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

Case no.: 21762/2024

N[...] R[...]

First Applicant

N[...] R[...]

Second Applicant

M[...] R[...] (minor)

Third Applicant

And

DIRECTOR GENERAL: HOME AFFAIRS

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

Coram: Pangarker J

Hearing date: 23 April 2025

Judgment date: 5 May 2025

JUDGMENT

PANGARKER J

Introduction

[1] This judgment addresses the duty of an applicant to first exhaust internal remedies before approaching a Court seeking the review of an administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The first and second applicants (the applicants) are Ukrainian nationals and are married to each other. The third applicant is their minor child, and it is common cause that the applicants entered South Africa legally on three-month tourist visas in September 2021. While in South Africa, Russia invaded the Ukraine, leading to a war between these two countries, which it is common cause, is still ongoing. The applicants consequently applied for asylum in South Africa, seeking refugee status, but their applications were rejected.

Common cause facts

[2] The applicants are currently holders of asylum seeker temporary visas issued in September 2024. Preceding the issuing of these temporary visas, each of the applicants were interviewed individually by Refugee Status Determination Officers (RSDOs) at the Refugee Reception Office in Epping in lieu of their applications for asylum. The outcome of the applications for refugee status/asylum was that they were rejected as unfounded in terms of section 24(3)(c) of the Refugees Act 130 of 1998 (the Act).

[3] The RSDOs decisions are attached to the first applicant's founding affidavit as annexure NR4. Shortly after the refusal of the asylum applications and in October 2024, the applicants appealed the decisions of the RSDOs and it is common cause that these appeals are still pending before the Appeals Board Authority (AB) and have thus not been finalized yet.

Condonation and the review applications

[4] On 9 October 2024, the applicants duly represented, delivered their Notice of Motion, seeking the following relief:

- 1. To seek exemption from the First and Second Applicants' having to exhaust internal remedies in terms of section 7(2)(c) of Promotion of Administrative Justice Act 3 of 2000 ("PAJA");**
- 2. To review and set aside the decision taken by the Refugee Status Determination Officers ("the RSDO decisions"), in relation to both First and Second Applicants' applications for asylum in terms of section 22 of the Refugees Act 108 of 1998, as amended ("the RA");**
- 3. Upon setting aside the RSDO decisions, to seek that the decisions are remitted for reconsideration, de novo, to a new RSDO, or directly to the First Respondent, or alternatively, the Second Respondent, with direction, in terms of 8(1)(c)(i) of PAJA, with a view to finalising First and Second Applicants' applications for asylum in terms of the RA;**
- 4. Directing the Respondents to pay the costs of this application in the event of its opposition.**
- 5. Further and/or alternative relief."**

[5] The matter came before Parker AJ in Third Division on 12 November 2024 who granted an order postponing the application for hearing to the semi-urgent roll. In addition to the postponement, Parker AJ also ordered that the Rule 53 record was to be filed by the respondents on or before 26 November 2024, and *inter alia*, the respondents were required to file their answering affidavits by 7 February 2025.

[6] The respondents failed to comply with the time-period provided for in Rule 53 and additionally, failed to file their answering affidavit in accordance with the timeline ordered by Parker AJ. They consequently applied for condonation formally and

motivated their reasons for the delay and non-compliance. Initially, it seemed that the applicants intended to oppose the condonation application but a day before the postponed hearing, the applicants attorney advised in a supplementary note, that condonation was not opposed.

[7] Suffice to mention that on the hearing date, the respondents' counsel made submissions regarding condonation and after considering the matter, the reasons for delay and non-compliance, I was satisfied that the explanation was sufficiently full and reasonable to enable me to determine how the delay and non-compliance came about, that good cause was shown for the granting of condonation and that no prejudice resulted in the delay, particularly as the applicants had delivered a reply to the answering affidavit. In the result, condonation was granted in respect of the delayed delivery of the Rule 53 record and answering affidavit.

