IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Holderness, AJ)

[Not Reportable]

Case No: 19483/2015

In the matter between:

M A Applicant

and

THE CHAIRPERSON OF THE REFUGEE APPEAL BOARD First Respondent

MALEMATJA MOHALE N.O Second Respondent

THE REFUGEE STATUS DETERMINATION OFFICER, DALIWANGA GEORGE N.O. Third Respondent

THEMBI NDLOVU N.O. Fourth Respondent

THE MINISTER OF HOME AFFAIRS Fifth Respondent

THE DIRECTOR-GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS Sixth Respondent

JUDGMENT DELIVERED ON 28 FEBRUARY 2017

HOLDERNESS AJ:

Introduction

[1] The applicant applies, in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), for an order reviewing and setting aside the first and third respondents' decisions rejecting the applicant's application for refugee status and asylum as unfounded, and, in terms of s 8(1)(c)(i)(aa) of PAJA, for an order substituting the impugned administrative decision with one by the court declaring him to be a refugee and granting him asylum in South Africa, as contemplated by section 3 of the Refugees Act 130 of 1998 ('the Refugees Act').

[2] 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 review and setting aside, but contends that if the impugned decisions are set aside, the court should not grant substitutive relief, but should rather remit the matter to the Department for consideration afresh.

Statutory framework

[3] The preamble to the Refugees 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*, which 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*'.

[5] The right to lawful, fair and reasonable administrative action is entrenched in our law in terms of section 33 of the Constitution,

[6] The circumstances in which one determines whether an individual qualifies for refugee status are set out in Section 3 of the Refugees Act, as follows:

> *'**Refugee status***
>
> *Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-*
>
> *(a) 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 avail himself or herself of the protection of that country, or, 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 return to it; or

(b) 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;'

[7] According to the UNHCR Handbook[1], whether a person is a refugee is an objective fact, and not a privilege to be accorded to those who deserve it:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status therefore does not make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'

[8] In *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs*[2] Justice Binns-Ward stated that determining whether a person qualifies under section 3(b) requires:

[1] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees *HCR/IP/4/Eng/Rev.1 Reedited* Geneva 1992 ('the UNHCR Handbook'), paragraph 28
[2] (8830/2010) [2014] ZAWCHC 134; [2015] 1 All SA 100 (WCC) (4 September 2014), para 6

'(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 <u>that demands that the individual's personal circumstances be taken into account.'</u> (emphasis added)

[9] If the applicant left the DRC of his own volition and was not compelled to leave, he does not qualify for refugee status in terms of section 3(b) of the Refugees Act. As noted in *Radjabu supra*, the assessed credibility of the person claiming refugee status will be an important determinant in the decision-making process.

Basis upon which the applicant claims to be a refugee

[10] Turning now to the applicant's claim for relief declaring that he is a refugee. The applicant contends that he is, objectively, a refugee who is entitled to South Africa's protection in terms of both section 3(a) and section 3(b) of the Refugees Act, because:

10.1 he fled his country owing to his *'well-founded fear of persecution by reason of his imputed political affiliation: having escaped from both a rebel controlled village and from government custody. He was and remains vulnerable to pursuit by both forces';* and

10.2 he was compelled to seek refuge elsewhere, '*owing to a serious disturbance of the public order in the eastern DRC, encompassing a comprehensive and notorious failure of state protection*.'

[11] In addition to a refugee's right to *non-refoulement*, international refugee law also recognises that a person who left his or her country for other reasons might become a refugee *sur place* if conditions in the country of origin are such that it is unsafe to return[3]. It appears to now be commonly accepted that conditions in the eastern DRC are such that no state which has adopted the international treaties, referred to above, can lawfully return a person there. This is dealt with more fully hereunder.

PROCEDURE TO BE FOLLOWED IN IDENTIFYING AND PROTECTING REFUGEES IN SOUTH AFRICA

Roles of the Refugee Reception Officer and the Refugee Status Determination Officer

[12] I now turn to the procedures which the respondents were required to follow. The Refugees Act gives effect to South Africa's international law obligations to:

12.1 receive asylum seekers;

[3] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees *HCR/IP/4/Eng/Rev.1 Reedited* Geneva 1992 ('the UNHCR Handbook')

12.2 inform them of their rights;

12.3 assist them to apply for asylum;

12.4 conduct an enquiry which is both supportive and inquisitorial; and

12.5 afford protection to those who are, objectively, refugees.

[13] Section 21(2) of the Refugees Act, read with the regulations to the Act, requires the relevant refugee reception officer ('RRO') to ensure that the application form has been properly completed and that the applicant received the necessary assistance for this purpose, including adequate interpretation. The RRO 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 must then be passed on to a refugee status determination officer ('the RSDO').

