

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: NO/YES

REVISED.

Signature

06/02/2020
Date

CASE NO: 46038/2016

AHMED HUSSEIN SIYAD

APPLICANT

and

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE CHAIRPERSON: REFUGEE APPEAL BOARD

SECOND RESPONDENT

L NDLOVU N.O

THIRD RESPONDENT

THE REFUGEE STATUS DETERMINATION OFFICE: TIRRO

FOURTH RESPONDENT

THE MINISTER OF HOME AFFAIRS

FIFTH RESPONDENT

THE DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS

SIXTH RESPONDENT

JUDGMENT

N V KHUMALO J

INTRODUCTION

[1] This is an application for a review of a decision taken by the 1st, 2nd, 3rd and 4th Respondents refusing the Applicant, Mr Ahmed Hussein Sayid ("Sayid"), a national of Somalia, refugee status and asylum. The order Sayid seeks is in the following terms:

[1.1] Reviewing, setting aside and declaring unlawful and unconstitutional the 1st, 2nd, and 3rd Respondents' decision made on 5 March 2016 and received by the Applicant on 18 December 2015.

[1.2] Reviewing and setting aside and declaring unconstitutional the 4th Respondent decision.

[1.3] In terms of s 3 (a) and/or (b) of the Refugees Act, 1998 (Act No. 130 of 1998) ("the Act"), declaring that the Applicant is granted refugee status.

[1.4] Directing the 5th and 6th Respondents forthwith to issue the Applicant with a s 24 of the Act permit.

[1.5] In the alternative remitting the matter to the Refugee Appeal Board (RAB) with the following directions:

[1.5.1] The RAB is directed to re-hear and make a decision on the Applicant's appeal within two month of the court's order, and;

[1.5.2] The Respondents must renew the Applicant's section 22 asylum seeker permit until his application for refugee status has been finally determined, which includes his right of review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[2] The 1st Respondent is the Refugee Appeal Board (RAB) that determines appeals against decisions of the 4th Respondent in terms of s 26 of the Refugees Act 130 of 1998 (the Act) and 14 (1) (b) of the Regulations to the Refugees Act ("the Regulations"). The 2nd Respondent is the Chairperson of the Refugee Appeal Board whose decision the Applicant seeks to review and set aside. He is cited in his official capacity. The 3rd Respondent, L Ndlovu is cited in her representative capacity as a member of the RAB. She together with the Chairperson, L Chipu heard and dismissed Sayid's Appeal against the RSDO decision. The 4th Respondent, the Refugee Status Determination Office ("RSDO") of the Tshwane Interim Refugee Reception Centre ("TIRRO") is the official responsible for the initial determination of the asylum Application. The 5th Respondent is the Minister of Home Affairs cited in his official capacity and the 6th Respondent, is the Director General who is responsible for the administration and implementation of the Immigration Act and the Refugees Act. The Application is opposed by all the Respondents.

[3] S 3 of the Act reads:

A person qualifies for refugee status for the purposes of the 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 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 of the whole of his or her country 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.

[4] According to Sayid's Founding and Supplementary Affidavits he is an asylum seeker who fled his home country Somalia in 2009. He fled after being threatened to be killed by Al-Shabaab men accusing him of living in the western culture and not attending the mosque. He was listening to Tupac music at the time and liked to play soccer. He was not going to change, therefore a few weeks later he decided to leave the country in the company of one Abduralman. They travelled by truck for three days from Mogadishu to Kismayo, which is closer to the Kenyan border. They then travelled by boat from Kismayo to Mombasa in Kenya. **They were in transit in Mombasa for less than 12 hours after which they changed to another boat that travelled to Mozambique.** They were then put in a container in a truck that took them across the border to South Africa, entering without a passport. Closer to the border, they jumped out of the truck and walked for three to four hours until they crossed into South Africa, jumping through a fence through at an area that was not heavily guarded. They took a taxi to a place called Mohamed's Lodge in Pretoria West where Somalians live.

[5] Sayid applied for asylum in December 2009 at the Tshwane Interim Refugee Reception Office ("TIRRO"). **According to him as he could not speak English properly,** he was assisted at TIRRO by an interpreter from Somalia to complete the B1 -1590 form who asked for R300 for the services. He could not pay but the interpreter assisted him anyway. On the same day he was interviewed by the Refugee Status Determination Officer ("RSDO"), which is the 4th Respondent, in an interview that lasted 10 minutes. The RSDO did not ask him too many questions, except being asked **through a translator his reason for leaving Somalia.** He told them about his family and was not allowed to say anything further. **He denies that he ever said his family fled to a rural area as is reflected on the RSDO decision.** He does not however elaborate on what exactly he told the officer. Following the interview he was called to collect an asylum seeker's permit. He does not remember receiving a written decision but a month later when he went to renew or extend his permit he was given **a form to complete which he suspects was a Notice of Appeal. He completed it with the help of one Mohamed, a friend.** He thereafter regularly renewed his permit.

[6] According to the RSDO Notice he was notified of the refusal by the RSDO on the same day 8 December 2009 and also that he is expected to note his appeal within thirty (30) days from the date of the decision. His notice to appeal was, according to the documents lodged for the first time after three (3) years on 23 January 2013. The stated reason for his claim's refusal was that it was unfounded.

[7] He alleges that an appeal hearing with the RAB was initially booked for him on 23 January 2013. It was postponed a few times until it finally took place on 27 February 2013. The Appeal was heard before one member of the RAB. **He attended with Mohamed who interpreted for him and a lawyer instructed by Mohamed.** He alerted the RAB member to the incorrect recording on his permit of 5 January 1989 as his birth date instead of 29 December 1991. The RAB member did not ask him many questions except about his family and for the reason why he left Somalia. **He told the RAB about his house that was destroyed**

and some members of his family that were killed. Also that he fled because of war in Somalia. After the appeal hearing he was furnished with a letter to take to TIRRO for his permit to be renewed. When he returned to TIRRO he was told to approach the RAB for a decision. Back at the RAB he was told that the member of the RAB has resigned and his documents were misplaced. He was consequently given another date, the 12 December 2013 for an appeal hearing in Pretoria.

