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

REPORTABLE

CASE NO: 13142/17

In the matter between:

L M	Applicant
and	
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	First Respondent
THE REFUGEE DETERMINATION OFFICER	Second Respondent
THE CAPE TOWN REFUGEE OFFICE	Third Respondent
THE DIRECTOR-GENERAL HOME AFFAIRS	Fourth Respondent
THE MINISTER OF HOME AFFAIRS	Fifth Respondent

Coram: P.A.L.Gamble, J
Date of Hearing: 12 March 2020
Date of Judgment: 7 July 2020

This judgment was handed down electronically by email to the parties' legal representatives.
The deemed date of hand down is 10h00 on Tuesday 7 July 2020.

JUDGMENT DELIVERED ON TUESDAY 7 JULY 2020

GAMBLE, J:

INTRODUCTION

1. The applicant is a national of the Democratic Republic of the Congo ("*the DRC*") who seeks to review two decisions which culminated in a refusal to grant her asylum in South Africa and a subsequent order for her deportation. To that end the applicant relies on –

1.1. A decision by the second respondent on 29 September 2014 to refuse the applicant's application for asylum;

1.2. A decision by the first respondent on 8 June 2016 to uphold the second respondent's refusal as aforesaid;

1.3. The issuing to the applicant of an order to depart the Republic allegedly taken by the fourth and fifth respondents on 5 October 2016.

The applicant further seeks an order remitting her application for asylum back to the first and/or second respondents for reconsideration.

2. At the core of the refusal of the application for asylum, lodged in terms of s22 of the Refugees Act ("*the Act*"), are alleged material inconsistencies in a number of factual averments made by the applicant over the years regarding her personal history, her arrival in the Republic as recorded in various working documents of the Department of Home Affairs ("*the Department*"), as also her affidavits filed in this application. As a consequence of the inconsistencies in the Departmental[1] documents, the asylum application was rejected by the second respondent ("*the RSDO*") on 29 September 2014 as "*manifestly unfounded*"[2] in terms of s24(3)(b) of the Act.

3. On 8 June 2016 the first respondent ("*the SCRA*") considered the decision of the RSDO in terms of the internal review procedure contemplated under s25(1) of the Act and upheld the RSDO's decision. Consequently, on 5 October 2016 the SCRA informed the applicant of the confirmation of the RSDO's decision and she was there and then issued an order in terms of s8(4) of the Immigration Act to depart the Republic by 26 October 2016. The applicant did not comply with this order but rather lodged this application for review on 25 July 2017.

4. The review is brought under the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*") and the notice of motion comprises an application for Part A relief for an interim interdict pending the final determination of the review under Part B thereof. When the matter first came before the court on 22 August 2017, the parties

---

[1] Save where specifically referred to, the 1st to 4th respondents will collectively be referred to as "*the Department.*"

[2] In terms of s1 of the Act, a "*manifestly unfounded application"* is defined as "*an application for asylum made on grounds other than those on which such an application may be made under this Act.*".

agreed to an interim interdict in terms of the Part A relief and fixed a timetable for the filing of the Rule 53 record and further affidavits.

5. After receipt of the Rule 53 record the applicant filed a supplementary affidavit on 28 February 2018. This was some 5 months after the agreed date for the filing thereof and 2 weeks after the agreed date for the hearing of the review. After various further postponements the matter was heard by this Court on 12 March 2020. At that hearing the applicant was represented Ms.A.Christians and the respondents by Ms.M.Samuels.

6. The application for review is out of time and does not comply with the 180 day period prescribed by s7(1) of PAJA: it was lodged 13 months after the SCRA's decision had been made and 9 months after the applicant had been informed thereof. In neither the founding nor supplementary affidavits does the applicant address this issue. It was only in the replying affidavit that the relief was sought in response to the point having been taken by the Department in the answering affidavit. In argument Ms. Samuels indicated that the Department persisted in its opposition to the application for an extension of time under s8 of PAJA.

7. There are two main facts which the Department places in issue in the answering affidavit. Firstly, it is said that the applicant has not established that the DRC is her country of origin. This allegation is said to be based, inter alia, on the fact that, in giving conflicting evidence about certain geographical localities in the DRC, the applicant does not "*know her own country*". That contention fell away when the applicant annexed a copy of her DRC passport to her replying affidavit.

8. Secondly, it is said that the applicant has given contradicting versions as to her date of birth and her date of entry into South Africa. The consequence hereof is that the applicant's age when she entered the Republic is in issue. On one version she would have been a minor and entitled to differentiated treatment for children under the relevant international instruments. On the other version she would have been a major when she arrived. I turn then to consider, firstly, the allegations made by the applicant in her affidavits placed before the Court.

MATERIAL ALLEGATIONS IN THE FOUNDING AFFIDAVIT

9. In the founding affidavit the applicant says that she was born in the province of Katanga in the DRC on […] 1994, but does not identify the city or town of her birth. The applicant goes on to say that she does not have a birth certificate or passport but was able to obtain from the DRC Embassy in Pretoria a document dated 9 January 2017 which is entitled "*Birth Certificate*" and which she says confirms her personal particulars: it reflects that the applicant was born on […] 1994 at Lubumbashi in the DRC. She is said to be the daughter of A M and B Y – it is not clear which of those persons was her father and which her mother.

10. The applicant goes on to say that she has some recollection of living "*at the time*" with her mother in a city called Kisangani in the midst of "*a brutal civil war (The First Congo War) until 1997 when Mobutu was overthrown and Kabila took power. I would have been three years old at the time. I can barely remember my father and do not know what happened to him whether (sic) he succumbed to the war or simply fled of his own right."*

11. Then the applicant describes her early childhood thus.

"*[22] For almost a decade of sporadic and horrendous violence I was brought up by my mother. I do remember that when the militant rebels began burning houses, when I was just 12 years old, I left the DRC. I was a child and I know my mother was concerned for my safety.*

[23] I do recall my mother handing me over to my auntie, also a DRC national, who was my mother's sister who took me with her own child to South Africa when her husband was killed."

12. Then the applicant describes her arrival in South Africa thus.

"*[24] In 2007 we travelled to South Africa by road and after a very long journey we arrived. We settled in Cape Town and I went with my auntie to the Refugee Reception Office in Cape Town. I was very scared and could not understand any English at the time.*

[25] They took my fingerprints and my auntie spoke to them. I am not sure what I received as my auntie took a document from them and kept it. I was a minor and I only understand now that my auntie and the Official (sic) treated me as an adult in 2007."

13. The implication that the applicant and her aunt attended the Refugee Reception Office in 2007 shortly after their arrival in Cape Town is based on a document which the applicant attaches to the founding affidavit - a copy of an asylum seeker temporary permit which was subsequently issued to her by the Department on

21 May 2014 and was due to expire on 16 September 2014. That document (annexure LMM 2 to the founding affidavit) reflects the applicant's date of birth as 21 September 1987.

14. The Department's file reference number in respect of the applicant in annexure LMM 2 is given as "*CTRCOD000091012".* That is the same reference number that the Department used in subsequent documents relating to the applicant's application for asylum. However, the applicant also refers the Court to a recordal in LMM 2 of an "*Alternative File Number: ctr/008248/07*" and points out that the suffix "*07*" suggests that her date of arrival in South Africa was indeed 2007.

15. As will appear more fully later, the Department takes issue with the applicant's alleged age and date of arrival on the basis that the contemporaneous notes of the RSDO (Ms. Zakhali Mosouenyane) relating to her interview with the applicant on 29 September 2014 for purposes of evaluating her application in terms of s 22 of the Act, reflect that the applicant told her that her date of birth was […] 1987 and that she arrived in the Republic at "*Beit Bridge rail*" on 29 September 2003, having left her country of origin on 12 September 2003.

16. In any event, the applicant goes on to say that she and her aunt resided in the Cape Town suburb of Retreat where she attended school eventually reaching matric at the Sibelius High School in 2012. During that year the school required proof of her refugee status and the applicant says she repeatedly attended upon the Department's offices in Cape Town to that end where she was issued with the aforementioned file reference number "*CTRCOD000091012".* Eventually, with the assistance of the school, says the applicant, she was issued with an asylum seeker

temporary permit in 2012. Although she no longer has a copy of that permit, the applicant refers to annexure LMM2 and suggests the 2012 permit was in similar form.

17. The applicant states the following in that regard.

> "*[29] The date of issue of my 'new' asylum seeker's permit was either the 10th of August 2012 or the 8th of October 2012, I'm not sure which as the dates on asylum permit (sic) are stated in both day/month/year and month/day/year format on a single document. Irrespective, this was just before or after my 18th birthday."*

18. If regard be had to other dates on annexure LMM2, it must be concluded that the date to which the applicant refers– "*10/8/2012"*– printed at the left foot of the document is 8 October 2012. This suggests that the applicant visited the Department's offices on that day.

19. The applicant goes on to say that, both at the time of her initial interview in 2007 (as per reference number ctr/008248/07) and at the second interview in 2012 (per reference number CTRCOD000091012), she was incorrectly treated by the Department as an adult. As a matter of fact, if the applicant's date of birth was as she now alleges (21 September 1994), she would have been aged 12/13 in 2007, 18 in October 2012 and 20 at the time of the interview with the RSDO on 29 September 2014. If the date of birth recorded on LMM 2 ([…] 1987) is correct she would have been 19/20 in 2007 and 25 in October 2012 and 27 at the time of the interview with the RSDO.