[14] In terms of s 24 of the Refugees Act, the RSDO was required *inter alia* to ensure that the applicant fully understood the procedures, his rights and responsibilities and the evidence presented, and to have due regard to the applicant's rights set out in section 33 of the Constitution.

[15] It has been repeatedly stated that because refugees are vulnerable and have often survived great trauma and hardship, may be intimidated by those in power, are unlikely to be proficient in English, and seldom have official proof of their claims, the interview conducted by the RSDO is required to be supportive and inquisitorial. The RSDO shares with the asylum seeker the duty to produce evidence in support of his claim and must generally give him the benefit of the doubt.[4]

[4] *Tantoush v RAB and Others* 2008 (1) SA 232

Role of the Refugee Appeal Board

[16] An asylum seeker whose application is rejected as '*unfounded*' may lodge an appeal with the Refugee Appeal Board ('RAB'). The RAB is constituted of at least three persons, a majority of whom constitute a quorum. Appeals conducted by one person sitting alone are unlawful, and the resultant decisions reviewable.[5]

[17] The RAB is established in terms of s 12 of the Refugees Act and is required in terms of s 12(3) to function without any bias and to be independent. The parties before it are the asylum seeker and the Department of Home Affairs.

[18] The RAB conducts an appeal in the wide sense, and is required to determine whether the decision reached by the RSDO was correct. An asylum seeker is entitled to be present during the appeal proceedings, and to be heard by the RAB.

Factual background

[19] I shall now set out the particular set of facts in the present matter, whereafter I will set out the review grounds and the legal principles governing substitution applications, before determining whether a proper case has been made out for substitution in terms of section 8(1)(c)(ii)(aa) of PAJA.

[5] *Harerimana v The Chairperson of the RAB and others* 2014 (5) SA 550 (WCC) at [20]

[20] The applicant is an adult male social worker, currently working as a security guard, born on 14 February 1967 in Sandoa, a village in Katanga Province situated between Tshimbalanga and Musumba in the DRC. The applicant moved with his family to Lubumbashi when he was three years old. He grew up and attended school in Lubumbashi.

[21] The applicant's home language is Swahili. He is also fluent in Ruund, French and Lingala. He only started to learn English after arriving in South Africa.

[22] In 1995 the applicant was employed by the Minister of Youth, Sport and Culture/Leisure as a social worker. In 1997 he was transferred by his employer to Goma in the Eastern DRC. The applicant regards Goma as his habitual place of residence and this does not appear to be disputed by the respondents. As set out in the applicant's founding affidavit:

22.1 Goma is the capital of the North Kivu Province, and is located on the northern shore of Lake Kivu, just one kilometer from the border with Rwanda, close to the Rwandan city of Gisenyi;

22.2 Goma was at the epicenter of the First Congo War, which ended in 1997 with the overthrow of Mobutu's regime by Laurent Kabila;

22.3 Children were orphaned in large numbers during the First Congo War, and required social aid. This was the reason for the applicant being stationed in Goma as a social worker;

22.4 Goma was and remains an unstable area surrounded by forest, characterised by violence, and occupied by armies, rebel militias and non-state armed groupings comprising nationals of the DRC and bordering countries.

[23] In 2002 the applicant married his wife, Irene, who moved from Lubumbashi to live with him in Goma. Their two daughters were born in 2002 and 2004, and a son was born in South Africa in 2009.

[24] In 2005 the applicant and certain colleagues reported financial mismanagement by their head of department, a Mr Kitoko ('Kitoko'), to the head office in Kinshasa. Later that year, the applicant was returning home by motorbike when he was ambushed and assaulted by five men who proceeded to interrogate him about his work in Goma. He suspected that this attack was at the instance of Kitoko, and fearing for the safety of his family, he sent his wife and children back to Lubumbashi in early 2006.

[25] According to the applicant, unbeknownst to him, his family never reached Lubumbashi. War was raging in the eastern DRC at the time, communications were not operative and they lost contact completely. He later established that, together with many other refugees fleeing the DRC, they had made their way to South Africa, where the applicant was eventually reunited with them in 2009.

[26] In late 2007, the applicant was assigned, together with two colleagues, to Murenje, a village 30 kilometres north of Goma, where they were responsible, in collaboration with NGO humanitarian aid agencies, for the welfare of orphaned, mostly homeless children in the village. The applicant kept rented accommodation in Goma, and travelled between Murenje and Goma by bicycle.

[27] Shortly thereafter Murenje was attacked and occupied by the Goma-based anti-Kabila rebel movement known as the Rally for Congolese Democracy (colloquially known as RCD-Goma). The applicant avers that the rebels assumed full military control of the village, which was placed under tight security, and no-one was permitted to leave. The applicant and his colleagues, as government employees, kept a low profile. Anybody who tried to escape, or who showed any resistance to the rebels, was killed.