[8] **At this second hearing he attended alone with no lawyer or interpreter.** The hearing was conducted by two members, a man and a woman, M Chipu and L Ndlovu, the 2nd and 3rd Respondent. Except for his personal details **he was asked for his reason for having left Somalia and whether he would be willing to go back. He told them he would be willing if there is peace in Somalia which was not there. He told them about the civil war there and the fact that he might be killed.** They wanted to know what he thought might be the reason his application was rejected by the RSDO. He told them his interpreter might not have told his story correctly and that it lasted for only 10 minutes. He had also told them that if he is granted asylum he was hoping to make a living by having access to health, education and all the things that someone needs to make life possible. The appeal lasted less than 30 minutes. Pending the outcome of the appeal he had continued to renew his asylum seeker permit. On 18 December 2015 he received the RAB decision dismissing his appeal. He consulted his attorneys for advice on the legal implication of the decision and the errors it contained in relation to his asylum claim which he regarded as impacting **on the procedural and substantive aspects of his rights to a fair refugee status determination.** The RAB has refused his Application on the basis that:

[8.1] He did not suffer any persecution or harm in terms of s 3 of the Act. He did not have a well-founded fear of persecution. He was therefore not compelled to leave his country of origin.

[8.2] He stayed in Kenya for a period of one month and was given protection by that country. There is nothing in his evidence that indicate that he was persecuted in Kenya because of his nationality. He left Kenya because he was seeking a better life for himself.

[8.3] living conditions do not fall within the threshold of s 3 of the Refugees Act therefore cannot be regarded as persecution. He enjoys/ed the protection of each country he has taken residence in. He would not qualify or be recognised as a refugee under ks 4(1) (d) of the Refugees Act.

[8.4] It is unlikely that he will face a reasonable possibility of harm or persecution if he were to return to Somalia. In his appeal there is nothing that indicates that he was either tortured, physically attacked or arrested while he was still in his country during 2009. He can return safely to his country of origin, there are areas which are identified not to be affected by civil war and are under government's control.

[8.5] The board finds that he has not discharged the burden of proof that has rested on him to justify the granting of asylum in terms of the Refugee Act.

[9] The Applicant brought this application only on 10 June 2016 more than 180 days from the date of the decision and the matter only set down for hearing in June 2018. The Applicant

has applied for condonation for the delay in bringing the Application. The court was persuaded that there was a reasonable explanation of the delay and being appreciative of the importance of the matter granted condonation. The Applicant was represented by Mr Letsebe and the Respondents by Ms N Rantho.

Grounds for Review

[10] The Applicant contends that the RAB should have provided him with an interpreter during the appeal hearing or notified him and afforded him (seven (7) days within which he should source his own interpreter. At his second hearing he had neither an interpreter nor a lawyer but the hearing was allowed to proceed. He argues that in the circumstances where he had limited understanding of the English language and the RAB members also with none or little knowledge of his mother tongue, for the purposes of the Refugees Act, PAJA and the Constitution it means there was no hearing at all. The same consideration being applicable to the situation at the reception office at TIRRO where he relied upon a volunteer as a result of their failure to provide interpretation services for the purposes of completing the form and conducting the RSDO interview. As a result he argues that the RAB's failure to deal with and remedy the RSDO's flaws constitutes a violation of its statutory duties as an appellate body under the Refugees Act. The flaws also combined with its own flaws constitute a violation of his rights to procedural fairness in the determination of his asylum claim. Mr Letsebe argued that not affording the Applicant an interpreter during the proceedings amounted to an irregularity that justifies a review of the proceedings.

Misapplication of the Law on the burden of proof

[11] The Applicant argues that the RAB misapplied the law when in paragraph 8 of its decision it stated that:

“the burden of proof is on the Appellant to show that he is entitled to refugee status” and “the standard of proof is that of a reasonable possibility of risk”, further that this reasonable risk must be considered in the light of all the circumstances i.e. past persecution and a forward looking appraisal of risk “whereafter it concluded that the Appellant has not discharged the burden of proof which rested on him”

[12] He argues that the Application of the burden in the abovementioned manner is incorrect as it is inconsistent with the test applied when determining the strength of the person's refugee claim as provided for in the **UNHCR Handbook** on Procedures and Criteria for determining refugees status which enjoins the adjudicator to meet the asylum seeker halfway, and assist with the resources at its disposal in proving the asylum seeker's claim. As a result of the misapplication of the burden and standard of proof, the RAB was bound to come to the wrong conclusion that Applicant has failed to discharge the burden that rested on him. **Further that the misapplication of the test meant that the RAB wrongly rendered Applicant's otherwise persecutory circumstances as being at odds with the qualifying circumstances defined under s 3 (b) of the Act.** It is also not mentioned if he has met or failed to meet the burden of proof that he is eligible to be granted refugee status. Reference is made to “Credibility” without stating anything further which he has concluded to mean his claim was found to be unbelievable.

Incorrect test

[13] The Applicant also contends that incorrect test applied to his refugee status. He submits that he has consistently based and is eligible to a determination of his refugee status under Section 3 (a) and 3 (b) and is entitled to be granted refugee status, if:

[13.1] He or she can show that he or she has faced persecution or threat of persecution by reason of his or her association or perceived association with any attributes listed in s 3(a) of the Act; and or

[13.2] country of origin information shows the prevalence of events seriously disturbing or disrupting the public order, as is revealed in the reports to which he has referred to below, and has attested to in his affidavit.

He argues that he has met the basis of the first criterion in s 3 (a) that requires individualised fear of persecution on either of the attributes listed in it by virtue of the fact that while in refuge in Ceelashabiya he fell victim to Al-Shabaab militants who perceived his life style to be pro-western ways and anti-Islam, more so because as they said, he did not attend mosque.

[14] He also contends that he qualifies to be granted refugee status under s 3 (b) by virtue of events in his country that are seriously disturbing and disrupting public order in many parts of the country. Whereby the Somali Government cannot, despite foreign assistance by the African Union peace forces and others, contain the violent situation in the country. On the basis of this criteria and the clear evidence of his eligibility, to be granted the refugee status under s 3 (a) and (b), from the RAB's decision it would appear that the RAB applied only the first criterion under s 3 (a). Even then it still failed to appreciate the manifest human rights violations prevailing in Somalia.

[15] The RAB has therefore contravened the express statutory provisions of the Act and its approach bound to yield an irregular finding that he is ineligible to refugee status when it would have been dangerous for him had he remained in Somalia, and remains dangerous for him to be expected to return there. Mr Letsebe argued that in that sense the court did not apply the law properly by making irrelevant considerations and disregarding relevant considerations.