20. In offering an explanation for this anomaly the applicant says the following.

> "*[30]…At the initial application [i.e. 2007] my age was incorrectly confirmed by the RSDO[3], as I was treated as an adult. As my auntie acted as intermediary during the initial application, the RSDO had an obligation to at least attempt to establish my age and my relationship to my aunty. This should have been done at the outset and I should have been afforded appropriate assistance and care of the authorities in terms of the Children's Act.*
>
> *[31] It is most unfortunate that the RSDO considered me to be an adult when I was in fact 12 years old at the time of the interview, which was conducted as if I was an adult and through my auntie as I did not speak the local languages. I have no idea as to why my date of birth was incorrectly reported as 21 September 1987 as I did not speak to the Official during the first interview with the RSDO in 2007.*
>
> *[32] As a child applicant and unaccompanied by a parent, I had no appreciation or understanding of the proceedings during 2007. At the time of application (sic) in 2012 when I first spoke to the RSDO, I would have had to be 25 (as opposed to 18) if my date of birth was 21 September 1987, yet this was never canvassed."*

---

[3] In the answering affidavit the Department says that the initial interview would have been conducted by a Refugee Reception Officer ("*RRO*") and not the RSDO who ordinarily only comes into the picture at a later stage of proceedings.

21. Turning to the 29 September 2014 interview with the RSDO (which resulted in the finding of a "*manifestly unfounded*" application on the same day) and which the applicant now seeks to review, the founding affidavit contains the following allegations.

> "*[33] [In 2012] I was granted asylum and continued to renew my permit until, during 2014, I returned to the Refugee Reception Office and was interviewed. I told the Official that I do not know what my auntie had discussed with the official during the initial application as I was a child and explained that I fled, or rather was sent, to the Republic due to the ongoing violence.*
>
> *[34] I was advised that my application for Refugee Status had been rejected by the RSDO and that the Standing Committee would review the decision…*
>
> *[35] Quite literally years past until, during 2016, I received communication indicating that the Standing Committee (SCRA) upheld the RSDO's decision to reject my application as Manifestly Unfounded…"*

22. In the founding affidavit the following is said in relation to the applicant's present inability to return to the DRC.

"*[40] As a DRC national I am not able to return and live in my home country. The political unrest and slaughter of civilians continue, especially in the Eastern part of the country where I hail from.*

[41] I was forced to flee as a child and sought refuge in the Republic. It is well documented that my country of nationality is unsafe and to remain or return is simply perilous and accordingly most patently a physical risk to my own person. I submit that I would be at an even greater risk as I am no longer familiar with my country, its people, its language or even my own family - or at least whatever little members remain."

23. In relation to the Department's alleged breach of her rights to administrative justice entrenched under s33 of the Constitution, 1996 the applicant says the following in the founding affidavit.

"*[45] I was a child at the time of the initial application. The Respondents are obliged to act accordingly in a lawful manner and ensure administrative justice ensues in terms of their domestic and international obligations.*

[46] The entire interview process before the RSDO was flawed and unfair in that I was excluded from the process as the discussions were

mainly between the RSDO[4] and my aunty. Moreover, I was apparently treated as an adult!

[47] Furthermore, what would have been expected is the RSDO had to record my age and that this would be taken into account, especially during the SCRA review. I am sure they are even aware of the fact that I was a minor at time (sic) of application (sic) and I certainly doubt that the adjudicators properly considered the facts of my case or apply (sic) themselves or even review (sic) my file. I am perturbed how the SCRA can act unlawfully when they are the oversight body.

[48] My right to remain in South African (sic) without the right to proper and final determination cannot be disputed. Such right exists and has been breached unlawfully…

[58] To denounce my application for asylum as manifestly unfounded, apparently as my 'claims are made on grounds other than those on which such an application can be made' is simply baseless and illegitimate when making a decision duly for asylum.

[59] I have at no stage made any misrepresentations of fact, innocent or otherwise, and have not had the opportunity to properly set out the

[4] This must logically be understood to be a reference to the RRO

facts surrounding my arrival in the Republic, save for the written appeal submitted to SCRA, which they do not have to consider."[5]

24. The application for refugee status by the applicant was based on s3 of the Act which reads as follows.

"***3. 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;

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or the whole of his or her country of origin or

---

[55] On 21 October 2016 the attorneys then acting for the applicant purported to exercise their client's "*right to make further representations in relation to his refusal in terms of s24(3)(b) of the Act".* The attorneys' demand for a further hearing before the SCRA was made about 2 weeks after the committee had informed the applicant of its decision and it was thus *functus officio*.

nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependent of a person contemplated in paragraph (a) or (b)."

25. In laying claim to refugee status in terms of s3[6] of the Act the applicant makes the follow allegation in the founding affidavit.

"*[62] It is a fact that the DRC experiences political problems in which uprisings are a common occurrence and the rule of law is not strictly guarded. I was forced to flee as a child due to violence against innocent civilians, including my immediate family."*

THE SUPPLEMENTARY RULE 53 RECORD

26. The Department filed its main Rule 53 record on 13 December 2017 and a supplementary record on 9 February 2018. The latter contained a number of documents to which the applicant had not previously had access and two which were already annexed to the founding affidavit, all of which she addressed in her supplementary founding affidavit of 23 February 2018. These include –

26.1 **Form BI – 1590**. This is the initial *pro forma* document entitled "*Eligibility Determination Form for Asylum Seekers"* which was filled in by an unidentified

[6] The applicant does not articulate her claim to refugee status under either ss(a) or (b) but refers, in general terms, to s3 of the Act in each of her affidavits before the Court.

Departmental official[7] on 23 October 2007 and which will be referred to as "*Annexure LMM 6";*

26.2 **Form BI – 1692**, an "*Asylum Seeker Temporary Permit*" issued to the applicant on 23 October 2007 by one Erik Lotriet, an RRO, and which will be referred to as "*Annexure LMM 7";*

26.3 An RSDO interview record dated 14 August 2008 recorded by one "*Luyanda"* and which shall be referred to as "*Annexure LMM 8".*

26.4 An entry dated 5 April 2011 by Mr. Vuyani Shwane in an unidentified "*Investigation Diary*" under file no. "*CTR/008248/*07" and which shall be referred to as "*Annexure LMM 9".*

26.5 The two asylum seeker temporary permits already annexed to the founding affidavit, which the Department identified in the record and which are also referred to as annexures LMM 10 and 11.

26.6 The typed notes of the interview conducted by the RSDO (identified as Ms. Zakhali Mosoeunyane) with the applicant on 29 September 2014 together with the RSDO's decision of the same day, all of which is referred to as "*Annexure LMM 12".*

---

[7] Presumably the RRO. If the signature on LMM 6 is compared with that on LMM 7 it appears to be the same person – Erik Lotriet, who is identified as such on LMM 7.

26.7 Included in Annexure LMM 12 is a letter from the SCRA dated 5 October 2016 upholding the RSDO's decision. The document reflects that the decision itself was taken on 8 June 2016.

FACTUAL ALLEGATIONS MADE IN THE APPLICANT'S SUPPLEMENTARY AFFIDAVIT

27. The information contained in the supplementary Rule 53 record is dealt with by the applicant in a supplementary (founding) affidavit with reference to the following documents.

28. Firstly, the **Form BI – 1590** is a document completed in manuscript and even to the untrained eye it is apparent that it was filled in by more than one person. Certain of the numerals on the document are written in what may be called the "Continental style" – the numeral one is written as an inverted tick mark and the numeral 7 has a line drawn across the vertical part of the numeral. I shall use that phrase to refer to the handwriting which fits that description. It is possible that the second style of hand writing is that of the RRO and I shall use that acronym to refer to the other handwriting on the form.

29. The applicant's surname is recorded as "*M*" while her other (given) names are "*M L*". These names all appear to have been written by the person using the Continental style of writing.

30. The applicant's date of birth is recorded as "*19**87** – […]*". The numerals "87" which I have highlighted are overwritten in bold as if a marker pen was used and

it is impossible to detect what the original numerals endorsed on the document are. The point is that the year of the applicant's birth has been the subject of either confirmation or alteration.

31. As already noted above, the applicant's place of birth is recorded as "*Kisangani*" in "*D.R.C*", while in the block on the form headed "*Ethnic Group*" is the word "*Lokele*". All of this is in the Continental style.

32. Further, there is evidence of a French-speaker having filled in part of the document, also in the Continental style. Under the box for the recordal of the applicant's religion appear the words "*Christian Catholique.*" The document records the "*Language*" of the applicant as "*Swahili*" and "*Lingala*" while the "*Other Languages*" spoken by the applicant are said to be "*French*". The nationalities of the applicant's parents are recorded in the appropriate boxes as "*Congolaises*".

33. There is a large block on the form entitled "*Residency During the Last Ten Years*". There are 2 entries here – "*D.R.C*" is written in the Continental style while "*Beach Front Mossel Bay*" is written in a different handwriting – possibly that of the RRO.

34. In section 2 of the form there is a heading "*Country Background"* which appears to be a form of interrogation of the knowledge of the applicant of here alleged country of origin. For example, next to the entry "*Currency*" appear the words "*Franc Congolaise*" while opposite "*Religion*" are the words "*Christian Catholoque".* In respect of "*Political Parties and Leaders"* the document records "*P.P.R.D. (Joseph Kabila) M.L.C. Jean Pierre Bemba*". All of this is in the Continental style.

35. Section 3 of the form is entitled "*Applicant's Story (Chronologically)".* The answers and the narrative are a combination of both styles of handwriting. In the Continental style it is said that the applicant left her country of origin on 18 September 2007 and entered the Republic on 22 September 2007 at "*Mesina*". The mode of travel is given as "*Track*"[8]

36. In response to the question "*Were you active in any organisation?"* The following is recorded in the Continental style,

- *"Name – MLC and PPRD"*
- *"Leader – Bemba and Kabila",*

while the following is noted in the presumed handwriting of the RRO –

- *"Activities - mobilising the youth and organising rallies."*

37. In response to the question *"Why are you applying for asylum?"* the following narrative is furnished in the handwriting of the RRO.