The RSDOs reasons for rejecting the asylum applications

[8] Aside from recording the applicants' different personal circumstances, the RSDOs decisions (or refusal letters, as described by the applicants)¹, are identical in every way. To understand this in context, it is necessary to summarise the content of these documents. The first applicant was interviewed by RSDO Mbulelo Nxeleba and the second applicant was interviewed by Shadrack Diamond on 29 July 2024.

[9] The officers' decisions indicate that the first applicant was born in Kyiv and the second applicant was born in Donetsk. Both resided in Kyiv at the time they left the Ukraine in 2021 to visit South Africa as tourists. The RSDOs refer to sections 2 and 3 of the Act² which state the following:

2. General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

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

¹ NR4

² Reference to amendments in the legislation is excluded

returned 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 public order in any part or the whole of that country.*

3. Refugee status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

- (a) *owing to a well-founded fear of being persecuted by reason of his or her race, gender, 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 other events seriously disturbing 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 in another place outside his or her country of origin or nationality*³; or

³ My emphasis

(c) *is a spouse or dependant of a person contemplated in paragraph (a) or (b).*

[10] Under the heading Burden of Proof in NR4⁴, the RSDOs record that the burden of proof is on the person submitting a claim⁵ and that the standard of proof is a reasonable possibility of persecution which must be considered in light of all circumstances, for example, past persecution and forward-looking appraisal of risk which means a reasonable possibility of persecution. Neither of the applicants belonged to any organisations in the Ukraine, nor were they ever arrested. No entry was made under the heading Credibility.

[11] The RSDOs recognize that the applicants base their applications on section 3(b) of the Act, and they indicate that the question for determination is whether the applicants will be safe if they return to the Ukraine. They also recognize that the applicants' express fears that should they return to the Ukraine, they may be harmed or killed because of the war with Russia.

[12] The RSDOs then proceed to quote extracts detailing the status of the aggression between Russia and Ukraine by referencing certain media outlets, broadcasters, press reports and more, such as The Wall Street Journal, NBC News, CNBC News, The Institute for the Study of War, The New York Times, Geoff Bennett, Amna Nawaz and Nick Schiffrin⁶. Objectively viewed, the tone of these reports and undated media extracts indicates and/or implies that the Ukrainian forces were gaining the upper hand in the war against Russia. For example, Nick Schiffrin's report states that:

⁴ NR4

⁵ The RSDOs refer to the United Nations High Commissioner for Refugees (UNHCR) Handbook on procedures and criteria for determining refugee status, p47, par 196. I make no finding on the correctness or otherwise of the reference to the UNHCR Handbook

⁶ My independent research indicates that Amna Nawaz and Geoff Bennett are broadcasters and co-anchors on the American PBS NewsHour, while Nick Schiffrin is an American journalist and PBS NewsHour's foreign affairs and defense correspondent – see <https://www.pbs.org>

“In year three of Russia’s full-scale invasion of Ukraine, Kyiv has, over the last week, flipped the script on Moscow with an audacious incursion into southern Russia, catching Moscow by surprise and sowing chaos”⁷.

[13] The further reports, as referenced by the RSDOs, indicate that Russia extracted troops from the Ukraine to deal with a Ukrainian incursion. Following on the lengthy reference to these press reports, the RSDOs then reach the following conclusion in the asylum applications:

“Country origin suggest (sic) that Russian forces are beginning withdrawing (sic) some troops from Ukraine.

In light of the above the (sic) she won’t face harm in terms of section 3(b) of the Act.”⁸

[14] The remainder of the RSDOs decisions refer to the appeal process in terms of section 26(1) of the Act. As indicated above, except for a reference to the applicants’ personal circumstances, the RSDOs decisions, issued on different dates, are identical, even in respect of the grammatical and typographical errors contained therein.

The applicants’ case for review

[15] The applicants seek a review and setting aside of the decisions taken by the RSDOs in relation to their applications for asylum brought in terms of section 22 of the Act. Furthermore, they seek to be exempted from having to exhaust internal remedies first in terms of section 7(2)(c) of PAJA.