Misapplication of s 4 (d) of the Refugees Act

[16] He indicates that when he transited through Kenya and Mozambique he did not stay in any of the two countries but used them as his travel routes to South Africa. The RAB drew a wrong inference that he was unqualified to gain refugee status in this country for it had reason to believe that he enjoyed the protection of another country in which he took residence. Further that he resided and left Kenya because of unbearable living conditions which is misplaced and unsupported by facts. The RAB, as a result of this flaw misapplied the provisions of s 4 (d) in an attempt to discredit him as an eligible candidate for recognition as a refugee as he already enjoyed protection of Kenya or Mozambique. He submits that he is entitled to be and to remain in South Africa as dictated by the Refugees Act that gives effect to South Africa's Constitutional and International Law Obligations towards asylum seekers and refugees.

[17] The Applicant refers to the real situation in his country and argues that the RAB had failed to consider his country's information as if they had done so they would have found that **persecutory circumstances prevailed that induced him to flee Somalia** and refusing him refugee status would result in him being deported and being exposed to persecution and possible death in his country. The RAB's drawing of a negative inference against his refugee claim was irregular and inconsistent with the Refugees Act.

[18] He submits that the RSDO and the RAB's decision have the effect that he eventually faces expulsion from this country or deportation to Somalia. If he is expelled or deported South Africa would have violated his human rights under the Refugees Act, the Constitution and International law, as his re-entry into Somali has the potential that he will suffer physical harm or even death. The RSDO has stated in its report that after research into the current situation in Somalia various country information reports indicate that although there still continue to be security incidents in Mogadishu since the fighting stopped. The RSDO report downplays the breadth and impact of the security concerns that still exists and contradicts what is in the report and must be rejected by the court. He argues that there is no rational connection between the decision of the RSDO and the reasons given for it.

[19] In his supplementary Affidavit he alleges that where he is asked to list the countries he transited en route to South Africa, the RSDO repeats the mistake in the B1- 1590 form listing Tanzania, Malawi, Mozambique and Zimbabwe which is in odds with what he stated in the Founding Affidavit where Zimbabwe is not mentioned. The RSDO persisted with the error recording Beit Bridge to the question of port of entry into RSA. He also when completing the B1-1590 form, **stated in his affidavit that he attended only primary school and never high school because of civil war.** However where it says education and highest qualification obtained, nothing is mentioned. The RSDO also wrongly records his highest standard of education as Std 8 contradictory to the averments in his Founding Affidavit where he confesses to lack of secondary education. The RSDO left the following questions unanswered:

[19.1] Why are you applying for asylum?

[19.2] Which measures did you take to solve your problem?

[19.3] If no please give reasons (a follow up to the question "Do you wish to return to your home country "which is answered ("NO")

[19.4] What would happen to you if you are returned to your home country? Upon which the RSDO concludes that his application is unfounded.

Misapplication of s 24 (2) of the Refugees Act

[20] The RSDO contravened s 24 (2) of the Refugee Act which provides that when considering an application for refugee status due regard is to be had to the rights set out in s 33 of our Constitution ensuring that the Applicant fully understand the procedures, his or her rights and responsibilities and the evidence presented, **which is the prerequisite to the making of a decision under s 24 (3) of the Act.**

[21] It is further submitted by the Applicant that the RSDO decision is no decision as is contemplated in s 24 (2) in that it is unlawful, irrational and procedurally unfair in that it

neither contains nor provides reasons imposed under s 33 (2) of the Constitution. In its decision it records that he fled Somali by reason of civil war. The relevant sections 3 is quoted without any linkage of his situation to the section but as a matter of formality without attaching any value or substance to it. In so doing wrongfully negating the rights accruing to him under subsection (a) and (b).

[22] In respect of the RAB, he accuses the Board to have abrogated its duties as it was a forgone decision to it and the RSDO to consistently deny him refugee status. It therefore as such, appears that although RAB had looked at the RSDO decision it shows from its decision that it was unperturbed by the manifested errors contained therein.

[23] **The Applicant also accuses the RAB of noting wrong information during the hearing specifically that, even though its decision states that “The appellant never attended school while he was in his country of origin. He has no educational qualification.” This is not noted anywhere in the RAB hearing notes. He suspects the information might have been sourced from the B1-1590 form which was left blank by the interpreter who assisted him. He denies that the answer came from him as he has attended primary school.**

[24] He also points out that the RAB member’s notes repeat the errors of the RSDO, listing Zimbabwe as one of the countries he transited en route to South Africa. In addition the bulk of the notes speak about his fear for his life due to the civil war in his country which confirms his reluctance to go back as long as civil war continues and desire to go back when peace prevails. They say nothing about his asylum claim. The place for a decision and where it is supposed to be indicated if the member agrees or disagrees with the decision is left blank by the member. This renders the decision of the RAB materially defective indicating an indecisiveness for the purposes of his appeal, he gathers the member did not get the support of the chairman, the 2nd Respondent. The 2nd Respondent’s notes not comprehensive and therefore he concludes that they would not have enabled him to make a decision. He refers to the constant declaration in the 2nd Respondent’s notes that Applicant fled Somalia fearing for his life as a result of civil war in that country. He reckons the RAB member’s notes taken together with the revelation of RAB’s failure to rectify the RSDO’s errors to mean that the RAB’s decision was a foregone conclusion.

[25] Finally he contends that the RAB failed to take into consideration the relevant country of origin information, sourced by itself on the human rights situation in Somali, especially as it relates to the civil war and Al Shabaab’s indiscriminate violence insurgency. It went on to ignore them as it proceeded to rule that his appeal should be dismissed for lack of merit, confirming his allegation that the Board took into consideration irrelevant information and ignored the relevant one.

Answering Affidavit

[26] In response Ms Daphney Kekana (“Kekana”), who, in her capacity as the Refugee Status Determination Officer took the decision which is the subject of review, has filed an Answering Affidavit on behalf of all the Respondents, including the Minister of Home Affairs. It is a strange turn of events since one would have expected the Minister to have wanted to abide by the decision of the court.

[27] In respect of the initial process at TIRRO, Kekana denies that the Applicant was required to pay any money for the interpreter and contends that she conducted the interview with the Applicant in accordance with s 24 of the Refugees Act by requesting information or clarification for purposes of making the decision on his asylum application. The Applicant was afforded an interpreter and an opportunity to state his case where after he was informed of the outcome of his application and his right to appeal to the RAB on the same day. Subsequent thereto he was issued with an extension of his s 22 permit bearing the same date of birth of 5 January 1989 for all those years without any complaint. The date of birth was provided by the Applicant in his application for asylum.

