from having regard to appellant's further submissions merely because it had informed the RSDO of its decision because that decision had not been communicated to the appellant and that while the RSDO remains an interested party because the SCRA automatically reviewed his decision, he was not an affected person.

Relevant Facts

4. The appellant is a 25 year old Somali national who submitted an application for asylum in terms of section 21 of the Refugees Affairs Act at the Maitland Refugee Reception Office.

5. He speaks Somali and has a basic understanding of Arabic but does not read, write nor speak English.

6. He relied on the services of an interpreter to communicate with the officials of the Department of Home Affairs.

7. He was interviewed by the RSDO on 4 October 2011.

8. On 5 October 2011 the RSDO rejected his application for asylum as manifestly unfounded because the RSDO believed he came to South Africa to seek employment and not because he was subjected to the threat of persecution or harm.

9. When he was informed of the RSDO's decision he was handed a document informing him that he had 14 days within which to make further submissions before the decision would be reviewed.

10. At that's stage his asylum seeker permit was renewed and extended until 5 April 2012.

11. On 27 March 2012, shortly before he was due to return to the Refugee Reception office, he obtained legal advice and written submissions were made to the SCRA on his behalf.

12. On 28 March 2012, his attorney received an acknowledgment of receipt of the submissions from the SCRA.

13. Appellant's attorney sent several emails to the SCRA thereafter requesting an update and response to the submissions.

14. On 4 February 2013, the Chairperson of the SCRA responded by saying that the representations ought to have been filed with the RSDO and the SCRA would consider them even if they were received outside of the 14 days stipulated, provided that the SCRA has not yet reviewed the decision of the RSDO.

15. On 4 February 2013, the appellant was informed that the SCRA had already reviewed the decision of the RSDO on 28 October 2011 obviously, without having regard to his submissions which were only delivered on 27 March 2012, at a time when he did not know that the SCRA had already undertaken the review. He was advised that the SCRA upheld the decision of the RDSO to refuse his application for asylum.

The Applicable Law

16. The intention of the *functus officio* doctrine is to mediate two competing interests, namely, " *finality or certainty on the one hand and flexibility and administrative efficiency on the other*."[1]

17. In **Retail Motor Industry Organisation & Another v Minister of Water & Environmental Affairs& Another**, Plasket AJA held that: "*Certainty and fairness have to be balanced against the equally important practical consideration that requires the re-assessment of decisions from time to time in*

[1] "Administrative Justice-LAWSA Vol 2 sn18 by JA D'Oliviera. Administrative Law in S.A. (2ed) (2102) at 278 by C.Hoexter

order to achieve efficient and effective public administration in the public interest."[2]

18. In the Retail Motor Industry case (*supra*), the Supreme Court of Appeal set out the applicability of four jurisdictional facts to demonstrate how the balance between certainty and flexibility ought to be achieved:

"*first, the principle applies only to final decisions; secondly, it usually applies where rights or benefits have been granted-and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision- maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions) fourthly, the functus officio principle does not apply to the amendment or repeal of subordinate decision.*"[3]

19. The facts in this case require us to consider two related factors, namely, when a decision is generally regarded as final and the decision maker as *functus officio* and whether the Refugees Act 130 of 1998 or its regulations contain any provision that obliges the SCRA to deviate from the general principles applicable to the doctrine.

[2] 2014 (3) SA251 (SCA) at para 24
[3] At para 25

20. There is nothing prohibiting the legislature or the executive from expressly departing from the general rule that a decision maker is only *functus officio* once its decision has been conveyed to the affected person.

21. In the relevant Act and regulations, there is however no express or implied attempt to depart from the general rule.

22. In **President of the Republic of South Africa v SARFU & Others**,[4] the Constitutional Court held that the validity of the President's decision to delegate to the Minister, the decision to appoint a commission of inquiry had to be determined with reference to the fact that until the notice of promulgation of the commission of inquiry had occurred, the President could alter his decision. Therefore the external act of promulgation was considered to be the formal communication and the President was not *functus officio* until the promulgation.

23. In **Member of the Executive Council for Health, Eastern Cape Province v Kirland Investments**, [5] the Superintendent-General of the Eastern Cape Department of Health made a decision to refuse Kirland's application to set up a private hospital but the Superintendent-General was involved in an accident before he could sign the letter of refusal.

24. The Supreme Court of Appeal, relying on the SARFU judgment, held that the decision could be reversed by the acting Superintendent- General because the earlier decision had not yet been communicated to Kirland and the

[4] 2000 (1) SA1 (CC) at para 44
[5] 2014 (3) SA 219 (SCA) at para 15

Superintendent-General was not yet *functus officio* because the decision is revocable before it is published or announced or otherwise conveyed to the affected person.