[16] The applicants also request that upon setting aside these decisions, the Court is to remit for reconsideration, the decisions *de novo* to a new RSDO or directly to the first respondent, alternatively, the second respondent with directions in terms of section 8 of PAJA with a view to finalising the asylum applications. It is accepted that

⁷ NR4

⁸ NR4

in terms of section 8(2) of the Act, the determination of refugee status falls under the authority of the RSDO, who is appointed by the first respondent.

[17] The application is based on the RSDOs refusal letters or decisions, as referred to above. The applicants complain that the reasoning behind these decisions is non-sensical, lacks objective intelligibility and is unfathomable. They clarify that they do not understand the decisions and indicate that they were obligated to appeal, failing which they would have had no status in the country and been considered as illegal foreigners. The applicants state that a failure to appeal within the ten days allowed following receipt of the RSDO decisions would have resulted in their possible detention and deportation, and thus, the appeal has provided them with temporary status in this country.

[18] The applicants take issue that the decisions of the RSDOs are identical in that the one officer copied the decision of the other, resulting in conduct which is highly irregular in the circumstances. The further issue taken is that these officials rely on reports from random media outlets and broadcasters rather than the United Nations High Commissioner for Refugees' (UNHCR) country conditions and hence conclude (with reference to these media reports) that the tide has turned in the Russia-Ukraine war and that Russia was on the back foot, a conclusion which the applicants vehemently deny.

[19] Their appeals against the rejection of the asylum applications are attached to the founding affidavit⁹ and it is evident that the applicants were assisted by the same legal representatives who currently represent them in this matter. There is no need to detail the content of the appeal except to refer to a few pertinent facts such as that the applicants resided in Kyiv prior to visiting South Africa, and that they emphasised the constant danger and threat to life in the Ukraine while the war is raging.

[20] Thus, they say, their return to the Ukraine (specifically Kyiv) was not possible as at the time airports were closed and the only entry into the country was through outlying countries such as Poland via train. More specifically, the applicants contend

⁹ NR5

that Kyiv was not exempt from attacks and loss of life with the first attacks occurring in February 2022. In support of their appeals, they indicate that they have started a family and purchased a residential property in Cape Town.

[21] The applicants express their amazement and shock at the conclusion which the RSDOs reach in their asylum applications, namely that the Ukraine has/had gained the advantage in the war and thus the applicants would not be harmed if they returned to their country of origin. The applicants contend that notwithstanding the appeal, they reserved their rights to review the officers' decisions, hence approaching this Court with the current review application in terms of section 6 of PAJA.

The respondents' defences and applicants' reply

[22] The respondents raise a point *in limine* of non-joinder of and failure to cite the Appeals Board (AB) in the review. Secondly, and perhaps more significantly, the respondents attack the review on the basis that the applicants are obliged or have a duty to exhaust internal remedies in terms of section 7(2)(a) of PAJA. They take further issue that in respect of their exemption application in terms of section 7(2)(c), the applicants fail to show exceptional circumstances and that it is in the interests of justice that they be exempted from first exhausting internal remedies before approaching this Court with a review.

[23] The respondents do not address the merits of the review as they hold the view and indeed submitted, that the technical points taken, if ruled in their favour, would be dispositive of the application. In my view, the main determination in this matter relates to the duty and obligation in terms of section 7(2)(a) of PAJA to exhaust internal remedies and the exemption application. I agree with the respondents' counsel's submission that these issues are dispositive of the review application.

[24] The respondents' case is that the applicants failed to comply with section 7(2)(a) of PAJA, and with reference to section 7(2)(c), that no exceptional circumstances are shown which warrant the granting of an exemption from the

obligation to exhaust the internal remedies nor do they show that the interests of justice favour the granting of such exemption.

[25] Insofar as the issue related to non-joinder of the Appeal Board is concerned, the applicants view is that the Appeals Board RAA has no place in the review because the RSDO decision-making was not objectively intelligible. They also hold the view that the Appeal Board “*would not even bother with our appeals*”¹⁰. Furthermore, their concern relating to unintelligible reasons in the RSDOs decisions, and the fear that the appeals would not be considered, led the applicants to reserve their rights to proceed with a review notwithstanding an appeal.