[28] She further indicates that the first appeal hearing was nullified by the fact that the member responsible for the process left the Department of Home Affairs before issuing the decision. **The second hearing was duly conducted in accordance with s 26 (1) (e) and the RAB panel requested the information that they deemed necessary from the Applicant.** The Applicant indicated during the second hearing that he did not require the services of an interpreter or a legal representative.

[29] **In response to the Applicant's allegations that he has consistently based his refugee status claim on s 3 (a) and (b)** the first and second criteria of s 3, Kekana points out that Applicant has indicated that he was able to move to another area in Somalia called Ceelashbiyah after he left his home. Whilst there he was cared for by a neighbour until he started working and had lived there for a considerable period of time. He also does not say why he could not find any other refugee employment in the neighbouring country such as Kenya.

[30] In respect of Applicant's allegations that he qualified under s 3 (a) and 3 (b) having fallen victim to Al Shabaab militants in Ceelashbiyah who did not appreciate his western ways and considering the report about the situation and the human right violations in Somalia, Kekana submits that in relation to that Applicant does not meet the criteria and called upon him to prove that he does.

[31] She also denied that there was misapplication of s 4 (d). She disputes the denial by the Applicant that he did not enter Kenya and Mozambique for the purposes of staying.

[32] Finally he also disputes that there are facts of exceptional circumstances placed before the court by the Applicant that justifies the substitution of the court's decision for that of RAB by granting of refugee status under s 3 (a) and (b) or that proves that it would be a waste of time or unfair to remit the matter back to the RAB due to resignations and delays in appeal hearings since October 2014 and the Board's incompetence.

[33] She submits in regard to the criticism on the manner in which the RSDO handled the matter, that she applied her mind to the facts that were presented by the Applicant with the assistance of an interpreter and found that the grounds upon which the Applicant relied for asylum were manifestly unfounded. The Applicant had alleged in his Founding Affidavit that he left his home village of Mogadishu for Ceelashabiya for a considerable period of time after the alleged atrocities that were allegedly suffered by his family, in total contradiction of the information that he provided during the interview that was conducted by the RSDO during his asylum application in which the Applicant had stated that he left Somalia because of war that was happening at the time.

[34] Kekana contends that the RAB found that the RDSO was correct in her findings that the Applicant's grounds for asylum were manifestly unfounded. There are therefore no allegations that supports the order that is required by the Applicant

[35] The burden of proof, as was correctly argued by the Respondent, is on the asylum seeker to prove (i) an irregularity in the proceedings that validates a review and the setting aside of the decision of the RSDO and its confirmation by the RBA and/or an unfair adjudication of the application, substantively, proving that the administrative process he was subjected to was not fair in that the RAB misapplied the law and thus came to a wrong conclusion. For the further prayers the Applicant is seeking in paragraph 1.3 and 1.4, for substitution of the decision, the establishment of exceptional circumstances for the court to reconsider the matter and substitute its own decision whereupon the Applicant is to show to the court that he qualifies under s 3 (a) and (b) of the Act to be granted asylum or refugee status (showing that he left his country for specifically politically motivated reasons and or that he has a well- founded fear of persecution 'by reason of his or her race, tribe, religion, nationality, politically opinion or membership of a particular social group) and not excluded under 4 (1) (b) of the Act.

Legal framework

Lack of interpreter services

[36] The acute vulnerability of asylum seekers and refugees at the time of their entering the country and application for such status is on the whole common and significant. It is recognised that many will have little knowledge of the law and often face language difficulties. It is therefore important that the official who deals with their application and process is sensitive to that actuality and internal remedies or systems are also in place to ensure that the applicants are protected from suffering any prejudice or being improperly assessed.

[37] In that regard the process is regulated domestically by the provisions of the Refugees Act, the Constitution and by International and Continental Instruments and Treaties to which South Africa is a signatory, namely the 1951 UN Convention relating to the Status of Refugees, 1969 OAU Convention Governing The Specific Aspects of Refugee Problems in Africa and 1967 Protocol relating to the Status of Refugees, the 1993 Basic Agreement between the Government of South Africa and the UNHCR and the Immigration Act.

[38] Our constitution commit to a culture of protection and respect of human rights of all people, especially the vulnerable, weak, citizens, non- citizens and the worst amongst us. In *Minister of Home Affairs and Others v Watchenuka and another* 2004 (4) SA 326 (SCA) (2004 (2) BCLR 120; [2003] ZASCA 142) at 330B it was recognised that:

'Human dignity has no nationality. It is inherent in all people-citizens and non-citizens alike- simply because they are human. And while that person happens to be in this country-for whatever reason- must be respected, and is protected, by s 10 of the Bill of Rights.'

[39] The relevant provisions of the Refugees Act that guides the manner in which the asylum seekers application process is to be handled or treated to safeguard their rights are encompassed in s 23 and 24 of the Act. Section 23 reads:

- (1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.
- (2) The Refugee Reception Officer concerned-
 - (a) must accept the application form from the Applicant;
 - (b) **must see to it that the application form is properly completed, and where necessary, must assist the Applicant in this regard;**
 - (c) **may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and**
 - (d) must submit any application received by him or her, together with any information relating to the Applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of s 24. (my emphasis)

[40] Section 24 of the Act reads:

- (1) Upon receipt of an application for asylum the Refugees 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 Office;
 - (b)...., (c)....,
- (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;
 - (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 5 working days after the date of the rejection or the referral;

[41] The requirement that the RRO and RSDO see to it that the Application is properly completed and that the **Applicant fully understands the procedures, his or her rights and**

responsibilities and the evidence presented, and where necessary help the Applicant, includes providing the asylum seeker with adequate interpretation services; *FM v Minister of Home Affairs* 2014 JDR 1732 (GP) at p102; *Tshiyombo v Members of the Refugees Appeal Board and Others* (13131/2015) ZAWCHC 190 (17 December 2015). In complying with the provisions of section 24 of the Act, the RSDO will conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and **ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented**; see Regulation 10 (1). Regulations 4 and 5 of the Regulations pursuant to the Act provide, inter alia, that a refugee reception officer must ensure that an Applicant is provided with adequate interpretation and, "where this is not practicable", that the Applicant can be required to provide his own interpretation, but must be given at least seven (7) days advance notice that he or she is required to bring an interpreter to the interview. In essence the RRO and RSDO have to ensure that the Applicant complies with all the requirements so that the process can result in a fair adjudication of the application.