25. In **Manok Family Trust v Blue Horison Investment 10 (Pty) Ltd & Others,**[6] the Supreme Court of Appeal, applied the Kirland judgment when it held that a decision taken under section11 (4) of the Resititution of Land Rights Act 22 of 1994 that a land claim failed to meet the requirements of the Act, was final and the decision-maker was *functus officio* because the decision had been conveyed to the applicant who claimed restitution.

26. In English law, the position is similar. Wade and Forsyth explains it as follows:

" *In the absence of special circumstances the tribunal's decision is irrevocable as soon as it has been communicated to the parties, even though orally and even though the reasons for it remain to be given later.*" [7]

27. In **Re: 56 Denton Road,** the same sentiment was expressed as follows:

"*Where Parliament confers on a body… the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and*

[6] 2014 (5) SA 503 (SCA) at para 14
[7] Administrative Law by Wade and Forsyth at 192

cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body." [8]

28. In three Australia cases, namely, Seminugus,[9] SZQOY[10] and SZRNY[11] the court held that the decision-maker is not *functus officio* until the applicant has been informed of the decision.

29. Even with due recognition of the differences between the Australian legislation and ours, the general principle enunciated in the Australian cases, are equally applicable in South Africa, namely, that the flexibility to alter a decision remains until the decision has been communicated to the affected person.

30. Daniel Pretorius says the following in explanation of the *functus officio* doctrine*:*

"*The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter."*[12]

[8] [1953] Ch 51 at 56
[9] Seminugus v Minister for Immigration & Multicultural Affairs [2000] FCA 240
[10] Minister for Immigration and citizenship v SZQOY [2012] FCAFC 13
[11] Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY [2013] FCAFC 104

[12] "The Origin of the *functus officio* doctrine with specific reference to its application in Administrative Law" 2005 SALJ vol 122 PAGE 832 at 832-833

Application of Law to the Facts

31. In this case, the SCRA's decision was communicated to the RSDO for two purposes, namely, firstly, to inform the RSDO as an interested party so that he could have a record of the decision and secondly, so that the RSDO could convey the outcome of the SCRA's automatic review to the asylum seeker, namely, the appellant.

32. The purpose of informing the appellant is clearly so that he knows that his temporary residence will terminate without his application for asylum being successful and so that he can exhaust further appeal procedures.

33. The far- reaching consequences that flow from a refusal of an asylum application, is sufficient justification for ensuring that an applicant is informed as soon as possible of the SCRA's decision.

34. It is however disconcerting that in this case the SCRA took its decision on 28 October 2011 and conveyed it to the RSDO immediately but the decision was only communicated to the appellant on 4 February 2013 when he went to renew his asylum seeker permit.

35. The appellant renewed his temporary permit on 5 April 2012 at the Reception Office and no one informed him on that day, that the SCRA had upheld the RSDO's decision.

36. The policy adopted by the SCRA that they will consider late submissions made before they make decisions demonstrates an appreciation of the need for flexibility although that policy does not go far enough in giving expression to the general principles applicable to the *functus officio* doctrine.

37. The 10 month delay in informing the appellant of the SCRA's decision materially prejudiced his prospects of success in challenging the procedural regularity of the decision in that the appellant could be deported as he is now illegally residing in the country.

38. Consequences, such as, summary deportation or the likelihood of persons remaining in the country illegally, themselves, ought to be sufficient incentive to make the respondent's process more transparent and accessible to asylum seekers at an earlier stage.

39. It is common cause that the practice prevailing at the time when the SCRA made its decision, was, that its members would arrive at the Refugee Reception Office, review the files, make the relevant decisions and leave the files at the office. The RSDOs are oblige to inform the applicants of the SCRA's decision. The SCRA is not advised about when an applicant will be informed.

40. The stated purpose of the Refugees Act is to give effect to the relevant legal instruments, principles and standards for refugees and asylum seekers, to regulate applications for and recognition of refugee status and to provide for rights and obligations flowing from such status.

41. Section 2 of the Act provides that no one may be returned to another country where that person will be subjected to persecution due to his or her race, religion, nationality, political opinion or membership of a social group or if his or her life, physical safety or freedom would be threatened.

42. Section 2 is meant to give expression to this country's obligation of non-refoulement under article 1A (2) of the Convention Relating to the Status of Refugees, 1951.