[26] Insofar as the obligation to exhaust internal remedies is concerned, the applicants contend that this obligation is not absolute and that an exemption could be sought in terms of section 7(2)(c) of PAJA. It is furthermore alleged that the interests of justice is dependent on the facts of each case, and that if the first respondent has no knowledge of the facts and the RSDOs refusals and appeal documents, then the respondents could never dispute exceptional circumstances and the interests of justice requirements.

[27] The replying affidavit at length deals with authorities which I addressed below but suffice to point out that the applicants remain of the view that the point *in limine* cannot be isolated from the merits of the RSDOs decision-making and to ignore this would leave them bereft of administrative justice.

Discussion

[28] Section 7(2)(a) – (c) of PAJA states as follows:

7 Procedure for judicial review

(1)(a) ...

(b) ...

¹⁰ Replying affidavit, p104

(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice¹¹.

[29] Having regard to PAJA, there is no doubt that the decisions forming the subject of this review constitute administrative actions as defined in section 1 of that Act and are thus capable of being reviewed and set aside. There is also no argument that both RSDOs rendered decisions as set out in annexure NR4 to the founding affidavit. These decisions also contain conclusions that in terms of section 3(b) of the Act, the applicants would not face harm in their country of origin, Ukraine.

[30] In my view, the opposition that the applicants did not exhaust their internal remedies, is the point requiring determination first. The parties agree with the interpretation and understanding of section 7(2) of PAJA. On my reading of section 7(2)(a), I must agree that given the peremptory language of the sub-section in that it uses the word “*shall*”, there is no doubt that as a starting point, the Court cannot review an administrative action under PAJA until an applicant for review has first exhausted the internal remedies provided for in any other law.

[31] It is also not disputed that an internal remedy, given the facts of this matter, is the appeal process provided for in section 26 of the Act. This appeal process has

¹¹ My emphasis

been utilised and has not yet, at the time of the issuing and subsequent hearing of the application, been finalised as it is pending before the Appeal Board. Insofar as a further remedy is or was available to the applicants, such is addressed later in the judgment.

[32] To put into perspective how stringent the requirement of section 7(2)(a) of PAJA is, I refer to ***Nichol and Another v Registrar of Pension Funds and Another***¹², where Van Heerden JA, with reference to *The Promotion of Administrative Justice Act Benchbook*¹³, explains that section 7(2)(a) imposes a strict duty to exhaust internal remedies, which has changed the common law. Under the common law, it did not follow automatically that the existence of an internal remedy prevented an application for judicial review until the remedy was exhausted. The meaning attributed by the Supreme Court of Appeal (SCA) in ***Nichol*** to section 7(2) was endorsed by the Constitutional Court in ***Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)***¹⁴.

[33] ***Nichol*** emphasises that an exemption must be applied for in terms of section 7(2)(c) and upon such application being granted, the applicant is then not required to exhaust all internal remedies before proceeding with a review application.¹⁵ The onus is on the applicant seeking exemption to satisfy the Court that there are exceptional circumstances, and that the interests of justice favour the granting of an exemption. The hurdle for the applicants is thus two-fold.

[34] Turning to whether the applicants show exceptional circumstances for an exemption from the duty to exhaust internal remedies, what may be construed as exceptional circumstances, would change from case to case. Once more, I refer to the SCA's judgment in ***Nichol*** when considering what is meant by exceptional circumstances as referred to in section 7(2)(c)¹⁶:

¹²2008(1) SA 383 (SCA) par [15]

¹³Iain Currie and Jonathan Klaasen, at 182

¹⁴2010 (4) SA 327 (CC) par [34]

¹⁵*Nichol* supra, par [15]

¹⁶*Nichol* supra, see para [17] – [20]

[34.1] an exceptional circumstance is something out of the ordinary which would render it inappropriate for the applicant to first exhaust the available internal remedy;

[34.2] the circumstance would be of the nature requiring the Court's immediate intervention on review rather than first exhausting an internal available remedy;

[34.3] the exceptional circumstance which is referred to "*under the auspices of a section 7(2)(c) exemption application should exist before or at the time of the institution of the review application*"¹⁷; and

[34.4] where the available internal remedy would be such to not provide the applicants with "*effective redress*"¹⁸ for their complaint.