[42] In terms of Regulation 5 where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process. In cases where sub-regulation 5(2) applies which is when it is not practicable for the Department of Home Affairs to provide an interpreter and interpretation is needed, the Applicant will be required to provide an interpreter whereupon he would be given the seven (7) days advance notice that he is required to bring an interpreter to the interview before the RRO or RSDO.

[43] The obligation also extends to the RAB. It furthermore may in terms of s 26 (3) before reaching a decision:

- (3) (a) invite the UNHCR representative to make oral or written representation;
- (b) ...;
- (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 enquiry;
- (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 Appellant.

[44] It is apparent that where there is a language difficulty at a hearing before a body such as either the RSDO or RAB, to the extent that the Applicant **does not fully understand the proceedings or he is not properly understood, such a hearing cannot be said to be fair**. In *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191; 2008 (1) SA 232 (T), the court noted, on the basis of s 12 (3) of the Act, that the RAB must function without bias and be independent. Not only is it required to be impartial in its decision making, but its process fair and transparent in addition it must be structurally independent.

[45] It is therefore very clear that any failure to comply with the procedural obligations is liable to subvert the proper administration of the Act and therefore of paramount importance that the scripts of the law are firmly followed. In *casu*, Mr Letsebe argued that not affording the Applicant an interpreter during the proceedings amounted to an irregularity that justifies a review of the proceedings. As a result Applicant argues that the RAB's failure to deal with and remedy the RSDO's flaws constitutes a violation of its statutory duties as an appellate body under the Refugees Act. The flaws also combined with its own flaws constitute a violation of his rights to procedural fairness in the determination of his asylum claim; see *Bolanga v Refugee Status Determination Officer and Others* 5027/2012, South Africa: High Court, 24 February 2015.

[46] During the RAB hearing the Applicant was without an interpreter or a legal representative and the same consideration being applicable to the situation at the reception office at TIRRO where Applicant alleges not to have been provided with interpretation services for the purposes of completing the form and conducting the RSDO interview and had relied on a volunteer.

[47] However it is common cause that at TIRRO and before the RSDO the Applicant did get the assistance of an interpreter except for a disagreement on whether the interpreter's services were volunteered or at the behest of TIRRO. Applicant alleges that since he could not speak English there was a challenge of a language barrier. According to the B1-5197 form, it was completed by the Applicant with the assistance of an interpreter, whose name was Abdi Hamid, a Somalian with O levels education. Although the Applicant's education was left blank in the B1-5197 form, he had in his Affidavit indicated to have been educated at a private primary school, and was only unable to attend high school. The RSDO recorded his response to a question about his highest qualification in education to be a Standard 8. The challenge of a language barrier was therefore not real when he and the interpreter could speak the same language and his understanding of English of a moderate or fair standard. Applicant also signed to confirm that he has submitted the information and attested to its truthfulness and correctness. He therefore would not have been prejudiced by the assistance he received from the interpreter whose purpose was actually nothing other than to assist him and make sure that he understood what information was required in order to properly comply with the process for due assessment. **He was also able to raise issue regarding the incorrect age recorded in the form and deny that he said his family fled to a rural area as is reflected on the RAB (RSDO) decision.** I will revert to this denial later in the judgment.

[48] The Applicant also attended two RAB Appeal Hearings, the first having been aborted due to the resignation of the Chairperson. However at the first appeal hearing the Applicant attended and made a personal call to not only have his own interpreter available but also a legal representative, who certainly must have taken him through the process and assisted him to also file the Affidavit in support of the Appeal and the Condonation Application. The same Affidavit dated 23 January 2013 was filed in support of the Condonation Application in terms of Rule 6 of the Refugee Appeal Board Rules, he also made in the second hearing on 12 February 2014. In addition, in the Notice of Appeal Hearing of the first and second hearing, he was advised of his right to bring a competent interpreter if he is not able to speak English and a legal representative. The use of legal services as well as the interpreter services at the Appeal hearing is a personal choice; see s 24 (4) and Regulation 5. Unlike what he did at the

first hearing, Applicant exercised his right not to bring either a legal representative or an interpreter at the second hearing. In consideration of his level of education, and the fact that he was aware of the choices he had, having been notified and exercised them before, going through the same proceedings for the second time, the Applicant could not have been expected to be compromised by exercising his personal choice not to have an interpreter or legal representative present, which he was entitled to do.

[49] As a result the RAB's continuation with the appeal hearing in the absence of an interpreter or legal representation as per choice of the Applicant did not result in an irregular or a procedurally unfair proceedings nor did it result in the violation of his rights as safeguarded by the Constitution.

Legal context on Refugees /Asylum seekers

[50] The legal framework within which the Application is to be considered is within the provisions of Section 3 of the Act that reads:

A person qualifies for refugee status for the purposes of the 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 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 of the whole of his or her country 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.**

[51] The purpose for the provisions of s 3 of the Act is to protect foreign nationals who are in South Africa and cannot return to their home countries for fear of persecution on the basis of grounds stated therein. Section 3 must be read with s 2, which contains a general prohibition against the return of a person to any country where life, physical safety or freedom will be threatened.

[52] Both provisions to be construed **generously in favour of persons seeking to qualify for asylum**. The Refugee Act is essentially a means preventing the sending back of an individual to a state in which a risk of persecution on political grounds or opinion exists. This is evidenced by the Act's title and preamble that provides that:

'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 and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide formatters connected therewith'.

[53] The preamble further records that South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, **assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law**'. As noted in *Radjabu* supra, at para 4, s 2 of the Act is manifestly premised on the expressions of the non-refoulment principle in Article 33 of the 1951 Convention and the 1969 OAU Convention

[54]. Section 6 (1) of the Act expressly enjoins that the statute be interpreted and applied with due regard to various international instruments including the 1951 Convention and 1969 OAU Convention.

Allegation of misapplication of the Law

The burden of proof

[55] Regulation 11 provides that:

(1) The applicant bears the burden of proof to establish that he or she is a refugee as defined in section 3 of the Act and is not excluded from refugee status pursuant to section 4 of the Act.