> "*There is continuous wars (sic) in our home country. We are not even sure which group to support any more. If I stayed I was going to end up killed so I fear for my life."*

38. When asked "*Which measures did you take to solve your problem?"* the applicant's reply is recorded thus in the handwriting of the RRO.

---

[8] While this may be a reference to a railway line, it is possibly a misspelling of "*truck".*

"*Nothing other than leaving the country."*

39. Lastly, in regard to this section, when asked if she wished to return to her home country the applicant ticked the "*No*" box and the following reason is written in the handwriting of the RRO.

"*There is a strong (sic) war in our country."*

40. Finally, the form provides for the identity and address of any interpreter used in the interview process. In the Continental style handwriting the name is recorded as "*K*" and the address is given as "*Muzenberg"* (sic).

41. In the "*For Office Use Only*" section of the document the RRO makes the following preliminary comment in relation to the application.

"*Applicant claims she left her country due to continuous wars."*

42. The applicant deals with the **Form BI - 1590** as follows in the supplementary affidavit.

"*6. This document appears to be the form that was completed when I first attended at a Refugee Office in 2007.*

7. The most striking thing about the form is that my year of birth looks as though it was amended. I don't know why this would have been done.

8. I have a vague memory that I was asked some questions that day. However, I could not speak any English and so my aunt would translate the questions and my answers. My aunt, K, is in fact listed as the interpreter on page 9 of the document.

9. The questions I remember answering are:

9.1 That my date of birth is 21 September 1994;

9.2 I gave my parents' names;

9.3 That I wanted to come to South Africa. In truth, I did not really have a choice about where to go. But, before sending me with my aunt, my mother asked me if I would like to leave the DRC with her as it was extremely unsafe in our country. I agreed to leave with my aunt.

9.4 That I left my country because there are continuous wars there and that I was afraid that I would be killed.

10. Having looked at this document, I can safely say that I did not give the following answers:

10.1 That I was born in 1987;

10.2 I did not say anything about the political parties or leaders. In fact, I do not even know who or what MLC and PPRD are;

10.3 As a twelve-year old, I definitely did not say that I mobilized the youth and organised rallies. We couldn't even leave our homes to go to school or shopping - I don't know how I would have been able to do the things mentioned in the form.

11. While I cannot remember actually signing the form, I do recall having photographs and fingerprints taken. I may also have signed the form. The signature is different to my current one, but it could just have changed over the years."

43. The next document is the **Form BI – 1692** (annexure LMM 7) which is a temporary asylum seeker's permit that was issued to the applicant under s22 of the Act on the same day that she saw the ROO, Erik Lotriet, for the completion of LMM 6. Indeed, the temporary permit reflects all of the personal details as recorded in LMM 6 – the names and date of birth are the same as also the country of origin. It records the applicant's residential address as "*[…] Mossel Bay 6506*" and it bears the applicant's signature which is similar to that on LMM 6.

44. The date of birth on LMM 6 suggests strongly that the "**87**" alteration was made contemporaneously with the completion of the Form BI – 1590. Indeed, this

date of birth is carried through in all subsequent documents originating from the Department.

45. The applicant comments as follows in respect of the **Form BI – 1692** (Annexure LMM 7).

> "*12. I assume this was the first asylum permit issued to me.*
>
> *13. In it, my name is spelled incorrectly, my date of birth is incorrect, and my address is incorrect. I have never been to Mossel Bay. At that time, I lived in Muizenberg with my aunt."*

46. Turning to **Annexure LMM 8**, one finds a note scrawled in barely legible manuscript on 14 August 2008 by a certain Luyanda as part of the "*RSDO Interview Record"* posing 3 questions and the recorded answers.

> "*1. Why did you leave DRC?*
>
> *The rebels wanted to kill me and my brother.*[9]
>
> *2. Why did they want to kill you?*
>
> *They were fighting and there were continuous wars in my country. My father and mother both died because of the continuous fighting in DRC. I thought that I will end (sic) dead also.*

[9] The first 2 letters "br" appear to have been written over an "m"

3. Are you willing to go back?

If things are fine I will.

The document bears the applicant's signature at the foot thereof.

47. This is how the applicant deals with Annexure LMM 8 in the supplementary affidavit.

"*14. I recall going back to the refugee office about a year after we first arrived in South Africa - I assume this document contains the notes from that day.*

15. At that stage, I could speak a little bit of English and I tried my best to answer the questions in English.

16. However, seeing the document, there are a few things that are wrong.

17. I did not say the rebels wanted to kill my brother and me - I did not have a brother before I left the DRC. (Years later, I heard from somebody else who came to South Africa that my mother is still alive and that she has a son.)

18. What I said was that the rebels wanted to kill me and my mother. After I told my advocate this, she looked closely at the document and

pointed out that it does actually look as though the 'm' was changed to a 'b'. I don't know why this would have been done.

19. The reason I said that was because my father was killed in our house right in front of me. It is a miracle that they did not also kill my mother and me. Instead, they just took some of our possessions and left. But the violence continued in our neighbourhood. Our neighbour's house was even set on fire. The reason I believe they were rebels is because they were in uniform and had long weapons.

20. I never told the refugee officer any of this because I was not asked detailed questions. In fact, I only told my advocate this information because I was asked specific questions about how my father died and how I knew they were rebels and not robbers.

21. I also did not say that my mother was dead. I know I said I did not have any parents with me in South Africa. I may also have said that I don't know if my mother is still alive, but I can't remember if I said it on this day or on a later occasion.

22. Although I said I will go back to the DRC if things are fine, I did not really know how I would get there or where I would go. I just meant that, at that time, I wouldn't mind going back if there is peace."

48. I turn next to **Annexure LMM 9** which is an entry dated 5 April 2011 made by Mr. Vuyani Shwane in the Department's "*Investigation Diary*" that reads as follows.

> "*The client came alone and she claims that her mother passed away in 2008. She is now living with her mother's friend. On the file the date of birth was changed so that she can make an application. She told me that is not the date of birth, her date of birth is the […]-1995. The child is now 16 yrs old which means she is still a minor. She must be captured and her date of birth be changed accordingly. I have explained to her that she needs to go to the social workers to apply for guardianship. The condition on her permit must be 'unaccompanied minor' ".*

49. The applicant's comments in regard to this document are the following.

> "*23. I remember going to Home Affairs in 2011 and speaking to a man - presumably Mr. Shwane.*
>
> *24. The reason I went was because I had left my aunt's care and my school needed papers from me. I went to Home Affairs on a few different occasions because they said they couldn't help me without any papers. I could not trace my aunt but, luckily, my primary school could give me a copy of my asylum permit which they had on record.*
>
> *25. I assume the notes on this page were made on the day I went back with a copy of that permit.*

26. I also did not say my mother died in 2008. At that stage, I had not heard anything from or about my mother since I arrived. This could be the time when I said I do not know if my mother is still alive.

27. I was not living with a friend of my mother. I was living with the mother of my school friend.

28. Mr. Shwane notes that my date of birth was changed so that I can make an application on my own. I did not tell him that.

29. I note that he also records my year of birth incorrectly.

30. In any event, he specifically states that my date of birth must be changed and that the condition of my permit be changed to 'unaccompanied minor'. As will be seen from all the subsequent documents, this was never done.

31. I did not get an asylum permit after this interview with Mr. Shwane. I was told that I must come back when I am 18 years old.

32. On Mr. Shwane's advice, I did try to get the assistance of a Social Worker. I went to see a Social Worker in Wynberg on two occasions, I think. But they told me they cannot help me without any documents and background information. The Social Worker also told me to follow Home Affairs' advice and go back when I am 18 years old. After that, I just gave up and tried to focus on school."

50. In addition to the comments offered in the founding affidavit, the applicant says the following in the supplementary affidavit in relation to **Annexures LMM 10 and 11.**

> "*33. It is clear from this document that the person issuing the document did not follow Mr. Shwane's instructions.*
>
> *34. I pointed out the mistakes in my name and address every time I went to renew my permit.*
>
> *35. I remember at one stage, I went to the refugee office every day for a week trying to get my information fixed. The reason I did this was that my school was worried that the Department of Education would have a problem if their information did not match the information on my permit. (This could have been at the time I tried to get a permit before I was 18 years old - it is difficult for me to remember the exact sequences all these years later.) At first I was told they will fix it when I come back again. But when I went to renew my permit, I was told that it was a long and complicated process."*

51. The notes recorded during **the RSDO interview** on 29 September 2014 (Annexure LMM 12) are a critical part of the Department's case and will thus be dealt with in some detail. I will leave the part of LMM 12 which records the RSDO's decision to refuse asylum for consideration when I deal with the Department's answering affidavit. It would appear as if the notes were recorded by Ms. Mosoeunyane directly onto a computer as there are no separate manuscript notes or annotations on the

interview record other than the signatures of herself, the applicant and an interpreter identified only as "*Erick"* at the end thereof.

52. The applicant's personal details are recorded in identical terms to the Form BI – 1590 and include her date and place of birth as "*[…]/1987*" and "*Kisangani*". Notwithstanding the aforesaid signature of "*Erick*" at the end of the document the notes record that no interpreter was requested for the interview.

53. As the alleged "*Reason for leaving Country of Origin*" the RSDO recorded the following.

> "*She said she was born in Kisangani and grew up in the same area until she was age 8. She said her parents passed on when she was still young and she was raised by her aunty. She said she left Kisangani when her aunty moved and they went to Kinshasa. She said she did not stay long there because the intention was to get to RSA. She said nothing happened to her back there to threaten her life but they left because they were coming to RSA. She said she has been in RSA for 9 years now and her aunty 1.*"

54. When shown an image of the flag of the DRC on the computer screen, it appears that the applicant identified the correct depiction. The document goes on to record the applicant's "*Story (Chronologically)*" as follows:[10]

[10] The notes are reproduced exactly as they appear on the record.