[35] Having regard to the above pointers, one must therefore ask what exceptional circumstances have the applicants placed before the Court in their section 7(2)(c) application for exemption them from the obligation to first exhaust the available internal remedies before approaching the Court for review of the RSDO decisions? The applicants state that the lack of intelligible reasons by the RSDOs¹⁹ resulted in them appealing the decisions. In addition, they indicate that the irregularity²⁰ of at least one of the officers' conduct, the unfathomable conclusions drawn that Ukraine gained the upper hand in the war and the reservation of their review rights, together with the RSDOs non-decisions, are exceptional circumstances.

[36] Turning to the reservation of the right to review, my understanding of the applicants' case is that notwithstanding the pending appeals and the provisions of section 7(2)(a), the fact that they indicated that they reserved their rights to approach the Court in terms of section 6 of PAJA, bolsters their view that in the circumstances, they could seek a review notwithstanding a pending appeal. On the aspect of the

¹⁷ Nichol supra, para [16]-[22]

¹⁸ Nichol, par [18]

¹⁹ Resulting in the refusal of the asylum applications

²⁰ And possible alleged forgery by one of the RSDOs of the other's written decision

appeal, I agree with the applicants' submission that once their asylum seeker applications were rejected, they had to appeal within 10 days of the RSDOs.

[37] However, the applicants provide no authority for their view that they were entitled, in the face of the peremptory provisions of section 7(2)(a) read with 7(2)(c) of PAJA, to reserve their rights to approach the Court on review, shortly after they lodged an appeal against the decisions. To the extent that there may be reliance on **Gavric v Refugee Status Determination Officer, Cape Town and Others**²¹ to support this view and approach, I address the issue later in the judgment.

[38] In terms of section 7(2)(a), the applicants would have had to await the outcome of their appeal first before approaching the Court on review. PAJA does not allow a parallel process, where an appeal and review exist simultaneously and to emphasise the strictness of the provisions of section 7(2)(a), the majority Constitutional Court judgment in **Dengetenge v Southern Sphere**²², makes this abundantly clear in the following manner when it stated that:

“The promulgation of PAJA makes it compulsory for the applicant to first exhaust the internal remedies before approaching a Court for review, unless an exemption was granted.”

[39] The reservation of rights averment, in my view, ignores the peremptory provisions of section 7(2)(a) of PAJA. Furthermore, the basis for the so-called direct review, notwithstanding a pending appeal to the AB, is because of a perceived inability to appeal or a compromised appeal because of the alleged unintelligible decision-making of the two RSDOs. This view is driven home in the applicants' attorney's written submissions which rationalises the reservation of rights argument in the following terms:

“Therefore, it would render their ability to appeal completely compromised and thus the antithesis of just administrative action were they to be compelled to

²¹ [2018] ZACC 38

²² 2014(5) SA 138 (CC) par [115]

*appeal within an internal appeals mechanism regardless of the standard of decision-making by the RSDOs*²³.

[40] In the applicants' motivation as to why they are entitled to approach the Court while they have a pending appeal, the further argument is that the RSDOs written reasons for their decisions were inadequate reasons and amounted to "*non-decisions in terms of section 5 of PAJA*"²⁴. This view requires a closer consideration of section 5 of PAJA, which addresses reasons for administrative action:

5. Reasons for administrative action

(1) *Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.*

(2) *The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.*

(3) *If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.*

(4) (a) *An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances and must forthwith inform the person making the request of such departure.*

²³ Applicants' Heads of Argument, par 24

²⁴ Par 41, p16, Founding Affidavit

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors,

Including:

- (i) the objects of the empowering provision;*
- (ii) the nature, purpose and likely effect of the administrative action concerned;*
- (iii) the nature and the extent of the departure;*
- (iv) the relation between the departure and its purpose;*
- (v) the importance of the purpose of the departure; and*
- (vi) the need to promote an efficient administration and good governance.*

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

(6) (a) In order to promote an efficient administration, the Minister may, at the request of the administrator, by notice in the Gazette publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.”