(2) In the absence of documentary evidence, **an applicant's credible testimony**, in consideration of conditions in the country of feared persecution or harm, **may suffice to establish eligibility for refugee status**. However, the Refugee Status Determination Officer may request the applicant to provide documentation, where available.'(my emphasis)

[56] The Applicant has contended that the manner in which the RAB applied the burden of proof was incorrect, which is as stated in paragraph 8 of the RAB decision that **"the Applicant is to show that he is entitled to refugee status, and that the standard of proof is that of a reasonable possibility of risk."** It is said to be inconsistent with the test applied when determining the strength of the person's refugee claim as provided for in the **UNHCR Handbook on Procedures and Criteria** for determining refugees status. The Applicant submitted that the **UNHCR Handbook enjoins the adjudicator to meet the asylum seeker halfway, and assist with the resources at its disposal in proving the asylum seeker's claim.**

[57] The Applicant argued that RAB's approach on the application of the test for proving refugee status in the manner described by it in paragraph 8 overlooks the role that the RAB itself should play in evidence gathering to assist the Applicant in proving his case, to that extent, the RAB failed in its duty.

[58] Taking into consideration the provisions of Regulation 11 (1) that an asylum seeker bears the burden of proof for purposes of establishing that he is a refugee as defined by the Act, Murphy J held in *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191; 2008 (1) SA 232 (T), [97] that: 'this does not require an Applicant for asylum to prove a real risk of

persecution on a balance of probabilities. **The appropriate standard is one of a reasonable possibility of persecution’.** Which is the same approach that was considered by the RAB except that it referred to ‘a reasonable possibility of risk’ which I regard to be even more accommodative. Murphy J at para 196-197, gave the following summary, premised on the guidelines in the UNHCR Handbook, of the manner in which the Appeal Board should proceed:

“196. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the Applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”

[59] The statement was made in consideration of the fact that in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. As a result an allowance to be made for the difficulties that an expatriate applicant may have to produce proof and recognising the duty of an examiner to himself gather evidence. However if all fails the determining factor being the credibility of the information. Murphy J therefore went further in recognising such an instance that, in terms of the handbook:

“197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the Applicant.”

[60] The power of the RAB as an Appellate Body is indeed as described by Murphy J in *Tantoush* at [19] wherein he states that:

“As already explained, because of 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.

Evaluation

[61] In the appeal hearing, the Applicant was asked questions by the RAB on information they deemed necessary. Applicant had on his own as per the onus he bore initially furnished the following information in his B1-1579 form as reasons why he was seeking asylum in South Africa, that “he fears for his life that is in danger as the interim Government and warlords are fighting in the country. The place he lives in Somalia was Southern Somalia where the war was serious as a result he decided to leave the country.” He had indicated during the RSDO interview that “He fled because of the civil war whereupon his place was destroyed and he had no place to go. His parents are living in the rural arrears and he cannot go there because life is too difficult there. He also indicated that he left Somalia on 03 October 2009 and

entered South Africa on 2 December 2009, entering through the Beit Bridge border. In the B1- 1579 form he indicated to have transited through 5 countries, having spent 5 days in Kenya, 1 day in Tanzania, 1 day in Malawi, 5 days in Mozambique and 1 day in Zimbabwe which is only a total of 13 days, leaving one (1) month and 17 days unaccounted for. He also could not submit a passport/travel document and or identity document. The RAB adopted the same approach as is maintained by Murphy J in *Tantoush* asking questions to seek clarification from the Applicant in the absence of any documents to prove the Applicant's account of events that he claims entitles him asylum.

[62] It is imperative to take into account what is advocated by the UNHCR Handbook sensibly, which implores the RAB to make its own enquiries and gather more information in order for a proper assessment to be made **but not for a decision to be made on skimpy information**. Also that unsubstantiated statements that are inconsistent with the general account by the Applicant are not to be accepted as true. The Applicant's argument that on the basis of his claim that is recorded by the RSDO 'that he fled because of civil war' the RSDO should have found that to be a ground for refugee status or for granting him asylum on s 3 (b) is misguided. It would have resulted in a decision that is made on skimpy information. It therefore had to be probed then assessed.

[63] It was therefore appropriate for the RAB to have made more enquiries from the Applicant to give him an opportunity to expatiate on the statements and the reports which he has referred to so that his claim can be properly assessed. It is unfortunate that it is from these enquiries that it became apparent that the Applicant's statements were inconsistent and had also a period of his sojourn in other countries that is unexplainable. He rather blames such inconsistencies and gabs on the interpreter who translated for him at RSDO: TIRRO, which blame has been shown to have no merit. On the basis of insufficient, inconsistent and incongruent information supplied by the Applicant which can only be proven by him, the RAB was correct in its assessment and finding that the Applicant has not discharged the burden of proof that was on him to show that he is affected in terms of s 3 (a) or 3 (b), or that there was a reasonable possibility of persecution if he is returned.

[64] Furthermore, on further enquiry Applicant's story that he had fled his home country because of the civil war that was raging at the time gained a different dimension. The facts changed to indicate that the real issue was a fallout with Al Shabaab due to his way of living which was in the western way, listening to Tupac music, playing soccer and his refusal to go to the mosque upon which Al-Shabaab warned him not to do it otherwise he would be killed or attacked. He had stayed on that part of the country in Ceelashabiyah for a long period of time having arrived from Mogadishu as a boy, being looked after by a neighbour and grown up to a young man, gaining employment for some time with no disturbance of a war. He was there for a period of 3 years. There was also never a personal attack on him or complaint of an insurgence in the area at the time he decided to leave the Ceelashabiyah, bar being influenced by his friend. The RAB also considered that he chose not to live in other parts of the country such as Kismayo where his origin is strongly rooted.

[65] His claim that he fled due to a civil war that was taking place was therefore deemed by the RSDO to be unfounded, and that he has not discharged the burden of proof as he was unable to show a reasonable possibility of risk, which was a fair assessment of his claim. His claim could not have been said to conform to the provisions of s 3 (a) or (b) in that there was

no facts that indicate a well-founded fear of personal persecution or if owing to external aggression he had any apprehension of danger. In *Bolanga* at para 34 the court held that the test is not whether the risk is imminent but whether it is real. The Applicant as indicated was also unable to account for the other times of his travels and stay in some other parts of Somalia. He had not complained of any war waged or about a volatile situation in those parts of his home country. He also insisted on the fact that he had remained in transit in the boat or ship when they stopped in the other countries they travelled through. On the other hand he had alleged to the RAB to have stayed in Kenya for a period of nearly a month. Whilst he had also furnished information in his Affidavit that he remained in transit in Kenya for only 12 hours. He also stayed in Mozambique for some days without any threats of persecution on his life, both countries being stable.

