

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

**Case no: 3899/2015
Date heard: 16/8/16
Date delivered: 20/10/16
Not reportable**

In the matter between

OMAR ABSHIR GORHAN

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

**THE CHAIRPERSON OF THE REFUGEE
APPEAL BOARD**

Third Respondent

**THE REFUGEE STATUS DETERMINATION
OFFICER N.O.**

Fourth Respondent

JUDGMENT

PLASKET J:

[1] The applicant, a Somali national, left his home near Kismaayo in the south of the Federal Republic of Somalia in about February 2011 and, having travelled through various African countries, entered South Africa at the Beit Bridge Border Post in about June 2011.

[2] On the applicant's arrival in Port Elizabeth he applied for asylum and was issued with his first asylum seeker temporary permit in September 2011. During 2012, he was interviewed by a Refugee Status Determination Officer (RSDO). On 13 March 2012, the RSDO rejected the applicant's asylum application.

[3] He took this decision on appeal to the Refugee Appeal Board (RAB). On 18 May 2015, he appeared before the RAB. He was legally represented in the

preparation of his notice of appeal and in the hearing of the appeal. On 23 September 2015, the RAB dismissed the applicant's appeal.

[4] As a result, the applicant launched this application to review and set aside the decisions of the RSDO at first instance and the RAB on appeal. The relief sought in the applicant's amended notice of motion are orders:

- '1. Declaring that the decision of the Refugee Appeal Board (third respondent) taken on 23 September 2015, upholding the decision of the fourth respondent, namely the Refugee Status Determination Officer, in terms of section 25 of the Refugees Act 130 of 1998, to be inconsistent with the Constitution, unlawful and invalid.
2. Reviewing and setting aside the third respondent's decision, upholding the decision of the fourth respondent to decline to grant the applicant refugee status and asylum.
3. Declaring the decision of the fourth respondent made in terms of section 24(3)(b) of the Refugee Act on 13 March 2012, to be inconsistent with the Constitution, unlawful and invalid.
4. Reviewing and setting aside the fourth respondent's decision rejecting the applicant's application for refugee status and asylum.
5. Declaring the applicant is a refugee who is entitled to asylum in South Africa as contemplated by section 3 of the Refugees Act.
6. The third and fourth respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application.'

[5] The application is not opposed by any of the four respondents – the Minister of Home Affairs, the Director-General of the Department of Home Affairs, the Chairperson of the RAB and the RSDO who took the initial decision.

[6] I was requested, after the matter had been argued, to allow the applicant's legal representatives time to engage with the respondents' legal representatives in an effort to settle the matter. I consequently did not deliver my judgment as expeditiously as I otherwise would have. I have, after reserving judgment, received supplementary heads of argument and copies of judgments from the applicant's legal representatives. I have considered these.

[7] Even though the respondents have not opposed the relief sought, I may only interfere on review with the decisions under challenge if I am satisfied that one or

both are tainted by a reviewable irregularity. In other words, the applicant still bears the onus of establishing the presence of one or more grounds of review.

The legislation

[8] The Refugee Act 130 of 1998 regulates the position of persons such as the applicant who, having left their countries of origin, enter South Africa and seek asylum.

[9] The long title of the Act states that its purpose is to 'give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for the recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith'.

[10] In terms of s 3 of the Act a person qualifies for refugee status – the grant of asylum – if that person:

- '(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b).'

[11] The system for the determination of the status of persons seeking asylum is set out in chapter 2 of the Act.

[12] In terms of s 8(1), the Director-General of the Department of Home Affairs is empowered to establish Refugee Reception Offices. Each must be staffed by at least

one Refugee Reception Officer (RRO) and one RSDO. They must, according to s 8(2), 'have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions' and the Director-General is placed under a duty by s 8(3) to ensure that they receive the 'additional training necessary' to enable them to perform their functions 'properly'.

[13] Section 12 establishes the RAB. It is required to function without bias and be independent.¹ It consists of a chairperson and at least two other members, all of whom are appointed by the Minister of Home Affairs, who must have due regard to their suitability to serve on the RAB by virtue of their 'experience, qualifications and expertise' together with their 'capability to perform the functions' of the RAB.²

[14] The RAB's functions include the hearing and determination of 'any appeal lodged in terms of this Act'.³

[15] Chapter 3 of the Act regulates applications for asylum. In terms of s 21(1), an application for asylum must be made in person to a RRO at any Refugee Reception Office. He or she must accept applications; must ensure they are properly completed and assist the applicant if necessary; may conduct enquiries that he or she deems necessary in order to verify the information furnished by the applicant; and must submit applications to a RSDO, together with whatever further information he or she has.⁴

[16] The powers of RSDO's regarding applications for asylum are set out in s 24. It provides:

- '(1) Upon receipt of an application for asylum the Refugee Status Determination Officer-
- (a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer;
 - (b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and

¹ Section 12(3).