[41] On a proper construction and interpretation of section 5 of PAJA, the subsection allows a person whose rights are affected by an administrative decision and who has not²⁵ been given reasons for the decision, to request reasons for such decision within a stipulated time-period. The relevant administrative official is obliged to provide the written reasons within 90 days after receiving the request²⁶ and those reasons are to be adequate, failing which, it is presumed in terms of section 5(3), that the administrative action was taken “*without good reason*”.

[42] In the event where the applicants are of the view that the decision is a non-decision and/or that no adequate reasons are/were provided, they could have prevailed upon the provisions of section 5(2) on the basis that the administrative officials were required to provide adequate reasons in writing for their administrative actions yet failed to do so. This course of action was not taken in this matter. To the extent that the applicants allege and hold the view that the reasons provided in the RSDOs written decisions are either inadequate, objectively unintelligible and therefore amount to non-decisions, I agree with counsel for the respondents that section 5(2) provides a mechanism and another internal remedy which the applicants could and should have utilised in the circumstances.

[43] To support this view, and with reference to the judgment in **Director-General, Home Affairs and Others v Link and Others**²⁷, Sher J writing for the Full Court of this Division²⁸, clarifies the position regarding the furnishing of adequate reasons to a person in terms of section 5(2) of PAJA, as follows:

“[47] Before moving on I wish to express a word of caution. The interpretation which I have adopted in relation to ss8(3) and 8(4) must not be understood as granting a licence to aspirant immigrants (or

²⁵ My emphasis

²⁶ Section 5(2) PAJA

²⁷ 2020(2) SA 192 (WCC)

²⁸ Goliath DJP and Gamble J concurring

other foreigners), who may be dissatisfied with decisions whereby their applications for temporary visas or permanent-residence permits have been refused, to rush to court to review such decisions, without ado, on the grounds that according to them inadequate reasons, or no reasons, were provided for such decisions. Although s 8(3) of the IA provides that any decision must be 'accompanied' by the reasons for it, ss 5(1) and 5(2) of PAJA provide that where reasons have not been given at the time of a decision being taken the affected party may request the furnishing thereof within 90 days from becoming aware of the decision, whereupon the administrator shall furnish 'adequate' reasons, in writing, within 90 days. Notwithstanding that the provisions of s 5(2) of PAJA are phrased in permissive terms, aggrieved parties will be expected in instances where adequate reasons were not provided at the time of the decision, to formally request such reasons, as was done in this matter, and will surely not be permitted to go to court without doing so. Only in instances where, pursuant to this, inadequate (or no) reasons are provided, will an aggrieved party possibly be entitled to approach a court to exempt them from exhausting their internal remedies, and to review the decision in question. And of course, whether exemption should be granted is a matter which must be determined in each case on the basis of the facts and circumstances which are before the court at the time."²⁹

[44] It is apparent from paragraph [47] in **Link**, that where reasons are provided by the administrative official to an affected person but those reasons are considered to be inadequate, the latter will be required to first request that adequate reasons should be furnished to them, and in circumstances where no reasons follow, or inadequate reasons are then provided, only then will an aggrieved person be entitled to apply for an exemption in terms of section 7(2)(c) PAJA.

[45] Pursuant to the above assessment, I must therefore agree with counsel's understanding of Sher J's interpretation of section 5 of PAJA as set out in paragraph

²⁹ My emphasis

[47] of **Link**, that only upon a failure to have provided adequate reasons, pursuant to the applicants' request in terms of Section 5(2), would the applicants have exhausted their internal remedy(ies) to obtain such reasons.

[46] On this basis alone, the argument regarding a reservation of rights to approach this Court on review when an appeal has already been lodged against the RSDOs decisions, must fail and the reliance on the reservation of rights issue as an exceptional circumstance in terms of section 7(2)(c), is accordingly found to be unconvincing and thus rejected. In my view, there can be no question of a reservation of rights to proceed directly to review where an appeal to the Appeal Board is pending when the mechanism available in section 5 of PAJA was not exhausted.