[66] As a result the allegation that there was a misapplication of the burden and standard of proof by the RAB which has led to it coming to a wrong conclusion that Applicant has failed to discharge the burden that rested on him is inaccurate. The Applicant has failed to submit any evidence of persecutory circumstances, that is the prospective of torture, as is defined in s 3 (a) of the Act as well, even at the time when he left the country. The finding that the Application is unfounded means that it does not pass muster for the granting of asylum to the Applicant having failed to discharge the burden of proof. It is obvious that the decision was based on the credibility of Applicant's account, thus a reference to "Credibility."

Misapplication of s 4 (d) of the Refugees Act

[67] The Applicant denies that he stayed in Kenya and Mozambique during his transit but allege to have used the two countries as his travel routes to South Africa. He argued that a wrong inference was drawn by the RAB that he was unqualified to gain refugee status for the reason that he took residence in these countries where he enjoyed protection. Further that he left Kenya because of unbearable living conditions which is misplaced and unsupported by facts. He argues that the RAB, as a result of this flaw misapplied the provisions of s 4 (d) in an attempt to discredit him as an eligible candidate for recognition as a refugee as he already enjoyed protection of Kenya or Mozambique. He however without tendering an explanation of what had really happened submits that he is entitled to be and to remain in South Africa as dictated by the Refugees Act that gives effect to South Africa's Constitutional and International Law Obligations towards asylum seekers and refugees.

[68] Section 4 is an exclusionary clause, constituting of grounds that disqualifies a person from being awarded refugee status. Only the provisions of s 4 (1) (d) are relevant to the Applicant's circumstances. It reads:

"A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-

(a) to (c)...,

(d) enjoys the protection of any other country in which she or he has taken residence

[69] As already indicated that the Applicant has after he left Somalia been resident in Kenya for a period of nearly a month, a version he gave to the ARB. He now disputes such a fact, however has failed to furnish an explanation of where he was during that period of nearly

a month, only accounting for the 13 days of his alleged travelling prior to reaching South Africa. Information that he has brought to hand before the ARB indicate that he travelled through Kenya and Mozambique, two countries that are stable. He was resident in Kenya for some time where his life was not allegedly threatened. In his Founding Affidavit he has failed to give a satisfactory explanation of his activities during that period. He alleged to have been in transit for 12 hours in Kenya en route to South Africa and never to have left the boat until they left Kenya. He advised the RAB that he did not want to stay in these two countries as he felt there was no democracy. He went to Kenya where he stayed for a month and nothing happened to him. He kept on reiterating to the RAB that he did not have an interpreter at the RSDO (even though he did), probably to explain the lacuna in his evidence that was inconsistent with the information in his B1 -1590 form and to the RSDO. He has already conceded that there was an interpreter at TIRRO of Somalian origin and he has also denied that he is uneducated and insisted that he had a private primary school education. He therefore cannot attribute the discrepancy to not having an interpreter or lack of education. He also did not insist in having an interpreter present or legal representative at the RAB hearing like at his first appeal hearing. The information regarding Kenya was correctly enquired upon, considered in the assessment of his claim to see if he is not excluded by the fact that he had remained in a country for a month that is stable and with no threat of persecution but decided to follow his friend to South Africa. At that point coming to South Africa was not due to persecution or fear of persecution.

[70] He has indicated that his was a pursuit for a better life and would not return to Somalia as he fears for his life. Under such circumstances the RAB was correct in considering that what he has mentioned as to make him fear for his life does not amount to a justified ground to create a well-founded fear of persecution, ie, that endangers his life or freedom, but motivated more by a pursuit for a better life, since even when he lived in a stable country with no threat to his life or of insurgence he decided to still move to South Africa for a better life, which information could not have been overlooked by the RAB in a fair assessment of the whole evidence. The Applicant required the RAB to only concentrate on the fact that he mentioned 'fearing for his life due to a civil war in his country' in order to find that he is a refugee to be granted asylum. That is regrettably contrary to what is advocated in Bohang that the Applicant's fear and risk should not only be imminent but be real. It was appropriate for the RAB to determine whether Applicant's fear was real. The RAB could not have sought more information from the UNHCR. Applicant was there and had, himself supplied the information required about his residence and travels. He did not have any documentation, The exchange as recorded does not indicate a misunderstanding.

[71] He has also indicated to have stayed in Zimbabwe although he now denies ever been in that country. The information was furnished to the RSDO. The consideration of that information to determine the Applicant's exclusion would be fair under the circumstances.

Misapplication of s 3 (a) and failure to apply s 3(b)

[72] It was argued by Mr Lebetso that Applicant's desire for asylum stems from both s 3 (a) and (b) that is from individualised persecution and the generalised conflict in his home country. Personalised as he has become a target due to Al Shabaab having bombed and killed his other family members and years later when they accused him of being pro- Western in his conduct. Under generalised conflict, when the security situation in Somalia where both Al

Shabaab and the OAU military forces operated, made it unsafe for him to remain in the country without the risk of losing his life. The latter situation was overlooked by the RAB who only concentrated on the personal persecution.

[73] Under the 1951 United Nations Convention, a refugee can be a “convention refugee” who has left his home country and has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or a membership in a particular group. Under the same convention a refugee can also be a person “in need of protection” whose removal to his home country would subject him personally to a danger of torture or to a risk to his life or a risk of cruel and unusual treatment or punishment. **However convention refugees and persons in need of protection based on a risk of life, or a cruel and unusual treatment must have faced personally the risk all the way through in the country in question.**

[74] In respect of determination by the RAB if the Applicant conforms to the generalised conflict situation, Ms Rantho argued that when an asylum seeker is shown to have true access to internal protection inside his or her own country, refugee status need not be recognised, which is an internationally recognised practice. She indicated that, that is what was considered by the RAB. He referred to the writing by James C Hathaway and Michelle Foster on “Internal Protection/ Relocation /Flight Alternative as an aspect of Refugee Status.