² Section 13(1).

³ Section 14(1)(b).

⁴ Section 21(2).

- (c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.
- (2) When considering an application the Refugee Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.
- (3) The Refugee Status Determination Officer must at the conclusion of the hearing-
 - (a) grant asylum; or
 - (b) reject the application as manifestly unfounded, abusive or fraudulent; or
 - (c) reject the application as unfounded; or
 - (d) refer any question of law to the Standing Committee.
- (4) If an application is rejected in terms of subsection (3)(b)-
 - (a) written reasons must be furnished to the applicant within five working days after the date of the rejection or referral;
 - (b) the record of proceedings and a copy of the reasons referred to in paragraph (a) must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral.'

[17] Chapter 4 deals with reviews of decisions by the Standing Committee established by s 9 of the Act and with appeals to the RAB. Section 26 is relevant for present purposes. It provides:

- '(1) Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24(3)(c).
- (2) The Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3).
- (3) Before reaching a decision, the Appeal Board may-
 - (a) invite the UNHCR representative to make oral or written representations;
 - (b) refer the matter back to the Standing Committee for further inquiry and investigation;
 - (c) request the attendance of any person who, in its opinion, is in a position to provide the Appeal Board with relevant information;
 - (d) of its own accord make further inquiry or investigation;
 - (e) request the applicant to appear before it and to provide any such other information as it may deem necessary.
- (4) The Appeal Board must allow legal representation upon the request of the applicant.'

[18] The system that I have outlined is a bureaucratic process. The decisions taken by the public functionaries concerned – RSDOs and the RAB – are quintessentially administrative actions as that term is defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).⁵ If there is any doubt, the obligation placed on RSDOs to ‘have due regard to the rights set out in section 33 of the Constitution’ tends to dispel that doubt.⁶

[19] Section 6(1) of the PAJA provides that anyone may institute proceedings in a court for the judicial review of an administrative action and s 6(2) codifies the grounds upon which administrative action may be reviewed and set aside.⁷ Section 8 provides an open-ended list of remedies that a court may award in the event of finding that administrative action is either unlawful, unreasonable or procedurally unfair.

[20] This case concerns an application for the review of the decisions taken by the RSDO and the RAB. That means that the court’s focus is on the way in which the decisions were made rather than whether they were ‘right’ or ‘wrong’: it involves the judicial supervision of the legality, rather than the wisdom, of the exercise of administrative power. Its starting point is that the empowering legislation concerned vested decision-making power in the administrators concerned, and not in the court. Baxter’s observation about the limits of judicial review in the common law era still holds good today:⁸

⁵ See the distinction drawn in *Minister of Home Affairs & others v Scalabrini Centre & others* 2013 (6) SA 421 (SCA), paras 97-98 between the policy laden executive functions of deciding where to establish Refugee Reception Offices, how many staff to employ in them and where to situate them, on the one hand, and the administrative function of determining the rights of asylum seekers, on the other. See too *Grey’s Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA), paras 21-24.

⁶ Section 33 deals with the fundamental right to just administrative action. Section 33(1) entrenches rights to administrative action that is lawful, reasonable and procedurally fair while s 33(2) creates a general right to reasons. Section 33(3) requires national legislation to give effect to these rights. That legislation is the PAJA.

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), paras 24-25.

⁸ Baxter *Administrative Law* at 305. See too Hoexter *Administrative Law in South Africa* (2 ed) at 61. (‘A fundamental limitation is that the focus of review is essentially on the legality of a decision rather than its merits: a court of review is not supposed to approve or disapprove the decision but merely to consider whether it was arrived at in an acceptable manner.’)

‘Without statutory authority, the court may not venture to question the *merits* or wisdom of any administrative decision that may be in dispute. If the court were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation. More than this, the court would be moving beyond its special area of expertise.’