"*left the country and she is staying with her pastor who is taking care of her.*

SHE CLAIMED THAT SHE WAS THE ONLY CHILD OF HER PARENTS. SHE SAID WHEN SHE FIRST CAME TO THE OFFICE SHE CAME WITH HER AUNTY AND SHE DOES NOT KNOW ANY INFORMATION THAT WAS PROVIDED ON HER APPLICATION. sHE SAID HER AUNTY ALREADY HAD A STATUS. SHE SAID WHEN HER AUNTY LEFT SHE WAS NO LONGER STAYING WITH HER AUNTY BECAUSE SHE WAS ABUSING HER. SHE SAID SHE WAS TAKEN AWAY FROM HER BY SOCIAL PAPERS. (WORKERS[11])

When did you leave your country of origin?: 12/09/2003

Port of Entry into RSA: Beit Bridge rail

When did you enter the RSA: 29/09/2003"

55. Under the heading "***Asylum Details***" the following questions and answers appear.

"*Why are you applying for Asylum?: She said she is applying because she wanted to study.*

[11] This word is written in manuscript on the record and is clearly a subsequent correction of an obvious error.

Which measures did you take to solve your problem?: To leave the country.

Do you wish to return to your home country?: NO

If no, please give reasons: She said she has no family back there.

What would happen to you if you are returned to your country?: She doesn't know.

Are you presently employed in South Africa or conducting business/study: NO

Current Source of Income: None."

56. The applicant deals with the **RSDO Interview notes** as follows.

"*36. In this document, again, my date of birth is incorrectly reflected as 21/09/1987.*

37. I notice that my reasons for leaving are incomplete on the first page of this document.

38. Again, I did not say both my parents passed on. This may have been the time I said I didn't know if my mother was still alive. I can't remember if it was before or after that that I heard my mother was still alive and had a young son. But I definitely didn't say that she had passed.

39. Although there was no direct threat on my life - as in, nobody had yet tried to kill me - my mother and I both were afraid that it would happen. As my aunt could not afford to take us both out of the DRC, my mother allowed me to go and she stayed behind.

40. There are also a few errors on the third page of this document:

40.1. I did not come to South Africa in 2003 and I did not say that I did. We arrived in 2007.

40.2. I also did not say that I was taken by social workers. After I left my aunt's care, my school tried to get social workers to assist me. Before anyone came to help, my friend's mother offered to take me in.

40.3. I also note that the reason for seeking asylum is that I wanted to study. This is not true. The interviewer asked me why I came back to the refugee office after such a long time. I said I came back for new papers because I needed papers to study. I don't know if she meant why did I come back in 2011 or 2014. Either way, the answer would be the same.

40.4. On the fourth page, I think I did say that I have no family in the DRC. The truth is, I have no idea if my mother is still alive and, even if she is, I have no idea where she is. I honestly do not

know what I would do or what would happen to me if I returned to the DRC."

57. Lastly, the applicant makes the following concluding remarks in her supplementary affidavit.

"*41. I think it is now even more clear than before that the Respondents made grave errors - in judgment and in law - when they considered my application for asylum.*

42. I cannot go back to the DRC as I have been in this country for over 10 years, since I was a child.

43. I have heard in the news that the situation in the DRC is getting even worse these days.

44. I would literally be left on the street and be in even more danger now."

THE ANSWERING AFFIDAVIT

58. The answering affidavit unfortunately does not assist the Court much. It is made by Ms. Mosoeunyane, the RSDO who dealt with the applicant's application for asylum on 29 September 2014. As such she is the *de facto* Second Respondent yet she purports to depose to the affidavit both on her own behalf (although she is not cited as a party in her personal capacity) and on behalf of the second respondent.

59. Although the deponent claims to be duly authorized to depose to the affidavit on behalf of the second to fifth respondents (and, importantly, not the first respondent), there is no legal nor factual basis laid down for this allegation. It is thus difficult, in the absence of a resolution or confirmatory affidavits, to understand how a relatively low level functionary in the Department can speak on behalf of the Director General, let alone the Minister of Home Affairs, who is not a functionary in the Department but a member of the National Executive.

60. It is notable, too, that in some instances Ms. Mosoeunyane refers to herself in the affidavit, *qua RSDO,* in the third person. For example, in para 85 she says "*The Applicant failed to inform the RSDO in **2014** of her true age",* while in para 97 she says "*In 2014, the Applicant was interviewed by the RSDO. The Applicant fails to mention her alleged aunt to the RSDO as is evident from the record."* It is not clear why the evidence is presented in this manner in circumstances where the deponent to the affidavit was personally able to admit or deny the allegations made by the applicant and to assert primary facts of which she was personally aware, having conducted an interview with the applicant.

61. As far as the first respondent (the SCRA) is concerned, although she does not claim to depose to the answering affidavit on its behalf, the RSDO offers the following explanation in the introductory part of her affidavit.

> "*2. The facts contained herein are both true and correct and falls (sic) within my personal knowledge except where the contrary appears from the context. Where I depose to facts which are not within my personal knowledge, I have ascertained these facts from documents in*

my possession or under my control or to which I have access and from persons in the employ of the First Respondent and who do have personal knowledge of such facts."

62. Nowhere in the affidavit does the deponent identify any persons to whom she has spoken and/or from whom she has established any primary facts, nor does she said that, where she deposes to hearsay evidence, she relies on the truth thereof, or that she reasonably believes such evidence to be true. Furthermore, the affidavit is not supported by any confirmatory affidavits from any of the Departmental functionaries who dealt with the applicant's application for asylum over the years (e.g. Messer's Lotriet, Luyanda or Shwane) and no explanation is offered for the failure (or perhaps the inability) to procure such evidence. Lastly, "*the persons in the employ of the First Respondent and who do have personal knowledge of such facts,"* are not identified either nor is there any attempt to procure confirmatory affidavits from such persons. In the result, the answering affidavit is riddled with inadmissible hearsay evidence which is in any event of little evidential value.

DECISION OF THE SCRA TO CONFIRM THE RSDO'S DECISION

63. The decision of the SCRA, which is the basis of the first ground of review in this matter, is not dealt with at all in the answering affidavit. Other than making vague and generalized statements such as -

"*140. The Applicant failed to allege and proof (sic) that SCRA (sic) acted lawfully…*

183. The Applicant was invited to make representations to the SCRA prior to their decision;

184. The Applicant failed to make representations to the SCRA,"

there are no allegations to be found in the answering affidavit suggesting, for instance,

(i) when the SCRA met,

(ii) who the members thereof were,

(iii) what matter/documentation was before it for consideration, and/or

(iv) what the reasons were for upholding the RSDO's decision.

64. In the result there is no opposition, whether in form or substance, by the SCRA to the application to review its decision taken under s25 of the Act to confirm the finding of the RSDO taken under s24(3)(b) thereof. The absence of such opposition is material in light of the specific requirements in s25(2) as to how such a review by the SCRA of an RSDO's decision under s24(3)(b) is to be conducted.

"***25. Review by Standing Committee***

(1) The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b).

(2) Before reaching a decision, the Standing Committee may -

(a) invite the UNHCR[12] representative to make oral or written representations;

(b) request the attendance of any person who is in a position to provide it with information relevant to the matter being dealt with;

(c) of its own accord make such further enquiry and investigation into the matter being dealt with as it may deem appropriate; and

(d) request the applicant to appear before it and to provide such other information as it may deem necessary."

65. One would have thus expected the SCRA to have taken the Court into its confidence, to have produced any relevant working documents or papers, explained the procedure it followed and furnished the reasons for its decision. In the absence thereof, and subject only to considerations regarding the failure to lodge the review timeously in terms of s7, the Court is entitled to invoke the presumption in s5(3)[13] of PAJA and presume that the decision of the SCRA was taken for no good

---

[12] The United Nations High Commission for Refugees.

[13] "*5. **Reasons for administrative action***

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial

reason.[14] The consequence of such a conclusion is that the applicant would be entitled to the review of the SCRA's decision.

ALLEGATIONS IN THE FOUNDING AFFIDAVIT REGARDING THE DECISION OF THE RSDO TO REFUSE ASYLUM

66. In the founding affidavit the applicant makes the following allegations specifically in relation to the decision of the RSDO. I reproduce the text precisely as it appears in the affidavit replete with grammatical and syntactical errors

> "*55. The second part of this application seeks to review the decision by the RSDO and its review by SCRA and request the above Honourable Court in terms of section 8 of PAJA to set it aside as unlawful for the reasons set out in section 6 of PAJA as the conduct was in clear violation of the Act and Regulations.*
>
> *56. It is thus requested that such conduct on the part of the RSDO and the decision to refuse my application for asylum be set aside and remitted back to the RSDO afresh for adjudication to ensure that my right to proper adjudication can expected.*
>
> *57. At the very least, the decision of the RSDO be reviewed afresh by the SCRA in terms of section 25 of the Act.*

---

review that the administrative action was taken without good reason."

[14] Wessels v Minister of Justice and Constitutional Development 2010 (1) SA 128 (GNP) at 141E

58. To denounce my application for asylum as manifestly unfounded, apparently as my 'claims [were] made on grounds other than those on which such a (sic) application can be made' is simply baseless and illegitimate when making a decision duly for asylum.

59. I have at no stage made any misrepresentations of fact, innocent or otherwise, and have not had the opportunity to properly set out the facts surrounding my arrival in the Republic, save for the written appeal submitted to SCRA, which they do not have to consider.

60. To date between (sic) the application of the law by the RSDO and SCRA have (sic) equally been deficient in terms of the Act. Moreover, the Act makes it abundantly clear that the manner in which the Act is applied must be I have not received a lawful review by SCRA notwithstanding the fact that my interview by the RSDO was in breach of my rights initially as a child and subsequently to administrative justice in the manner this interview was conducted."

It would be fair to say then that, despite shoddy drafting, the founding affidavit lays down a direct challenge to the basis upon which the RSDO came to her conclusion.