[75] The Applicant has indicated that he has elected not to stay in other parts of Somaliyo like Kismayo where his origin is strongly rooted and elected to come to South Africa on an influence by a friend. The Applicant did not face personal persecution all the way through in his home country. He indicates that he left Ceelashabiyah weeks after the alleged once off threat from Al-Shabaab about his playing soccer and listening to Tupac music. It did not come in the midst of war. He decided to join Abdurahman to Kismayo. The place is closer to the Kenyan border. He did not speak of conflict or facing any personal risk when he was there, but that whilst they were there Abdurahman told him he wanted to travel to South Africa. He resolved to travel with Abdurahman, not compelled by any volatility in that part of Somalia where they spent a week. Such circumstances were correctly taken into consideration by the ARB when it arrived at a decision that Applicant had not shown a well- founded fear that resides under s 3 (b) to be granted asylum.

[76] From the decision it is also obvious that his other reason for fearing for his life was as completed in his B1-1579 form which is just ‘fearing for his life which is in danger. Further that the interim government and Al Shabaab are fighting in the country. The place he lived in Somalia was Southern Somalia where there was serious war. His parents had to relocate to a rural area where life is unbearable, he as a result decided to live the country. He therefore came to South Africa. It was rejected as unfounded pointing out at the inconsistencies. The reports attached refer to death by starvation due to aids that has been blocked. The UN declared the famine to have ended in 2012.

[77] There is also no basis for the argument by the Applicant that ARB ignored the reports on the situation in Somalia at the time of his application when he had stated that there was war in Somalia. To the RAB, he in his affidavit dated 23 January 2013 alleged that he fled his home country with his family after his grandfather, uncle and brother were killed and his mother brutally assaulted in front of his eyes. They managed to escape by the grace of god and proceeded to South Africa as their destiny of protection. The RAB had to consider all the accounts that have been given by the Applicant so far including the relevant reports on

Somalia to establish if the alleged external or internal aggression would have been a cause for a well- founded fear under s 3 (b). The Applicant was subjected to a fair process procedurally and substantively and therefore there is no cause for the decision to be reviewed or to set aside the decision of the RSDO and RAB as sought by the Applicant.

[78] The court is aware that in certain cases where there are apparent inconsistencies in the statements provided by the Applicant, the practice is rather to remit the matter to the RAB for further consideration and investigation. However the inconsistencies and incongruences on his account of events devalues its credibility, since it is also not capable of verification due to the fact that he lacks any authenticated documentation and his alleged mode of travel was unconventional. Any further investigation would serve no purpose.

Misapplication of s 24 (2) of the Refugees Act

[79] The RSDO contravened s 24 (2) of the Refugee Act which provides that when considering an application for refugee status due regard is to be had to the rights set out in s 33 of our Constitution ensuring that the Applicant fully understand the procedures, his or her rights and responsibilities and the evidence presented, which is the prerequisite to the making of a decision under s 24 (3) of the Act.

[80] It is further submitted by the Applicant that the RSDO decision is no decision as is contemplated in s 24 (2) in that it is unlawful, irrational and procedurally unfair in that it neither contains nor provides reasons imposed under s 33 (2) of the Constitution. In its decision it records that he fled Somali by reason of civil war. The relevant sections 3 is quoted without any linkage of his situation to the section but as a matter of formality without attaching any value or substance to it. In so doing wrongfully negating the rights accruing to him under subsection (a) and (b).

[81] The Applicant's contention in this regard is similar to the contention he raised on the procedural fairness of the RAB and the RSDO processes. The fact that the Applicant had access to the services of an interpreter who was from the same home country and with 0 level qualifications rules out that the Applicant might have been subjected to a process that he could not understand and therefore his rights compromised.

[82] The RSDO furnished the Applicant with a decision in writing. The reasons, albeit very brief, formed part of the decision. The RSDO also referred to Credibility as well. The reasons may not be lengthy or be accepted by the Applicant however they dealt with other information that was considered, including incidents of safety and that there is no war.

Violation of the principle of non- refoulment

[83] At the heart of the Refugee law is the principle of non-refoulment (non-return). Section 2 of the Act establishes a general prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances. It reads:

2. Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or turned to any other country or be subject to any similar measure, if as a result of such refusal,

expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

[84] Applicant has argued that the RSDO and later RAB's decision has the effect that he will, if not rescued by the intervention of this honourable court, eventually face the expulsion from this country or deportation to Somalia. He is advised that if expelled or deported, South Africa would have violated his human rights under the Refugees Act, the Constitution and International Law, **for his re-entry into Somalia has the potential that he will suffer physical harm or even death.**

[85] In *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9 Madlanga J captured the essence of the principle of non-refoulement when he stated that 'This is not about non return for the sake of it; it is about not returning asylum seekers to the very ill-recognised as basis for seeking asylum- that were the reason for their escape from their countries of origin.' Having given consideration to the grounds that Applicant submitted to the RSDO and RAB for having left Somalia and his sojourning in the neighbouring Kenya, and ultimately arriving in South Africa and what has motivated his final move to this country, there is nothing that has been placed before the two bodies that indicates real threat to his life, physical safety or freedom at his home country. He has been found to have relied on general instability that he alleged was prevailing.

[86] The non-refoulment principle has been found by the European Court of Human Rights in a *Hirsi Jamaa* unanimous Judgment, to not admit any reservations, with Judge Pinto de Albuquerque highlighting the principle's peremptory nature by stating that:

"When there is risk of serious harm as a result of foreign aggression, internal armed conflict, extrajudicial death, forced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, or trial based on a retroactive penal law or on evidence gathered by torture or inhuman and degrading treatment in the receiving State, the obligation of *non-refoulement* is an absolute obligation."

[87] This indicates how serious the issue of non refoulement is viewed by the courts and therefore reliance on a general report on the historical situation of a country which does not refer to real and imminent danger to the asylum seeker as submitted by Mr Lebetso, is not what was envisaged by s 2. The RAB had to establish if there was a factual likelihood that Appellant will face persecution if he goes back to Somalia. Considering the Applicant's account and claim, understandably, the RAB could not reach such a conclusion. There might be hardship in acclimatising but no war reported or possibility of reasonable risk that the

Applicant will be exposed to the atrocities referred to in s 2 if he is to return to his home country.

[88] Under the circumstances the following order is made:

THE ORDER

1. The Application is dismissed with no order as to costs.


N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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