[21] Because judicial review concerns the supervision by the courts of powers granted by the legislature to the executive, it is a process in which the three branches of government are ‘enmeshed in a trilateral relationship’;⁹ and that is the reason why Chaskalson P, in *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others*¹⁰ described administrative law (in which judicial review is such a core concept) as being ‘an incident of the separation of powers’.

[22] In a case such as this, therefore, the focus is on how the empowered functionaries – the RSDO and the RAB – exercised their powers, not on whether the court, had it been granted the same powers, would have exercised them differently. For that reason, it is necessary to consider the material before the RSDO and the RAB, and how they dealt with that material.

The decisions under challenge

[23] From my summary of the applicable legislation, it is clear that an RSDO acts as a decision-maker at first instance in respect of applications for asylum. This officer is required to have sufficient expertise – ‘qualifications, experience and knowledge of refugee matters’¹¹ – to do the job, and to have been trained if he or she was wanting in any of these respects.¹²

[24] The RAB is also staffed by persons who are specialists in their field: s 13(1) provides that those who are appointed to it must be suitable for the position by virtue of their ‘experience, qualifications and expertise’.

⁹ Baxter (note 8) at 300.

¹⁰ *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC), para 45.

¹¹ Section 8(2)(b).

¹² Section 8(3).

[25] The appeal created by s 26 is a wide one: not only is the RAB empowered to 'confirm, set aside or substitute' any decision of a RSDO, but it also has powers, inter alia, to 'make further inquiry or investigation'.¹³ In other words, the appeal contemplated by s 26 is a re-hearing of the merits. In *Tantoush v Refugee Appeal Board & others*¹⁴ Murphy J dealt with the powers and functions of the RAB as follows:

'The applicant has trenchantly criticised the RAB's misinterpretation of the nature of its functions as an appellate body. As already explained, because of the RAB's powers to gather additional evidence, the intention of the legislature was to confer upon the RAB an appellate jurisdiction in the wide sense, meaning that it is not bound to pronounce upon the merits within the four corners of the record of the RSDO. An ordinary appeal is one where the appellate body is confined to the record of the body appealed against. A wide appeal is one in which the appellate body may make its own enquiries and even gather its own evidence if necessary - *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 592A - E. In both kinds of appeal the primary function is one of reconsideration of the merits of the decision in order to determine whether it was right or wrong, or perhaps vitiated by an irregularity to the extent that there has been a failure of justice. Where the appellate body is placed in exactly the same position as the original decision-maker it will be able to correct lesser irregularities and will enjoy a power of rehearing de novo.'

[26] I turn now to the attacks on the decisions of the RSDO and the RAB.

The RSDO

[27] In the record of his decision, the RSDO informed the applicant that his application for asylum had been rejected as unfounded in terms of s 24(3)(c) of the Act.

[28] The RSDO recorded the applicant's claim as being that he had left Somalia 'because of fighting between Al Shabaab group and another Somali group over ruling the country'. He then set out the grounds in terms of which asylum could be claimed, contained in s 3 of the Act, and recorded that the burden of proving the

¹³ Section 26(2) and (3).

¹⁴ *Tantoush v Refugee Appeal Board & others* 2008 (1) SA 232 (T), para 90.

claim for asylum rested on the appellant. He stated that the standard required was 'reasonable possibility of persecution' which must be 'considered in light of all circumstances i.e. past persecution and forward looking appraisal of risk (reasonable possibility of persecution)'.

[29] He furnished his reasons for the decision that the claim was unfounded, stating:

'The determination of refugee status requires an evaluation of the applicant's frame of mind "fear of persecution", however, "well-foundedness" implies that the frame of mind must be supported by an objective situation prevailing in own country of origin.

Upon evaluation of your statements it was found that your claim is insufficient and thus not acceptable to the decision maker.

According to the Somalia COIR 2011, Kismayo is, in general safe regardless of clan membership.'

[30] In his application, the applicant had, in answer to the question as to why he had applied for asylum, said that he had left Somalia 'because of civil war and if I go back I'll be killed'. In the interview notes that are part of the rule 53 record, two issues are noteworthy. First, it is recorded that the applicant did not require the services of an interpreter. Secondly, his version was recorded as follows:

'He left his country because of fighting between Al Shabaab group and another Somali group over ruling the country. All his children are married so he did not have any responsibility towards them and his wife is still there because they did not have enough finance to leave with her, he sends money to her whenever he can and he intends to bring the wife when he makes enough money to bring her.'