THE REPLY IN THE ANSWERING AFFIDAVIT TO THE FOUNDING AFFIDAVIT

67. The reply to these allegations by the RSDO in the answering affidavit are as follows.

"***AD PARAGRAPH 55***

161. The contents of this paragraph are denied.

162. The Applicant is seeking relief as set out in paragraphs 6-12 in Part B of the Notice of Motion.

AD PARAGRAPH 56

163. The contents of this paragraph are denied.

164. The Applicant is seeking relief as set out in paragraphs 6-12 or Part B of the Notice of Motion.

AD PARAGRAPH 57

165. The contents of this paragraph are denied.

166. The Applicant's claim for asylum has been dealt with according to prescribed rules and regulations of the Refugees Act.

167. The Applicant failed to establish that the RSDO's decision was not in accordance with section 25 of the Refugees Act.

AD PARAGRAPH 58

168. The contents of this paragraph are denied.

169. The Applicant's claim for asylum has been dealt with according to prescribed rules and regulations of the Refugees Act.

170. The Applicant failed to establish that her claim for asylum was not manifestly unfounded.

171. The basis of the Applicant's claim is that her application should have been dealt with as an unaccompanied minor.

172. On the Applicants own version, the asylum seeker application was not made as an UAM.[15]

*173. The Applicant was with her 'alleged auntie' when she made an application for asylum seeker in **2007**.*

*174. The Applicant failed to disclose all relevant information about her age to the RSDO in **2014**.*

*175. It is important to note that the Applicant was well versed in English in **2014**, especially in light of the fact that she attended school in Cape Town (on her own version).*

AD PARAGRAPH 59

176. The contents of this paragraph are denied.

---

[15] Presumably this is intended to be an acronym for "*unaccompanied minor,"*

177. It is very clear that the Applicant made misrepresentations throughout the asylum seeker process.

*178. She inflated her age in **2007** as is evident in the investigating diary of **2011.***

179. The Applicant failed to disclose all relevant information regarding her age to the RRO and the RSDO.

*180. The Applicant failed to inform the RSDO that she met with the RRO in **2011**.*

*181. From **2007 to 2014**, the applicant had an opportunity to disclose all relevant information pertinent to her claim for asylum to the RRO and the RSDO in respect of her age.*

182. The Applicant failed to do so.

183. The Applicant was invited to make representations to the SCRA prior to their decision.

184. The Applicant failed to make representations to the SCRA.

AD PARAGRAPH 60

185. The contents of this paragraph are denied.

186. The Applicant's claim for asylum has been dealt with according to prescribe rules and regulations of the Refugees Act.

187. The Applicant failed to establish how the RSDO and the SCRA acted 'deficiently' in terms of the Refugees Act.

188. The Applicant failed to disclose all relevant information regarding her age to the RRO and the RSDO.

189. The Applicant failed to establish how her rights were breached.

190. The Applicant's claim for asylum was dealt with based on information provided by the Applicant.

191. It is incumbent on the Applicant to disclose all relevant information about her asylum claim to the RRO and the RSDO."

68. The response, as can be seen, is largely made up of rote allegations and does not engage at any meaningful level with the issues in the case other than in relation to the Applicant's age. It is, at its best, a repetition of meaningless mantras which do not constitute acceptable reasons. Given that the deponent to the affidavit was the very person who made that decision, she was in the best position to do so and was duty bound to inform the court and the applicant of her reasons.

69. It will to be noted that the decision dated 29 September 2014, which was made on the same day that the applicant was interviewed by Ms. Mosoeunyane and immediately handed to the applicant, is included in the supplementary Rule 53 record

as part of Annexure LMM12. This notwithstanding, the RSDO makes no reference in the answering affidavit to the reasons contained therein nor does she confirm them under oath. Most importantly, there is no allegation in the answering affidavit by the RSDO as to how she understood the phrase "*manifestly unfounded*", how she purported to apply it to the facts before her and what the factual basis was for her finding in this regard against the applicant.

THE REPLY IN THE ANSWERING AFFIDAVIT REGARDING THE RSDO'S DECISION

70. When one has regard to the supplementary affidavit and the Department's response thereto, the position is slightly different. In paragraphs 56 and 57 above I reproduced the relevant allegations made by the applicant in the supplementary affidavit in response to the RSDO's decision made available in the supplementary Rule 53 record. I shall now set out the reply of the RSDO to these allegations to the extent relevant.

> "***AD PARAGRAPH 38***
>
> *244. The content of this paragraph is denied. The Respondents have serious credibility concerns in this regard. The Applicant is changing her statement as she goes along. The Applicant must provide this Honourable Court with reasons for the information given to the RSDO.*

AD PARAGRAPH 39

245. The content of this paragraph is denied. The Respondents note that the life of the Applicant was not in danger when she left her country of origin but that she had a subjective fear that she could be killed if she stayed in her country. On the applicant's own version, she did not leave the DRC as an unaccompanied minor nor did she enter the RSA as an unaccompanied minor.

AD PARAGRAPH 40.1

246. The Respondents note the content of this paragraph. On the Applicant's own version she states that 'they' arrived in 2007.

AD PARAGRAPH 40.2

247. The content of this paragraph is denied. The Respondents has (sic) serious credibility concerns in this regard. The Applicant failed to allege and proof (sic) the names and particulars of her aunt and her friend's mother.

AD PARAGRAPH 40.3

248. The content of this paragraph is denied. It is the Applicant who provided this information to the RSDO. The Applicant must allege and proof (sic) the source of information.

AD PARAGRAPH 40.4

249. The content of this paragraph is denied. The Applicant states that she does not know where her mother is and yet she knows that she is still alive and that she had a son.

AD PARAGRAPH 41

250. The content of this paragraph is denied. The Applicant failed to allege and proof (sic) that the Respondents came to the wrong decision.

AD PARAGRAPH 42

251. The content of this paragraph is denied. The relevance (sic) this paragraph is not clear. The Applicant failed to allege and proof (sic) her age at the time when she entered the RSA.

AD PARAGRAPH 43

252. The content of this paragraph is denied. The paragraph contains irrelevant matter.

AD PARAGRAPH 44

253. The content of this paragraph is denied."

71. These portions of the answering affidavit suggest that the primary concern of the RSDO in refusing the asylum application was the applicant's lack of

credibility. She had allegedly given conflicting information regarding her date and place of birth, her date of entry into the Republic and whether she entered as an unaccompanied minor. Yet when the applicant makes allegations which seek to bring her within the ambit of s3 of the Act by referring to current turmoil and internal unrest in the DRC in paragraph 43 of her supplementary affidavit, the RSDO's response in para 252 of the answering affidavit is dismissive, alleging a lack of relevance in relation to such allegations.

THE RSDO's DECISION AS INCORPORATED IN ANNEXURE LMM 12

72. As I have already pointed out, there is no attempt by either the RSDO or the Department in the answering affidavit to adduce any substantive reasons for the refusal of asylum nor any endorsement of the RSDO's decision to refuse asylum. That notwithstanding, it is necessary to deal with the RSDO's decision of 29 September 2014 for the sake of completeness, given that it does form part of the Rule 53 record.

73. At the outset the RSDO articulates the applicant's grounds for asylum as follows.

> "***Claim***
>
> *You claim to have left your country because you have no family and you came here with your aunty who was taken (sic) care of you. You said you last saw your aunty in 2009 and what you know is she is no longer in the country. Furthermore, you claimed that you are not willing to go back to your country because you have no family back there. Lastly, you*

indicated that you left your country in 2003 and arrived in RSA on (sic) the same year using land transport."

74. Then the RSDO recites the provisions of s3 of the Act and goes on to explain the burden of proof which the applicant bears.

"***Burden of Proof***

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, at paragraph 196, page 47, affirms the assertion that 'it is a general legal principle that the burden of proof lies on the person submitting a claim.'

The standard of proof is reasonable (sic) possibility of persecution and must be considered in light of all circumstances i.e. past persecution and forward looking appraisal of risk (reasonable possibility of persecution)."

75. The RSDO then deals with the veracity of the applicant's allegations as follows.

"***Credibility***

During the second interview with the Refugee Status Determination Officer [RSDO] credibility concerns were discovered and you were inconsistent both on your application form and the second interview. During the interview, you were given the opportunity to clearify (sic)

discrepancies that were brought to your attention and you failed to do so."

76. Finally, the RSDO articulates her reasons for refusing asylum thus.

"***Reason for Decision***

During the interview, you mentioned that you left your country when you were very young and you came here with your aunt, who had her own status. You said your parents passed on when you were very young and your aunty took you with her because you had no one as you were the only child. There were some discrepancies between your oral and written testimony and when asked about them you said you have no idea what was written on your BI 1590. You said your anty (sic) whom you came with is no longer in RSA, and you last saw her n (sic) 2009.

Your claims are made on grounds other than those on which such an application may be made under the Refugees Act. This means an application that is clearly not related to the criteria for the granting of refugee status laid down in the 1951 Convention, the 1969 OAU Convention and our own Refugees Act, 1998. It is therefore on this basis that your application be rejected as Manifestly Unfounded in terms of the Refugees Act 130 of 1998 and other related legal instruments. With your second claim of family disputes, we cannot grant Asylum (sic) because your application for Asylum (sic) is made on grounds other than those on which an application may be made under the Act."

EVALUATING THE RSDO'S REASONS

77. There can be little doubt that the Department's records reflect inconsistency in the applicant's version as to her date of birth. It ranges from 1987 to 1994 and even 1995. The Department's records also reflect a suggestion (which is denied) that the applicant intentionally changed her date of birth so as to place herself in a position where she could might be afforded the protection contemplated under s32[16] of the Act as a child in need of care. The suggestion that a Departmental official sanctioned the alteration of so important an event as the applicant's date of birth so as to afford her legal entitlement to a status which she was otherwise not entitled, beggars belief, but that is indeed what Mr. Shwane's entry in 2008 amounts to.