[28] After approximately six months, the applicant and his two colleagues managed to escape Murenje by hiding in a truck which had delivered food aid from the United Nations World Food Program. He made his way back to Goma, however he was then arrested in Goma and after being detained for an indeterminate time in police holding cells, was transferred to the offices of the National Intelligence Agency *(Agence Nationale de Renseignements* or ANR) whose role it is to ensure the internal and external security of the State.

[29] The ANR suspected the applicant of being involved with the rebel forces and interrogated him regarding events in Murenje. The applicant was released after a month. Three months later he was re-arrested by the ANR. The applicant alleges that during this second incarceration, he feared for his life as he was assaulted whilst in detention. He states in paragraph 21 of his founding affidavit that several prisoners would be called out by name and were then never seen again.

[30] Towards the end of 2008 one of the ANR agents agreed to help the applicant escape. He hid in the guard's car to escape the prison complex and was taken home to collect some of

his personal belongings. Under cover of darkness he walked to the shores of Lake Kivu, and obtained passage on a small fishing vessel south, until he reached Lake Tanganyika, after travelling afoot through the villages between the southern end of Lake Kivu and the northern tip of Lake Tanganyika. He reached the Tanzanian border and travelled by truck through Zambia and Zimbabwe, to South Africa.

[31] The applicant estimated that he left the DRC on 4 December 2008 and arrived at Beit Bridge on 14 December 2008. He first attempted to apply for asylum in Pretoria, however the queues were long and there was a lot of fighting. He then travelled by bus to Cape Town to try and apply for asylum. Upon arrival in Cape Town he worked in a scrap metal business for a few weeks to earn some money to survive.

Application for temporary asylum

[32] On 2 February 2009 the applicant formally applied for a temporary asylum seekers permit. He was not offered any assistance, either by an RRO, or by an interpreter, and the procedure was not explained to him nor was he informed of his rights. On the B1-1590 which the applicant completed, there is a note under the heading 'Preliminary comments by Refugee Reception Officer', that the applicant required the services of an interpreter.

[33] In response to the question on the application form 'Why are you applying for asylum', the applicant's answer was, *verbatim,* the following:

> '*I am from the war zone, so there are not the opportunity of to stay in peace. Because I was a functionary or civil servant. So, if the rebels entry in city, they attack all or*

any local authority employee. One day I was go on an assignment at 30km of Goma, I was arrested by the rebels troup. I was stay with them six months and I was get a occasion for to flee from there and I was running away. I was back to Goma sicing. Now, in my country, my city, the secret service of government to pursue me because I am from the rebels zone. I am in insecurity at any time and anywhere on my own country. If the peace come, I can back home.'

[34] In his founding affidavit the applicant's explanation for not mentioning his arrest and imprisonment by the ANR was that he feared this would compromise his application for asylum. I am satisfied that, in the circumstances, this is reasonable explanation for such omission.

[35] The applicant was issued with a temporary asylum seeker permit, which he renewed periodically, and was reunited with his family.

The RSDO interview and decision

[36] The applicant was interviewed by the RSDO on 17 May 2011. He was not offered the assistance of an interpreter and the RSDO was not interested in the reasons why he left the DRC. Curiously, the RSDO expressed annoyance at the fact that the applicant had studied in two places, namely Goma and Lubumbashi. On the same day, he returned his decision, namely that in terms of section 24(3)(C) of the Refugees Act, the applicant's application was rejected as unfounded.

[37] The applicant states that the RSDO's appears to have complied the interview notes relating to his application *'partly from my application form and partly from his own imagination',* as he never asked the applicant about his skills, nor about his criminal convictions or military service.

[38] The reason given by the RSDO for the decision is as follows:

> *'You claimed that you were born in Sadoa village in Katoa province and you were studying in Lubumbashi from 1987 to 2003. You also mentioned that you were working in Goma from 1998 to 2008. You have decided to leave your country because you were arrested by the rebels for six months 30Km from Goma. You again mentioned that after fleeing the rebels you were than accused of working for the rebels by the secret service. After considering all the relevant fact into your application I have come into conclusion that you claim does not call to question any material fact and country of information is not consistent on this matter because it is unlikely that you can study in Lubumbashi from 1987 to 2003 (sixteen years) and again to be able to work in Goma from 1998 to 2008 (ten years) eveven though it is fact that the political instability and insecurity in Goma. You could also go back to your place of birth Katanga which is peacefull and under government control. Inlight of the above well founded fear does not apply.* (sic)*'*

[39] The decision is not entirely incoherent and the reasons given for the decision are neither clear, nor cogent. Had the RSDO properly undertaken an inquisitorial role, he would have ascertained that the applicant was a government employee deployed to Goma (not by choice), and then deployed to a rebel occupied village from which he had to flee. Given the

benefit of the doubt, it is clear that the applicant was effectively caught between the RCD-Goma and ANR.