[31] In his founding affidavit, the applicant stated that the decision of the RSDO was irregular because it was materially influenced by an error of law; was not rationally connected to the information before him; was taken as a result of irrelevant considerations being considered and relevant considerations being ignored; was unreasonable; and was 'unconstitutional and unlawful'. The founding affidavit contains no factual allegations that support these legal conclusions.

[32] It is not suggested in the founding affidavit that the recordal of the facts in the eligibility determination form for asylum seekers (dated 13 August 2011), the

RSDO's interview notes (dated 13 March 2012) and the record of decision (also dated 13 March 2012) are inaccurate in any way.

[33] In these documents the applicant said he left Somalia 'because of civil war' and 'because of fighting between Al Shabaab and another group over ruling the country'. No other facts were provided and it became clear that he had lied about his wife, stating that she was still alive whereas he later said she had been killed by a stray bullet.

[34] The information, gleaned from the applicant, that was before the RSDO was that the applicant had left Somalia because of civil war. In other words, the claim for asylum was based on s 3(b): the applicant had to establish that owing to events seriously disturbing or disrupting public order in Somalia, he was compelled to leave and seek refuge elsewhere. It was not part of the applicant's claim that he fell within the terms of s 3(a) – a well-founded fear of persecution as a result of race, tribal affiliation, religion, nationality, political opinion or membership of a particular social group. (On the different facts set out in the founding affidavit, the applicant would not fall within s 3(a) either, but that is neither here nor there because this version was not before the RSDO.)

[35] It was in the context of the claim based on civil war causing the applicant to leave Somalia that the RSDO referred to the country information report available to him concerning the current situation in Somalia, namely that Kismaayo was, in general, safe. The RSDO was entitled to have regard to this information.¹⁵ There is no allegation in the founding papers that the RSDO made use of this information in a procedurally unfair manner by not affording the applicant a fair opportunity of dealing with it.

[36] In the heads of argument the point was taken that 'the respondents' failed to assist the applicant in his application for refugee status and during his interview with the RSDO; and that, as a result, s 24 of the Act was not complied with. This

¹⁵ Khan and Schreier (eds) *Refugee Law in South Africa* at 40.

argument has no merit because there is absolutely no evidence in the applicant's founding affidavit in support of it.

[37] In summary, the RSDO had before him a version, the credibility of which he doubted, which, because of his information about the current situation in Somalia, did not pass muster: it failed to establish the need for the applicant to seek refuge in South Africa. In my view, the applicant has not established any ground upon which the decision of the RSDO may be reviewed and set aside.

The RAB

[38] The appeal hearing before the RAB is a complete rehearing. In the applicant's appeal, he was legally represented and a detailed affidavit was submitted. So too were a number of documents concerning the current situation in Somalia and heads of argument. It was thus a re-hearing in the fullest sense. Even if I am wrong in respect of my conclusion that the hearing before the RSDO was free of reviewable irregularity, the appeal was capable of curing any irregularity that there may have been.

[39] In the founding affidavit no distinction was drawn concerning the attacks upon the decision of the RSDO and the RAB: the same grounds of review apply to both.

[40] The applicant placed a more complete version before the RAB than he appears to have done before the RSDO. A detailed affidavit told of how he had farmed on land owned by him in an area called Jamami about 60 kilometres from Kismaayo. He also owned a boat which he used to transport people on the Juba River.

[41] He came into conflict with Al Shabaab, then engaged in a struggle for control of the area with a warlord, Bare Hirale. Al Shabaab wanted his land and his boat and detained him. He was released after three days. Al Shabaab wanted him to join it and offered him employment in return for his land and boat. As a result of fear that he would be targeted by Al Shabbab for failing to co-operate, he left Jamami for Kismaayo.

[42] In Kismaayo, he said, he was 'internally displaced for about three months'. On realising, he said, that he could not depend on the government to protect him, and Al Shabbab taking control of Kismaayo, he fled Somalia.

[43] As with the decision of the RSDO, s 3(a) of the Act does not arise. On the facts set out above, whatever well-founded fear of being persecuted the applicant may have harboured, he was not going to be persecuted by reason of his 'race, tribe, religion, nationality, political opinion or membership of a particular social group'.