78. In any event, by the time the applicant was interviewed on 29 September 2014 she was (on her own version) a major and so any considerations of protection under the Child Care Act were irrelevant by the time the RSDO's decision was made. Hence her date of birth was not material to the substance of the application at that stage. This does not of course mean that a false statement as to the applicant's date of birth is irrelevant for other considerations under s24(3) of the Act. However, it is not clear just how the RSDO sought to draw a negative conclusion

---

[16] **32. Unaccompanied child and mentally disabled person**

(1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983… must forthwith be brought before the Children's Court for the district in which he or she was found.

(2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act….

which militated against the granting of asylum from the inconsistencies in the applicant's date of birth alone.

79. There are no inconsistencies in the Department's records as to the applicant's alleged place of birth. In the Form BI -1590 she is said to have been born in Kisangani. This is the same place mentioned to the RSDO in the interview of 29 September 2014 where it was recorded that the applicant spent the first 8 years of her life there, whereafter, it is said, she moved to Kinshasa with her aunt. Not long thereafter, according to the RSDO, the applicant said she travelled to South Africa.

80. In argument, Ms. Samuels utilized the Google Maps app on her cellphone and invited the Court to do likewise when considering the matter. She observed that the distance between Kisangani (which is in the north east of the DRC) and the capital, Kinshasa (which is in the south west) is more than 2300km. Counsel also noted that in the founding affidavit the applicant alleged that she was born in the province of Katanga, which she noted was in the south east of the country more than 1500 km from the capital and about 1400km due south of Kisangani, whereas the copy of her birth certificate (annexed to the founding affidavit) and the copy of her passport (annexed to the replying affidavit) both reflect the applicant's place of birth as Lubumbashi. This, said Ms. Samuels (thanks to Google) was also in the south west of the country.[17]

81. While there is certainly some uncertainty on the papers before the Court as to just where the applicant first saw the light of day, there was no dispute on the

[17] A Google search reflects that Lubumbashi is the second largest city in the DRC after the capital, is situated in the province of Katanga and is about 2000 km south east of the capital.

evidence available to the RSDO: all of the documentation suggested Kisangani[18] and there was no reference to either Lubumbashi or Katanga, the province in which it is located. The RSDO accordingly had no reason (in September 2014) to find a lack of credibility on the part of the applicant as regards her alleged place of birth.

82. As will be seen from the extracts from the RSDO's decision quoted above, she expressed "*credibility concerns*" arising from the Form BI -1590 form on the one hand and the interview that she held with the applicant. The decision is, however, sorely lacking in any detail in this regard. The applicant was at least entitled to know what aspects of her case were untrue and which were attributable to possible misunderstanding given her age at the time the Form BI – 1590 was completed and the complications arising from language and interpretation in regard thereto.

83. As I attempted to demonstrate earlier in this judgment, the Form BI – 1590 was partially completed by a person other than the RRO and who was probably a French language speaker – perhaps the interpreter-aunt referred to as "K" in the document. Yet the RSDO seems to have paid little regard to the fact that such inaccuracies as may have arisen 7 years later when the applicant was a major (and who then spoke English), as a consequence of ignorance or misunderstanding on the part of the aunt. And, the reference to "*Mossel Bay*" could notionally have been an incorrect recordal of "*Muizenberg*" on account of phonetic similarity and a foreign

---

[18] Both the Form BI – 1590 and the RSDO's interview notes record the applicant's ethnicity as "*Lokele*". According to Wikipedia Online encyclopaedia this is an ethnic group of about 160 000 people who live on the south bank of the Congo River in the vicinity of Kisangani. Similarly, Wikipedia confirms that "*Lingala*" (one of the languages recorded on the Form BI – 1590 as allegedly spoken by the applicant) is widely spoken in the north of the DRC, which includes the area around Kisangani.

accent. The Court is driven to speculation because we just do not know: the RSDO has not said anything more than that "*There were some discrepancies between your oral and written testimony and when asked about them you said you have no idea what was written on your BI 1590."*

THE APPROACH TO ASSESSING REASONS PROVIDED BY THE RSDO

84. In the recent judgment in *Gavric*[19] the Constitutional Court dealt with the functions and duties of an RSDO in determining applications for asylum. I intend to quote extensively from the judgment of Theron J because it defines the approach, particularly with respect to the adequacy of reasons, which is mandated in circumstances such as the present case.

> "*[67] Asylum seekers are entitled to administrative action that is lawful, reasonable and procedurally fair. A decision on an asylum application constitutes administrative action. Counsel for the applicant and respondents were agreed that the rejection of an application for refugee status must be accompanied by adequate reasons which, at the least, satisfy the requirement of rationality.*
>
> *[68] In Koyabe*[20] *this Court set out the factors to be taken into account when determining the adequacy of reasons:*

---

[19] Gavric v Refugee Status Determination Officer, Cape Town and others 2019 (1) SA 21 (CC)

[20] Koyabe v Minister of Home Affairs and others 2010 (4) SA 327 (CC) at [64]

'[T]he factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be 'full written reasons'; the 'briefest pro forma reasons may suffice'. Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.'

[69] The Supreme Court of Appeal in Phambili[21] explained the value of giving reasons as enabling an aggrieved person to understand why the decision went against her and decide whether or not to challenge the decision. It is clear from Phambili that the reasons should consist of more than mere conclusions, and should refer to the relevant facts and law, as well as the reasoning processes leading to those conclusions. In this matter the RSDO provided mere conclusions, not reasons. The RSDO failed to consider a fundamental question, namely, is the alleged crime political in nature.[22]

---

[21] Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing Pty) Ltd 2003 (6) SA 407 (SCA) at [40]

[22] *Gavric* concerned the question whether the applicant for asylum in question was excluded from

[70] It must be noted, as the amicus has mentioned, that many of the applicants for asylum who deal with RSDO's are unrepresented, vulnerable and lacking in the necessary language and legal skills to have a meaningful engagement with them and ensure that the RSDOs' adhere to their duties. It is therefore imperative that the RSDO's fulfill their functions properly. This is especially the case given the catastrophic consequences that can result if an application for asylum is wrongly rejected. An RSDO's failure to properly exercise her powers can have devastating consequences for the applicant concerned.

[71] Having regard to the context in which RSDO's make decisions and the potential consequences thereof for the applicant, they are required to adhere to the principles of administrative justice. In this matter the reasoning of the RSDO fell short of the required standard in that, at the very least, the RSDO ought to have provided some reasoning for her conclusions.

Procedural Unfairness

[72]…

[73] Section 24(1) of the [Refugees] Act provides that an RSDO may, when considering an asylum application, request further

---

refugee status in terms of s4 the Act by having allegedly committed a crime which was not of a political nature.

information from an applicant, the Refugee Reception Officer or the United Nations High Commissioner for Refugees (UNHCR) representative. The Handbook[23] recognises that it may be necessary for the RSDO to assist the applicant in obtaining relevant information in order to properly determine the application. This is premised on the factual reality that persons fleeing their country often arrive with the barest necessities and often cannot afford legal representation.

[74] Regulation 12[24] provides:

> *'(1) With exception of cases decided under section 35(1) of the Act, eligibility determination will be made on a case-by-case basis, taking into account the specific facts of the case and conditions in the country of feared persecution or harm. In making a determination of eligibility, the [RSDO] may –*
>
> *(a) request information or clarification from the applicant or Refugee Reception Officer;*
>
> *(b) consult with and invite a UNHCR representative to provide information and, with*

[23] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol to the Status of Refugees

[24] Regulations issued in terms of s38 of the Act published in GN R366 of Government Gazette GG21075 of 6 April 2000.

the permission of the asylum seeker, provide the UNHCR representative with any information requested by the UNHCR, pursuant to sub-sections 24(b) and (c) of the Act;

(c) consider country conditions information from reputable sources; and

(d) refer any question of law to the Standing Committee pursuant to section 24 (3) (d) of the Act.'…

[79] It is… necessary to state that a person can only be said to have a full and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because the person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the maximum audi alteram partem…which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.

[80] In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert

> *evidence in a meaningful way. In Foulds,* [25] *Streicher J held that a decision maker was under an obligation to disclose adverse information and adverse policy considerations, and give an affected person an opportunity to respond thereto. If an administrator is minded to reject the explanations of the interested party, she should at least inform the party why she is so minded, and afford that party the opportunity to overcome her doubts.*
>
> *[81]…. On the basis of the paucity of the reasons provided by the RSDO [in this matter] and the procedural unfairness, the decision of the RSDO was invalid and must be set aside."* (Internal references omitted)

85. From a procedural point of view, I am of the view that in this matter the RSDO failed to measure up to the standard required by the Constitutional Court. She did not meet the test suggested above in *Foulds* and articulate her difficulties with the application in order that the applicant could be given a fair chance to satisfy the RSDO, nor did she take the trouble to establish just why it was that the applicant claimed the right to be in the Republic and under what circumstances she purported to flee her country of origin. This is critical in determining under what category of refugee as contemplated in s3 of the Act an applicant resorts.

---

[25] Foulds v Minister of Home Affairs 1996 (4) SA 137 (W) at 149H-J

86. Further, from a substantive point of view, I regret to say that the reasons set out by the RSDO are neither intelligible nor informative and certainly do not convey to the ordinary reader thereof why she thought that her refusal of the application for asylum was justified. Central to that decision was the criterion of "*manifestly unfounded*" under s24(3)(b) of the Act.

"*MANIFESTLY UNFOUNDED*"?

87. What then is meant by "*manifestly unfounded"*, being the basis upon which the RSDO rejected the application for amnesty? During the course of preparing this judgment counsel were requested to assist the Court with any authorities relevant to the phrase, given that neither side had attempted to do so in their original heads or during argument.