[40] The applicant's explanation for not mentioning his capture, imprisonment and assault at the hands of government forces was because he feared that it would jeopardise his application. This is precisely why the RSDO was enjoined to adopt an inquisitorial approach to ensure that he had the full story before simply rejecting the application as unfounded.

Appeal to the RAB

[41] Duly assisted by the UCT Law Clinic, the applicant lodged an appeal against the RSDO's decision with the RAB.

[42] In terms of section 13(1) of the Refugees Act, **t**he Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly, and at least one of the members of the Appeal Board must be legally qualified. It appears from the written decision of the RAB that the applicant's appeal was only heard by one member, Mr. Malematja Mohale, the second respondent ('Mohale').

[43] In the Notice of Intention to Lodge an Appeal filed on behalf of the applicant, it was recorded that the application wished to appeal the decision of the RSDO on the ground set out in section 3(2)(b) of the Refugees Act, namely that he was compelled to remain outside his/her habitual place of residence due to events seriously disturbing the peace.

[44] The burden of proof is on the applicant to show that he is entitled to refugee status, however if he is unable to support his statements by documentary or other proof, if his account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.[6]

[45] The applicant was assisted during the appeal by Monique Schoeman of the UCT Law Clinic, however his rights were not explained to him and the interpreter did not play any role during the appeal proceedings. The interview proceeded in English, a language in which the applicant is not proficient.

[46] In the applicant's heads of argument for the appeal, the facts set out are consistent with the facts alleged in the founding affidavit, save that in the heads of argument it is alleged that after escaping from the ANR he hid in the bushes for two weeks before fleeing the DRC. This anomaly in his version may be the result of the language barrier or a miscommunication between the applicant and his legal representative. I am not persuaded that his version falls to be disregarded because of minor inconsistencies.

[47] A delay of four years elapsed until the applicant received the RAB's decision, dismissing his appeal, on 5 June 2015.

[48] In terms of section 26(3) of the Refugees Act:

> *'(3) Before reaching a decision, the Appeal Board may-*

[6] UNHCR Handbook, para 196

(a) invite the UNHCR representative to make oral or written representations;

(b) refer the matter back to the Standing Committee for further inquiry and investigation;

(c) request the attendance of any person who, in its opinion, is in a position to provide the Appeal Board with relevant information;

(d) of its own accord make further inquiry or investigation;

(e) request the applicant to appear before it and to provide any such other information as it may deem necessary.'

[49] As to the standard of proof, in general the applicant's fear should be considered to be well-founded if he can establish, *to a reasonable degree*, that his continued stay in his country of origin has become intolerable.[7] The applicant is not required to prove a 'real risk' on a balance of probabilities. The appropriate standard is 'a real possibility of persecution'.[8]

[50] It appears that the RAB was aware of the facts pertaining to the applicant's claim, namely that he was deployed by the government to a rebel controlled village and was subsequently arrested and detained by the ANR because he had moved from a government controlled area to a rebel controlled area.

[51] The RAB noted that the applicant's attorney argued that the applicant must establish to a reasonable degree that he has a well-founded fear of persecution, and that because international law does not regard asylum seeking as a last resort, the concept of internal flight

[7] UNHCR Handbook, para 42; *Fang v Refugee Appeal Board* [2006] JOL 18635 (T)
[8] *Tantoush v Refugee Appeal Board and others supra*

alternative should not be invoked to undermine the right to seek asylum and protection against *refoulement.*

[51] Pertinently, it was recorded that:

51.1 the applicant moved to Goma which he considered to be his habitual place of residence, as he had resided there for a period of ten years;

51.2 that he was considered to be a member of the rebels by both the police and the ANR, and was arrested twice; and

51.3 that the agents of persecution in this case are both state (the police and the ANR) and non-state agents (the rebels).

[52] The RAB accepted that the standard of proof which the applicant was required to meet was a reasonable possibility of risk, which had to be considered in light of all the circumstances.