[44] The RAB, like the RSDO, found that the applicant's version lacked credibility for various reasons, including the fact that he lied about his wife, made a frankly nonsensical attempt to explain that and, at a late stage, also said for the first time that his father had also been killed in the conflict. It found that he had 'failed to give a coherent and plausible version of how he was personally affected by the above fighting to the extent that he was compelled to leave his habitual place of residence to seek refuge in foreign countries'.

[45] Secondly, the RAB took the view that the fact that the applicant's five children and three siblings still reside in Kismaayo tended to show that 'the impact of the insecurity situation in Somalia, particularly in Kismaayo on the appellant and his family did not compel the appellant to surrender the protection of Somali government to seek refuge elsewhere hence his family is still in Kismaayo'. This, it said, was 'supported by the evidence of the appellant to the effect that Kismaayo is now under the control of government soldiers, and this shows a relative stability in Kismaayo and a safe place to return to'.

[46] The RAB concluded as follows on the credibility issue:

'28. The Board is entitled to accept that there was a civil war in Somalia between government forces and rebel groups, in particular Al-shabaab militants and that the attendant unrest has caused serious disturbances or disruption to public order.

29. However the contradictory factual accounts of the effect of situation on the appellant personally does not support a finding, based on evidence before the Board, that he was

compelled to leave his country of origin in the sense required for him to qualify as a refugee in terms of **section 3(b) of the Refugees Act**.

30. For the appellant to qualify as a refugee, his evidence regarding a reasonable possibility of persecution or harm must be coherent and plausible. It must not run counter to generally known facts.

31. Consequently the Board cannot give the appellant the benefit of doubt since, when looking at the totality of evidence in this case, his factual accounts is not plausible.'

[47] The RAB then considered what it termed objective information concerning the position in Somalia from 2011 to 2014, including constitutional reform and the holding of elections in 2012; the recapture in early 2013 by Somali government forces and the African Union Mission in Somalia (AMISOM) of 'all of Somalia's major urban centres from Al-Shabaab', although, it said, Al-Shabaab still controlled most rural areas; the strengthening of the military forces in Somalia with the deployment by the United Nations of 4 000 troops to augment the approximately 22 000 African Union troops; and the launching of extensive military operations in March 2014 'to remove Al-Shabaab from all the remaining areas in the southern parts of Somalia that were still under its control' and, in August 2014, the launching of 'an operation in the Indian Ocean with the mandate of cleaning up the remaining rebels in the countryside'.

[48] On the basis of this information, the RAB concluded that, in 'applying forward looking approach, the Board finds that there is no reasonable possibility of persecution or harm if the appellant returns to his country of origin'.

[49] I can see no misdirection in the RAB's factual findings and its conclusions drawn from the facts: the appellant had only himself to blame for the adverse credibility findings made against him as a result of his untruthfulness, for changing his version and for offering a nonsensical explanation for doing so. There is, in the absence of misdirection on the part of the RAB – and I can detect none – no basis upon which I may interfere with its decision.

[50] Furthermore, the RAB, in the application of its expert knowledge, took into account events that tended to indicate that there was no reason why the appellant

could not return to Somalia. The fact that the appellant's legal representatives put forward a different picture in the documents that they lodged with the appeal does not avail the appellant: it was for the RAB to determine the facts and, in the absence of any other ground of review, it is only within the narrow ambit of material mistake of fact as a ground of review that I would be able to interfere.

[51] In *Dumani v Nair & another*¹⁶ Cloete JA considered the scope of this relatively recently developed ground of review. He held (in the context of a comparative analysis of this ground of review):¹⁷

'In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been — ie an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary — an "administrator" as defined in PAJA — the material-error-of-fact ground of review does not entitle a reviewing court to reconsider the matter afresh.'

In order not to intrude too far into the merits, the error of fact must relate to a fact that is objectively verifiable — one that can be 'established in the sense that it is uncontentious and objectively verifiable'.¹⁸

[52] The facts relating to the current situation in Somalia do not fall within this narrow band with the result that, even if the RSDO's and the RAB's factual findings were incorrect, they are not reviewable on that basis.

The result

[53] As the applicant has failed to establish any ground of review in respect of the decisions taken by both the RSDO and the RAB, the application cannot succeed.

[54] The application is dismissed.

¹⁶ *Dumani v Nair & others* 2013 (2) SA 274 (SCA).

¹⁷ Para 32.

¹⁸ Para 32.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant: M Veldsman instructed by the NMMU Refugee Rights Centre

For the respondents: No appearance