88. Ms. Samuels filed a short supplementary note and referred the Court to the UNHCR *Handbook*, the UNHCR's *Position on Manifestly Unfounded Applications for Asylum*[26], *Gavric's* case and the judgment in this Division of Holderness AJ in *O.N.*[27].

89. Ms. Christians did likewise and, in addition to the 1992 UNHCR Position Paper, referred the court to a number of Canadian decisions dealing with the point,

---

[26] The document is dated 1 December 1992, 3 European Series 2, p397, and available at http://www.refworld.org/docid/3ae6b31d83.html. It will hereinafter be referred to for the sake of convenience as "*The Position Paper."*

[27] O.N. v The Chairperson of the Standing Committee for Refugee Affairs and others [2017] ZAWCHC 57 (16 May 2017)

Rahaman[28], *Ahmad* [29] and *Liang*[30]. Counsel also referred to the decision of the House of Lords in *Yogathas and Thangarasa*[31].

90. Neither the *Handbook* nor *Gavric* offer any assistance regarding understanding the phrase because it is not dealt with in either. In *O.N.* the Court assumed, on the basis of the decision taken by the RSDO, that the application for asylum had been rejected as "*manifestly unfounded"* but this was not the express wording employed by the RSDO in that decision. After referring to the definition in s1 of the Act the court looked at the facts of the case and found that a case for asylum was "*well founded, and has (sic) the result that [the applicant] is a refugee as defined in section 3(a) of the Act."* The decision unfortunately entails no analysis of the phrase and is of little assistance in determining what the Legislature intended it to mean.

91. Some assistance can be found in both the Position Paper and the decision of the House of Lords. As appears from the Refworld website referred to above, the Position Paper is the UNHCR's response to the issue involving manifestly unfounded asylum applications which was adopted at meeting held in London on 30 November – 1 December 1992 by Ministers of Member States of the European Union ("EU") responsible for immigration. The purpose of the meeting was to discuss the harmonisation of procedures to be adopted by Member States in dealing with an ever-

---

[28] Rahaman v Canada (Minister of Citizenship and Immigration) [2002] 3 FC 537

[29] Ahmad v The Minister of Citizenship and Immigration 2019 FC 11

[30] Liang v The Minister of Citizenship and Immigration 2019 FC 58

[31] R (Santhia Yogathas and Sritharan Thangarasa) v Secretary of State for the Home Department [2002] UKHL 36; [2002] 4 All ER 800 (HL)

increasing number of asylum applications with which the EU was being confronted at the time. The Position Paper commences with the following introduction.

> "*UNHCR has long taken the position that national procedures for determination of refugee status may usefully provide for dealing in an accelerated procedure with manifestly unfounded applications for refugee status or asylum. These procedures should, however, include certain procedural safeguards regardless of whether the claim is presented at the border or within the territory. These guarantees should also be applied to pre-admission/screening procedures at the border. Furthermore, these guarantees should be respected in procedures dealing with first country of asylum cases.*

92. The Position Paper then furnishes definitions of "*Manifestly Unfounded or Abusive Applications"* as follows under distinct headings.

> "***(i) Clearly Fraudulent Applications***
>
> *The Office has stated that the notion of 'clearly fraudulent' could reasonably cover situations where the applicant deliberately attempts to deceive the authorities determining refugee status. The mere fact of having made false statements to the authorities does not, however, necessarily exclude a well-founded fear of persecution and vitiate the need for asylum, thus making the claim 'clearly fraudulent'. Only if the applicant makes what appear to be false allegations of a material or*

substantive nature relevant for the determination of his or her status could the claim be considered 'clearly fraudulent'.

As to the use of forged or counterfeit documents, it is not the use of such documents which raises the presumption of an abuse of the application, but the applicant's insistence that the documents are genuine. It should be borne in mind in this regard that asylum-seekers who have been compelled to use forged travel documents will often insist on the genuineness until the time they are admitted into the country and their application examined.

Applications suspected of being filed to forestall an expulsion order should only be considered as manifestly unfounded if the applicant has had ample opportunity to apply for asylum previously and has not given a valid explanation for the delay.

Where applicants have already had their claim for asylum rejected in another country upon examination of the substance of their claim, UNHCR agrees that such applications could appropriately be considered in the procedure for manifestly unfounded applications. However, this should only be the case where the examination of the substance is in conformity with UNHCR eligibility standards and procedures comprise adequate procedural guarantees. In such cases, rejection in a previous procedure raises a rebuttable presumption that there is no substance to the claim.

(ii) Applications not Related to the Granting of Refugee Status

The Office has on a number of occasions stressed that a claim should not be rejected as manifestly unfounded even if it does not fall under the 1951 Convention definition, if it is also evident that the applicant is in need of protection for other reasons and thus may qualify for the granting of asylum.

When an assessment of credibility is necessary to establish the subjective element of the applicant's claim the situation is different. Issues of credibility are so complex that they may be more appropriately dealt with under the normal procedure."

93. The speech of Lord Hope of Craighead in *Yogathas and Thangarasa*[32] provides an understanding of the genesis of the Position Paper. The Learned Law Lord explained how the entry of the United Kingdom and other parties into the EU created problems for the interpretation of domestic statutes against the background of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("*ECHR*") within the jurisdiction of the European Court for Human Rights. There were particular concerns where asylum had been refused in one Member State and a refugee then applied for asylum in another. How then were countries within the EU required to consider asylum in respect of persons who had come from a Member

[32] The case involved 2 Tamil refugees from Sri Lanka who had entered the EU via Germany where they resided before moving later to the United Kingdom.

State and might be required to be returned to such State in the event of asylum being refused?

94. As I understand it, the decision at the London meeting of Member States in November/December 1992 to adhere to the UNHCR recommendations in the Position Paper led to the adoption later that month in Edinburgh of the so-called "*1992 Resolution*" by the European Council. Lord Hope explains further.

> "*26. By the end of the 1980's the Member States of the European Union were faced with a rising number of applications for asylum. The burden of dealing with these applications, many of which turned out after examination to be unfounded, was causing increasing concern to the national authorities. Among other problems was the fact that the large number of applications which were unfounded was delaying the recognition of refugees who were in genuine need of protection…*
>
> *27. The creation of an internal market in which people could move freely within between member states created a further problem. It led to a concern that asylum seekers might seek to abuse the system by lodging applications for asylum in two or more member states…*
>
> *28…*
>
> *29. The 1992 Resolution… was one of the products of an ad hoc intergovernmental programme on asylum policy which had been established in 1986…*

30. In paragraph 1 (a) of the main text, under the heading 'Manifestly unfounded applications', the 1992 Resolution declared:

> *'An application for asylum shall be regarded as manifestly unfounded because it clearly raises no substantive issue under the Geneva Convention and the New York Protocol for one of the following reasons:*
>
> - *there is clearly no substance to the applicant's claim to fear persecution in his own country…;*
> - *the claim is based on deliberate deception or is an abuse of asylum procedures…'*

31…

'<u>Manifestly unfounded</u>'

32. The use of the expression 'manifestly unfounded' in this context appears to have its origin in the work of the ad hoc intergovernmental program which was endorsed by the 1992 Resolution. It was, of course, already familiar in the context of human rights, as article 35.3 of the ECHR provides that applications to the European Court of Human Rights which are manifestly ill-founded may be declared inadmissible. It is clear from the way in which the expression was used in the 1992 Resolution that it was intended to describe those applications which, because they were clearly without

> *substance, were suitable for treatment by means of an accelerated procedure without compromising the obligations of Member States under the Geneva Convention."*

95. The Canadian decisions referred to by Ms. Christians are also of some assistance. The applicable statutory provision in that country[33] includes the phrase "*manifestly unfounded*" and proceeds on the basis that such a claim for asylum is "*clearly fraudulent".* The judgment in *Liang* provides a useful summary of the Canadian approach.

> "*[15] The Applicant argues that the manifestly unfounded finding is not reasonable as it is premised on a series of other conclusions reached by the RPD[34] that are not reasonable and do not go to the core of his claim for protection. In particular, the Applicant raises issue with a number of negative credibility findings made by the RPD, as well as the conclusion that the tendered summons is a fraudulent document.*
>
> *[16] The consequences of a 'manifestly unfounded' determination are significant as they deny the Applicant an opportunity to appeal the RPD decision and deny an automatic stay of removal. As such, a finding that the claim is manifestly unfounded is subject to a full consideration of all the evidence (Rahaman v Canada (Minister of Citizenship and*

---

[33] Section 107.1 of the Immigration and Refugee Protection Act, SC 2001, c27 [IRPA] reads as follows: "*If the Refugee Protection Division rejects the claim to refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent."*

[34] The Refugee Protection Division

Immigration). In particular, as Rahaman explains, a manifestly unfounded determination cannot be made simply because a board member does not consider elements of the claimant's narrative evidence to be credible.

[17] This case is similar to the recent decision of Yuan v Minister of Citizenship and Immigration 2018 FC 755 where Justice Strickland found the RDP's finding that the claim was manifestly unfounded was not reasonable, and summarized her reasoning at paragraph 44 as follows:

> And while *Warsame* and *Nanyongo* could be taken to suggest that it was open to the RPD to base its manifestly unfounded finding of its cumulative credibility findings, I confess that I have some concern that, at least in this case, these add up to the claim been clearly fraudulent, as opposed to having no credible basis. In any event, here the RPD did not base its manifestly unfounded finding on the basis of its cumulative negative credibility findings.

[18] Similarly, here the RPD does not appear to have reached the manifestly unfounded determination based upon cumulative negative credibility findings, but instead based upon finding the tendered summons was fraudulent."

96. Finally, in *Ahmad* the Federal Court, relying on *Yuan*[35], found (at paragraph 30) that the threshold for finding that a claim was manifestly unfounded was high.