[53] In summary, the reasons for the RAB's decision not to uphold the appeal against the decision of the RSDO were as follows:

53.1 It is implausible that the authorities would deploy the applicant to work in Murenge and then later him saying he has contacts with the rebels purely because in undertaking his work he was in an area occupied by the rebels;

53.2 Even if he was arrested as he alleges, which is highly unlikely, the authorities in Goma would know about innocent civilians who were caught up in Murenge and the authorities who deployed the applicant to work in Murenge should have come to the applicant's help;

53.3 The applicant's claim that he was arrested twice by the authorities does not reach the threshold required for sustained or systemic violation of basic human rights, and it appears that if he indeed was arrested, he was rather a victim of random violence;

53.4 There is no evidence of anything which will set the applicant apart to the extent that he will be 'selected for persecution' if he goes back to his country;

53.5 Regarding whether it will be safe for the applicant to return to the DRC, in light of events 'seriously disturbing or disrupting public order', the RAB found that whilst Goma remains unsafe, the applicant lived in Lubumbashi and could safely have remained there with his family, who are still residing there;

53.6 The applicant does not have a political profile so it is highly unlikely that anyone will have an interest in him if he returns to his country; and

53.7 It is unlikely that the applicant will face a reasonable possibility of persecution if he returns to his country of origin, and considering 'objective country

information' about the DRC there is no basis for the applicant's claim in terms of section 39b) of the Refugees Act.

Alleged inconsistencies in the applicant's version

[54] In the answering affidavit filed by the respondents, which was deposed to by the fourth respondent, the following inconsistencies or improbabilities in the applicant's version were pointed out:

54.1 In the application form for temporary asylum, the applicant never alleged that he was arrested but stated that the '*secret service of government pursue me because I am from the rebel zone'.*

54.2 Regarding the allegations that an ANR agent helped him to escape custody, the question posed by the respondent is why an ANR agent would, at great personal and professional risk, help a low-level government employee to escape police custody;

54.3 In the founding affidavit the applicant alleges that after helping him to escape from prison, the ANR agent transported him home to collect some belongings, and he then fled the DRC. In his heads of argument in the appeal it is alleged that after he had escaped he hid in the bushes for two weeks before deciding to come to South Africa.

[55] The respondent contended that the cast doubt on the applicant's version by these contradictions leads one to believe that his original stance, that he was not arrested, is correct.

The applicant's explanation regarding the alleged inconsistencies in his version

[56] In his replying affidavit the applicant avers that the allegations that he never hid in the bushes for two weeks after he escaped and that these allegations in the heads of argument were not in accordance with his instructions to his legal adviser, and in any event are not contained in any statement or affidavit signed by him.

[57] The applicant points out that to the extent that there were perhaps any inconsistencies between his version before the RSDO and the version set forth in the heads of argument, which may well have been the result of interpretation difficulties, the inquisitorial nature of the board's role in the proceedings required them to make adequate enquiries to resolve any such confusion.

[58] Regarding the criticism of the RSDO for not asking the applicant about his skills or criminal record, the applicant avers that the fourth respondent, the deponent to the answering affidavit has misconstrued his criticism, which is not that the RSDO did not ask him about such skills, but rather that not only did he not ask, but that he recorded answers to these questions without having asked them in the first place.

JUDICIAL REVIEW

Grounds of review

[59] The review and setting aside of the RSDO's decision is not opposed by the respondents. I am satisfied that a proper case has been made out for the review and setting aside of the decision, for the following reasons:

59.1 The applicant did not receive the required support and assistance when he first applied for asylum in 2009. He was not interviewed by a RRO, the relevant procedures were not explained to him, he was not advised of his rights and he was not provided with the services of an interpreter, which he clearly required. As appears from the Eligibility Determination Form for Asylum Seekers, annexed to the founding affidavit as annexure 'M2', the second respondent was fully aware that the applicant required the services of an interpreter;

59.2 more than two years elapsed before the applicant was called to an interview with the RSDO, at which the RSDO failed dismally in his obligation to conduct the enquiry in a supportive and inquisitorial manner. The RSDO's decision is incoherent, misquotes the law, and is made without proper foundation;

59.3 A further two years elapsed before the hearing before the RAB, at which the inquorate board, consisting of a single member (it is not known whether he is legally qualified as envisaged in section 13(2) of the Refugees Act), without considering objective facts about the applicant's country of origin, and without making the necessary finding of facts, or even credibility findings, rejected the applicant's version of events out of hand as being 'implausible'; and

59.4 The applicant was ultimately only informed of the outcome of his appeal on 11 May 2015, six and a half years after he first applied for asylum.

[60] The applicant attacks the procedure adopted by and the decision of the second respondent as the sole member of the RAB, on the following grounds:

60.1 the written decision includes incorrect facts taken from the improperly completed B1-1590 form, including reference to the 'initial interview', whereas the applicant was in fact never interviewed by an RRO, and includes reference to facts which were not canvassed during the hearing before the RSDO.