43. Section 25 (3) (a) and (b) defines the SCRA's functions as follows:

    (a) May confirm or set aside a decision made in terms of section 24 (3) (b) and

    (b) Must decide on a question of law referred to it in terms of section 24 (3) (d).

44. Before arriving at its decision, the SCRA may use its inquisitorial and investigative powers under section 25 (1). This gives the SCRA power to go beyond the mere "record" of the decision of the RSDO.

45. In **Bula v Minister of Home Affairs,**[13] the court said that the automatic review by the SCRA " *was clearly intended to ensure that deserving applicants are not wrongfully turned away. This in turn ensures that South Africa meets its international obligations.*"

[13] 2012(4) SA 560 (SCA) at para 68

46. Section 25 (4) provides that; " *The Standing Committee must inform the Refugee Status Determination Officer concerned of its decision in the prescribed manner and within the prescribed time."* The Act clearly does not require the SCRA to inform the applicant of its decision. In practice it is the RSDO who informs the applicant, usually when he or she comes into the Refugee Reception Office to renew the temporary residence permit.

47. There are obvious practical difficulties that are sought to be obviated by adopting this procedure as very often, refugees or asylum seekers may not have fixed addresses.

48. While the practice is explicable in view of the high volume of applications for asylum that the RSDOs and SCRAs receive, no cogent reasons were advanced for the SCRA not being given the further submissions after it reviewed the RSDO's decision but before its decision was communicated to the appellant.

49. The court *a quo* appears to have seized upon the words '*in the prescribed manner and within the prescribed time*" in order to arrive at the conclusion in para 24 of its judgment that those words prove that the legislature envisaged that the decision had to be taken within the time frame that it had to be communicated to the RSDO and therefore the SCRA was found to be *functus officio.*

50. The fallacy in that conclusion is that a prescribed time period or manner in itself does not make a decision final.

51. I find myself in agreement with the appellant's counsel when he says that the practice of the SCRA is irrelevant to interpreting the Act; it doesn't impede considering late representations and practical considerations can't outweigh substantive principles.

52. The interpretation of a statute cannot yield to administrative practice and convenience.

53. Appellant alleged that the RSDO and consequently the SCRA were given an incorrectly interpreted account of what he conveyed to the interpreter, as his reason for coming to this country and he accordingly wants the SCRA to have regard to his late written submissions which, if considered, ought to at least persuade the SCRA to decide if it should conduct further inquiries and investigations before making its decision.

54. On behalf of the appellant, it was submitted that the SCRA was entitled to adhere to its policy that written submissions be made within 14 days. Mr Bishop for appellant argued that this policy could not be inflexibly applied.

55. He acknowledged that in certain circumstances the SCRA may refuse to consider late submissions if the explanation for the lateness was not satisfactory.

56. On behalf of appellant it was argued that the SCRA would have to consider the late submissions, even if it is merely for the purpose of condoning its lateness.

57. Having found that the general principle applicable to the *functus officio* doctrine, applies in this case, namely, that the decision of the SCRA had to be communicated to the appellant as the affected party for the SCRA to be *functus officio*, the RSDO's failure to inform the appellant before his late written submissions were delivered, has the effect of making the SCRA not *functus officio* on 28 March 2012 when it received the late further submissions.

58. I would accordingly remit the application for asylum back to the SCRA for reconsideration with due regard being had to the late written submissions filed by appellant on 27 March 2012, albeit for the initial purpose of deciding whether an inquiry or investigation was justified in the circumstances.

Costs

59. Since the appellant has been successful in the appeal, costs should follow the result both in the appeal and in the court *a quo.*

IT IS ORDERED THAT:

1. The order of the court *a quo* is set aside;

2. The decision of the Standing Committee of Refugee Affairs communicated to Appellant on 4 February 2013, is set aside;

3. The appellant's application for asylum is remitted back to the Standing Committee of Refugee Affairs for reconsideration;

4. The costs order of the court *a quo* is set aside;

5. The Respondents are directed to jointly and severally pay the Appellant's costs in the court *a quo* and in the appeal.

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R. ALLIE

VELDHUIZEN, J:

I agree.

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A. VELDHUIZEN

ROGERS, J:

I agree.

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O. ROGERS

ALLIE, J [VELDHUIZEN, J et ROGERS, J agree) - 12/02/2016

The order of the court *a quo* is set aside;

The decision of the Standing Committee of Refugee Affairs communicated to Appellant on 4 February 2013, is set aside;

The appellant's application for asylum is remitted back to the Standing Committee of Refugee Affairs for reconsideration;

The costs order of the court *a quo* is set aside;

The Respondents are directed to jointly and severally pay the Appellant's costs in the court *a quo* and in the appeal.