97. In summary then the international authorities referred to all appear to adhere to the principle that a finding that an application is manifestly unfounded is intended to apply only to the clearest of cases and is intended to be used as a mechanism to swiftly weed out fraudulent or bogus claims where an applicant would otherwise be unable to bring herself within the ambit of the definition of a refugee as contemplated under the original international instrument, the Geneva Convention Relating to the Status of Refugees of 1951. Importantly, the approach has been to avoid deciding issues of credibility (save where fraud is obvious) when determining whether a claim is manifestly unfounded.

98. In the considering the South African domestic statute, one finds that the Legislature was mindful of the requirement in the Position Paper that asylum applications which are rejected as "*Manifestly Unfounded*" should be subjected to procedural safeguards such as internal review, hence the automatic right afforded to an unsuccessful applicant under s25 of the Act. However, our Act does not, like the Position Paper, treat a "*Manifestly Unfounded*" application as being synonymous with abusive or fraudulent applications. Nor is it entirely comparable with the Canadian statute which expressly defines the phrase in the context of a fraudulent or abusive application.

---

[35] Yuan v Canada (Citizenship and Immigration) 2018 FC 755 at [45]

99. Rather s24(3)(b) grants the RSDO the power to refuse an application in each of the 3 specified categories referred to in the subsection, and each category will have to be assessed with reference to its own particular facts. As an aid to assist the RSDO in coming to the relevant conclusion, the Act provides distinct definitions for each of "*manifestly unfounded", "abusive"* or "*fraudulent*" asylum applications.

100. So, one finds in s1 an "*abusive application for asylum*" is defined as

> "*an application for asylum made –*
>
> *(a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or*
>
> *(b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin;*

101. Similarly, a "*fraudulent application for asylum*" is defined in s1 as "*an application for asylum based without reasonable cause on facts, information, documents or representations which the applicant knows to be false and which facts, information, documents or representations are intended to materially affect the outcome of the application".* Consideration of such an application could involve determining credibility on the part of the applicant.

102. And, as already noted above the definition of "*manifestly unfounded*" is "*an application for asylum made on grounds other than those on which such an application may be made under this Act."*

103. In resorting to establish the intention of the Legislature in regard to s24(3)(b), one must resort to the ordinary basis of statutory interpretation. In my view, by intentionally creating a separately defined ground for refusal under the rubric "*manifestly unfounded*" the Legislature has expressly excluded from consideration under this ground the criteria which resort under either an abusive or fraudulent application. This would accord with the canon of construction under the maxim "*exclusio unius expressio altius"*. To this extent, our Act distinguishes the over-arching categories of applications which the Position Paper and the Canadian statute cover.

104. S3 of the Act creates the categories of societal hardship and other prejudicial circumstances which would entitle a person to flee her country of origin and seek asylum in the Republic. Accordingly, persecution on the basis of, *inter alia,* one's race, religion or nationality would afford a victim of such persecution ground for asylum under s3(a). So too, under s3(b), a situation where the country of origin had been subjected to external aggression, occupation or foreign domination would permit a refugee to seek asylum in the Republic. Further under s3(b), if the country of origin has been subjected to "*events seriously disturbing or disrupting public order in either a part or the whole of… the country…and the applicant is compelled to leave… her place of habitual residence in order to seek refuge elsewhere…"* she would be entitled to apply for asylum here.

105. One can conceive of any number of illustrative examples in considering when a claim is manifestly unfounded. In the first place, there is the situation where an applicant has already been refused asylum and she applies again on the same basis as before. Then there is the situation, where an applicant intentionally claims, in

order to be eligible for asylum under s3(a) of the Act, to come from a region which is notorious for its persecution of ethnic minorities when in truth and fact she is not a member of that minority group or has never resided in that region, In my view, this too would amount to a manifestly unfounded application. Or, for example, a citizen of Lesotho who enters South Africa and claims refugee status on the basis of s3(b) alleging that his country of origin has been occupied by South Africa when such an invasion has not occurred, would be liable to be refused asylum without more on the basis of the application being manifestly unfounded.

106. And, if an applicant were to present herself at the Refugee Reception Office and seek asylum because her country of origin's health care system had collapsed and she desperately needed to avail herself of the Republic's health care system to address a life-threatening illness, it would not be competent to consider her for asylum because she would be making an application for asylum on grounds other than those set out in s3(a) or (b) of the Act. Simply put, her application would (to use the vernacular) not tick the statutory boxes and it would be liable to be rejected as manifestly unfounded.

107. In the result, I agree with Ms. Christians' submission in her supplementary note that the definition of manifestly unfounded contemplates a swift decision made in a clear-cut case at the first interaction that an applicant has with the authorities dealing with refugees which is not dependent on findings of credibility.

108. In coming to her decision in this matter the RSDO simply said to the applicant that her claim "*was made on …grounds other than those on which such an application may be made under the Refugees Act."* However, the RSDO did not

articulate with any degree of clarity just what those grounds were: all that she said was "*with your second claim of family disputes, we cannot grant Asylum (sic)*". The finding begs the question, what was the first claim made by the applicant?

109. In any event, the RSDO got it wrong - there was no claim for asylum based on "*family disputes".* As I read the documents contextually, at all times the claim was predicated on the applicant fleeing civil unrest in the DRC and thus, arguably, fell to be adjudicated under the grounds contemplated in s3(b) of the Act resorting under the phrase "*events seriously disturbing or disrupting public order".* In the result the RSDO asked the wrong question and, unsurprisingly, reached the wrong conclusion. The decision therefore lacks rationality.

CONCLUSIONS ON REVIEWABILTY

110. For the reasons set out above, I am of the view that the decision of the RSDO is both procedurally and substantively flawed and for those reasons it falls to be reviewed.

VARIATION OF THE 180 DAY TIME LIMIT

111. In terms of s7(1) of PAJA the application for review should have been lodged within a reasonable time after it came to the applicant's notice, but in any event not more than 180 days thereafter.

112. The decision of the RSDO was taken on 29 September 2014 and the review by the SCRA upholding it was taken on 8 June 2016. However, the SCRA decision was only handed to the applicant under cover of a letter dated 5 October

2016. The Department offers no explanation for effectively taking 2 years to review a fairly straightforward decision but is quick to hold the applicant to the time limits in PAJA.

113. In any event, it appears that the applicant consulted a firm of attorneys specializing in immigration law, Craig Smith and Associates, who purported to lodge an internal appeal with the SCRA on 21 October 2016. When there was no response to that procedure from the SCRA the attorneys filed an application on 20 March 2017 in which the court was asked to direct the SCRA to make a decision on the so-called appeal. That application was set down for hearing in the Motion Court on 25 April 2017.

114. The applicant says that prior to the matter being heard her attorneys were contacted by the State Attorney who alerted them to the correct state of affairs. The Motion Court application was thus withdrawn and this application was launched on 25 July 2017. Although the delay between April and July 2017 is not explained by the applicant it is not inordinately long in the circumstances, particularly if regard is had to the fact that there were documents which needed to be obtained, assessed and filed with the application for review. When viewed overall it cannot be said that the applicant sat on her hands and did nothing. She appointed attorneys who professed expertise in that area of the law and was entitled to expect of them to attend to her matter diligently and expeditiously. She should not be prejudiced if her attorneys did not execute their mandate professionally and timeously.

115. In exercising its power under s9(2) of PAJA to grant an extension of time beyond the 180 day limit contemplated under s7(1) the Court is enjoined to give

consideration to the interests of justice. In *Camps Bay Ratepayers*[36] Maya JA (as she then was) postulated the approach as follows –

> "*[54]…Section 9(2) however allows the extension of these time frames where 'the interests of justice so require'. And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, importance of the issues to be raised in the intended proceedings and the prospects of success."*

116. Having regard to those considerations, and in particular the nonchalance with which the SCRA approached its functions in confirming the decision of the RSDO, the importance of the matter to the applicant and her prospects of success in the review, it would in my view be contrary to the interests of justice to deny the relief sought under s9(2). To do so would result in the "*catastrophic consequences*" alluded to by Theron J in *Gavric*.

APPROPRIATE RELIEF

117. Counsel were both in agreement that in the event of the application succeeding this was not an appropriate case for the court to substitute its own decision. Rather, it was submitted, the matter should be remitted to the RSDO for a

---

[36] Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) at [54]

fresh decision to be taken by a person other than Ms. Mosoeunyane. I agree with that submission. In addition, and to the extent that the factual and legal basis for the applicant's expulsion from the Republic is voided by the review of the Departmental decisions, it is necessary and appropriate to set aside that decision too.

ORDER OF COURT

Accordingly it is ordered that:

A. The applicant's failure to meet the time limits imposed by s7(1) of the Promotion of Administrative Justice Act, is extended until 25 July 2017;

B. The decision taken by the second respondent on 29 September 2014 to refuse the applicant's application for asylum in terms of s24(3)(b) of the Refugees Act, 130 of 1998 is hereby reviewed and set aside;

C. The decision taken by the first respondent on 6 June 2016 in terms of s25(1) of the said Refugees Act to uphold the aforesaid decision of the second respondent is hereby reviewed and set aside;

D. The application for asylum is remitted for reconsideration by the second respondent by a person other than Ms. Zakhali Mosoeunyane;

E. The order that the applicant should leave the Republic of South Africa purportedly made in terms of Regulation 30(4) of the Immigration Regulations is hereby reviewed and set aside.

F. The applicant's costs of suit herein are to be paid by the first, second, third and fourth respondents jointly and severally, the one paying the other to be absolved.

_____

GAMBLE, J

Appearances:

For the Applicant: Ms. A. Christians
Instructed by Streicher, Opperman & Associates,
Goodwood.

For the Respondents: Ms. M. Samuels
Instructed by the State Attorney,
Cape Town.