60.2 The extraordinary delay from the date of the appeal hearing (September 2011) and the date of the decision (June 2013), which probably contributed to the poor quality of the decision;

60.3 The incorrect burden of proof is repeated, namely 'real risk', as opposed to 'reasonable possibility of harm';

60.4 The second respondent claimed to have regard to 'objective background information, which is neither identified nor disclosed and in respect of which the applicant was not invited to make representations;

60.5 The second respondent sets out several legal propositions without linking any such propositions to the applicant's claim, before irrationally concluding

that the applicant's story is 'implausible', and that it would be safe for him to return to Lubumbashi;

60.6 He failed to properly apply his mind to the applicant's persecution claim under section 3(a) of the Act or to his claim under section 3(b) of the Act;

60.7 He ignored the applicant's right to remain with his family, who remain asylum seekers in South Africa;

60.8 He bases certain conclusions and inferences on unfounded assumptions and opinions, which were not disclosed to the applicant nor to his legal representative at the hearing, and with regard to which they were not given an opportunity to comment; and

60.9 He ignores relevant facts including the commonly known fact of the dangerous conditions in the eastern DRC in general, and Lubumbashi prisons in particular, and the risks which the applicant will face if he is forcibly returned to the DRC.

Does the RAB's decision fall to be set aside?

[61] It is clear from the record that the RAB was not properly constituted and on this basis alone the appeal procedure was fatally flawed and falls to be set aside.

[62] Regarding the appeal findings, it is apparent from the numerous reported and unreported decisions involving judicial reviews in refugee matters, that all too often the approach by the relevant decision makers is sceptical and cynical, and that, rather than giving applicant's the benefit of the doubt in the absence of good reasons not to do so, the evidence given is frequently rejected, even though there were no facts to controvert it.

[63] It has been said time and again that the burden of proof applicable in civil proceedings is inappropriate in refugee cases, that the enquiry has an inquisitorial element, that a lower standard of proof is required, and that the relevant body should liberally apply the benefit of doubt principle.

[64] Regarding the first issue, namely whether the applicant has a well-founded fear of persecution, there are several factual inaccuracies in the RAB's decision, such as the fact that his wife and children are living in Lubumbashi, when they are in fact living with him in Cape Town, and that his manager intervened when he was arrested by the police, resulting in his subsequent release.

[65] The RAB accepted that the applicant only went to Murenge on the orders of his employer (a government department), but states that *'it is implausible that the authorities can deploy the appellant to work in Murenge and then later arrest him saying that he has contacts with the rebels purely and simply because during the course of his work the area happened to be occupied by the rebels.'*

[66] A number of illogical and unsupported assumptions follow. For example, the view taken was that even if the applicant was arrested, the authorities in Goma would know about

innocent civilians caught up in Murenge and the authorities who deployed the applicant to Goma would come to his aid. This of course presupposes that the applicant's employer had knowledge of his arrest, and if it did have such knowledge, it would be inclined to intervene on his behalf and that such intervention was likely to secure his release.

[67] There is no evidence of the government authorities coming to the aid of civilians unwittingly trapped in rebel zones, nor was there any countervailing evidence regarding the human right abuses which the applicant alleges are ongoing at the prison in the DRC. In any event, the applicant's evidence shows that not only did the government not come to his assistance, but he was detained on mere suspicion that he was associated with the rebels.

[68] Ignoring the political instability and unrest in the eastern DRC, which is well known and has caused serious disturbance or disruption to public order, and the peril which the applicant may well face if he returned and was tracked down by the rebels or the government authorities, the RAB found that the applicant's claim that he was twice arrested does not reach the threshold required for sustained or systemic violation of basic human rights. The board concludes it *'lacks the quality of a persecution required for a convention reason. It appears that he was rather a victim of random violence, if he was indeed arrested.'*

[69] 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 fear.[9]

[9] *Tantoush v Refugee Appeal Board and Others supra* at paras 97 to 98.

[70] I do not regard the applicant's story as being either fanciful or far-fetched. It lacks details in certain respects, for example the name of the prison, or the reason why an ANR agent would at risk to himself assist the applicant to escape from a state prison. There were however no objective facts put up to contradict his version of what transpired prior to his flight to South Africa, and it is apparent that the RAB did not avail itself of its rights in terms of section 26(3)(d) and/or (e) to make further inquiry or investigation or to request the applicant to appear before it and to provide any such other information as it may deem necessary.

[71] The applicant was held against his will in a rebel controlled village, he was arrested twice and assaulted in a prison from which other prisoners frequently disappeared, and where human rights abuses were rife, he then escaped at great personal risk and fled to South Africa where he has sought asylum since 2009.

[72] To my mind these events cannot be described as 'random violence'. If one accepts that the applicant had to escape a rebel occupied village and was subsequently arrested twice on suspicion of being involved with the rebels from who he had escaped, it cannot be said that his fear of persecution is not well founded, from both a subjective and objective standpoint.

[73] Regarding the second issues in, namely whether in terms of s 3(b) of the Refugees Act and in light of events seriously disturbing or disrupting public order in the DRC the applicant will be safe if he returns there, the second respondent formed the view that it would not be unreasonable for the applicant to return to Lubumbashi, which is relatively peaceful,

because according to his claim that it where he spent most of his life, and his family remains there.

[74] It is correct that the applicant grew up and studied in Lubumbashi, however the RAB failed to take cognisance of the fact that he resided in Goma and that this was his place of habitual residence since 1997. As set out more fully below, internal flight alternative ('IFA') is not an alternative for a section 3 (b) claim for refuge. Furthermore, it is not correct that his family is presently residing in Lubumbashi. They live in South Africa with the applicant.

[75] The second respondent states that considering objective country information about the DRC, there is no basis for the appellant's claim in terms of section 3(b) of the Refugees Act. The RAB does not state what objective information it has had regard to, nor what the information discloses. This too appear to be a cut and paste allegation without factual foundation.

[76] As to the question whether, in terms of s 3(b), it is a bar to the granting of asylum that the applicant could have found refuge elsewhere in his own country, in *Katabana v Refugee Appeal Board & Others*[10] Justice Davis stated that the IFA does not apply to s 3(b) of the Refugees Act.

[77] The respondents do not appear to dispute that it would be unsafe for the applicant to return to Goma, which the RAB acknowledge that the applicant regards Goma as being his habitual place of residence, and if the IFA alternative is excluded, then to my mind the applicant is entitled to refuge in South Africa in terms of section 3(b) of the Refugees Act.

[10] WCHC Case 25061/2012, page 8

Application to strike out

[78] The applicant applied for certain averments to be struck out of the respondent's answering affidavit, which was deposed to by the fourth respondent, the manager of the Cape Town Refugee Office, Ms Ndlovu ('Ndlovu').

[79] The applicant objects Ndlovu's evidence on the basis that she was not involved at any stage in the making of any of the decisions under review, and her affidavit is argumentative. The applicant applies for the irrelevant speculation and opinion evidence to be struck out.

[80] The respondents contend that the application for the striking out of certain portions of the affidavit is unnecessary and is irregular inasmuch as it does not comply with Uniform Rules 6(11) and 6(15), and, more fundamentally, the applicant has failed to show prejudice which it is required to show in order to succeed with its application to strike out.

[81] The respondents aver that the reason for the filing of the answering affidavit was to highlight inconsistencies in the applicant's version. The respondents' view is that the applicant's version is unsupported by any objective facts, and relies on bald statements which also amount to self-corroborating evidence.

[82] Rule 6(11) provides that interlocutory and applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require.

Rule 6(5) provides that the court may on application order to be struck from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[83] The applicant did not file an interlocutory application to strike out the offensive passage, but merely asked for such relief in the body of his replying affidavit. I am persuaded by the respondent's argument that the applicant failed to properly comply with rule 6(11), read with rule 6(15). The applicant did not seek condonation for his failure to comply with the relevant sub-rules, and in any event to my mind he did not show that he would be prejudiced if the application was not granted.

[84] The application to strike out certain passages from the answering affidavit is accordingly refused.

Substitution in terms of s8(1)(c)(ii)(aa) of PAJA

[85] The power of substitution conferred by s8(1)(c)(ii)(aa) of PAJA 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. Questions such as bias, incompetence, whether the relief sought will be a foregone conclusion if the matter is remitted.

[86] The relevant principles were succinctly stated by Heher JA in *Gauteng Gambling Board v Silverstar Development Ltd and Others*[11]*:*

86.1 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';

86.2 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;

86.3 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

". . . 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".

[11] 2005 (4) SA 67 (SCA) at para 28-29

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.

86.4 Considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.

[87] 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.[12]

[88] In *Mubala v Chairperson of the Standing Committee for Refugee Affairs and Others* the court noted that details of the violence and the destabilisation in the eastern DRC is well documented as it has been ongoing for many years causing thousands of citizens to flee the DRC. In *Van Gaderen N.O. v RAB and Others*[13] the court held that the DRC was a country in turmoil and that the Refugee Appeal Board erred in its finding that the situation in the DRC did not pose a danger to the applicants.

[12] See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty)* D *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].

[13] Unreported judgment of the Transvaal Provincial Division under case number 30720/2006, delivered 19 June 2007

[89] In November 2011 this court in *Katshingu v Chairperson Standing Committee for Refugee Affairs and Others*, an unreported judgment[14], considered reports regarding the social and political turmoil and refugee problem in the Eastern DRC, in granting an order according refugee status and asylum.

[90] The first consideration is thus whether the court is in as good a position as the administrator to make the decision. In other words, was the administrator's expertise or special expertise required to make a decision? Does the court have all the necessary information to make a decision?

[91] If the court is in as good a position, the next question is whether the result is a foregone conclusion. Put differently, if there could only be one proper decision.

[92] In determining whether exceptional circumstances exist, delay, incompetence and bias are other factors which can be taken into account if the court is in as good a position and the result is a foregone conclusion. The court may also take into account that remittal would involve further delays and costs, particularly where there have already been substantial delays.

[93] The overarching consideration is fairness to all parties concerned, and the need to balance the substitution remedy against separation of powers concerns.

[14] Case number 19726/2010, delivered 2 November 2012

[94] Even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution. Substitution remains an extraordinary remedy and remittal is almost always the prudent and proper course.[15]

[95] In the present application, the question should be framed as follows: Are there circumstances justifying a refusal to grant the applicant refugee status?

[96] It appears that the sole basis upon which the substitution order is opposed by the respondents is that it will effectively deprive the first, second and / or third respondents from fulfilling their legislative mandate to make decisions such as whether the applicant is a refugee or not.

[97] To my mind this is not a compelling basis for opposition to substitutive relief being granted. The respondents have failed to fulfil their legislative mandate at every stage of the applicant's application.

[98] I am persuaded by the applicant's argument that this is an exceptional case in which substitutive relief is appropriate, because of the following:

98.1 It is more than seven years since the applicant arrived in South Africa and first sought asylum. There have been inordinate and unjustified delays between when he first applied for asylum in 2009 and when the decision of the appeal board was made in June 2013;

[15] *Trencon Construction v Industrial Development Corporation* 2015 (5) SA 245, paras 34 and 42

98.2 The applicant and his family are settled in Cape Town and their youngest child was born here. To remit the matter and risk further procedural delays would unfairly infringe on the applicant's right to have certainty regarding his legal status, and the incumbent benefits this would give him, and on his right to family life;

98.3 The applicant's application for asylum has been beset by procedural obstacles and delays at every step. He has not been afforded a fair hearing either by an RRO (he was not even interviewed by an RRO), nor by the RSDO, where he was not given the services of an interpreter when he clearly needed one, and at the RAB which was not *inter alia* properly constituted.

98.4 The facts underpinning the applicant's claim for refugee status have been clearly stated both before the RAB and in the founding affidavit filed in this matter, and it is now merely a question of applying the relevant legal principles in determining whether the applicant is in fact a refugee;

98.5 It appears to be notorious that the eastern DRC, which was the applicant's habitual place of residence, is unstable and unsafe, and as the applicant's uncontroverted evidence is that he was caught between State and rebel forces, he is entitled to refuge in terms of either section3(a) or section 3(b) of the Refugees Act; and

98.6 In the peculiar circumstances of this case and in accordance with the *non-refoulement* principle, it would be incompatible with the Refugees Act to force the applicant to return to the eastern DRC.

[99] If this matter were to be remitted, it is difficult to see, as was the case in the *Katabana* matter *supra,* what other facts respondents can raise to rebut the applicant's evidence, particularly as they were not able to produce any facts in their two decisions referred to above.

[100] In all the circumstances I consider that there are exceptional circumstances in this case and that the interests of justice dictate that this court should make the decision to declare the applicant to be a refugee.

[101] I accordingly make the following orders:

a) To the extent that it is necessary, the third respondent's decision of 17 May 2008, rejecting the applicant's application for refugee status and asylum as 'unfounded' is reviewed and set aside;

b) The decision of the Refugee Appeal Board dated 11 June 2013 dismissing the applicant's appeal against the decision by the third respondent in terms of section 24(3)(c) of the Refugees Act 130 of 1998 to reject the applicant's application for refugee status as 'unfounded' is reviewed and set aside.

c) In terms of section 8(1)(c)(ii)(aa) of the Promotion of Administration of Justice Act 3 of 2000, the aforementioned decision of the Refugee Appeal Board is hereby substituted with a decision setting aside the decision of the third respondent and substituting it with a decision in terms of section 24(3)(a) of the Refugees Act granting asylum to the applicant.

d) The fourth respondent is directed to issue the applicant with a formal written recognition of refugee status as provided in section 27(a) of the Refugees Act read with the provisions of regulation 15 of the Refugee Regulations (Forms and Procedure), 2000 published in GN R366 in GG 21075 of 6 April 2000, as amended by GN R938 in GG 21573 of 15 September 2000, within 10 days of the service upon her of this Order; and

e) The fourth, fifth and sixth respondents shall pay the costs of the application, jointly and severally.

M HOLDERNESS

Acting Judge of the

High Court

APPEARANCES

For the Applicant: Adv S Harvey

Instructed by: UCT Refugee Rights Clinic

For the Fourth, Fifth and Sixth Respondents: Adv A Nacerodien

Instructed by: Office of the State Attorney

Date of Hearing: 29 November 2016

Judgment delivered on: 28 February 2017