[47] Reverting to what I refer to as the guidelines or pointers in **Nichol** regarding a determination as to whether exceptional circumstances exist for the granting of an exemption, aside from the applicants' denial that the Ukraine had gained the upper hand in the war and their questioning of the officers' reliance on the numerous media reports referred to in NR4, no explanations (other than the reservation of rights argument) are provided nor are there any circumstances set out as to why this matter requires the Court's immediate intervention on review rather than the applicants' first exhausting internal remedies.

[48] Furthermore, from the facts presented by the applicants, their status at the time of instituting the review was the same as at the time of lodging the appeal. In other words, the applicants, in view of the pending appeal, have temporary status in South Africa, meaning that they may remain in the country pending the appeal outcome. Insofar as facts are alleged regarding the Russia-Ukraine war, it is common cause that at the time of the institution of the review, the war had not ended.

[49] Thus, to the extent that the existence and effect of the war in the Ukraine is in itself to be regarded as an exceptional circumstance warranting the granting of an exemption, the only point to make is that this issue relates to the merits of the review, which is an aspect I make no finding on at this stage given that the

respondents raise the non-compliance with section 7(2)(a) of PAJA as a matter requiring the Court's determination first. Furthermore, the applicants provide no proof that the available remedy of an appeal against the RSDOs decisions would not provide effective redress for their complaint. To add, the appeals are already before the Appeal Board and while it is not uncommon that these processes take time, on a reading of the appeals, it cannot be excluded that the outcome of such appeals may be favourable to both applicants.

[50] After hearing the appeal, the Appeal Board may confirm, substitute or set aside a decision in terms of section 26(2) of the Act. Section 26(3) grants the AB wide ranging powers which includes but are not limited to inviting the UNHCR representative to make oral or written submissions, calling for persons to appear and provide information and conducting an investigation and enquiry of its own accord. Legal representation of an appellant is allowed in terms of section 26(4) of the Act. Thus, by all accounts, an appeal as an internal remedy is an appropriate mechanism to provide the applicants with effective redress for their complaint against the decisions of the RSDOs.

[51] The attorney's argument that there are currently no Appeal Board appointees available to hear appeals is unsubstantiated. This statement is made in his heads of argument and reliance is placed on annexure NR1³⁰, yet there are two annexures NR1 in the application and neither relate to information regarding officials available or not available to hear the appeals in terms of section 26 of the Act.

[52] Furthermore, there is no evidence before this Court that the Appeal Board, the RSDOs or the respondents have in any way frustrated the applicants' efforts and attempts at obtaining effective redress in terms of the available internal remedies³¹. Aside from a late Rule 53 record, which was condoned, the facts in this matter indicate that the applicants failed to request adequate reasons from the RSDOs as envisaged in section 5(2) of the Act and **Link**, thus it cannot be concluded that that they took all reasonable steps to exhaust available internal remedies.

³⁰ Heads of argument, par 15

³¹ Koyabe, par [47]

[53] As indicated earlier in the judgment, section 5(2) provides a mechanism for the applicants where inadequate reasons were provided or where the reasons provided amounted to a non-decision. Aside from an appeal, section 5(2) would have been an available, effective and adequate internal remedy had it also been utilised in the circumstances.

[54] The further point to make is that an applicant's view that he or she has good grounds for review and therefore that is to be regarded as an exceptional circumstance forming the basis for a section 7(2)(c) exemption, was rejected in **Nichol**³², as follows:

'[24] Moreover, as was pointed out by counsel for both sets of respondents, Nichol's contention in this regard 'puts the cart before the horse'. It is based on the proposition that Nichol is entitled to be exempted from complying with the requirements of s 7(2)(a) of PAJA and exhausting his internal remedies merely because – so it is contended – his case on the merits of the main application is strong. This cannot be so. Taken to its logical conclusion, such an approach would defeat the purpose of s 7(2), which requires an applicant for judicial review to have exhausted his or her internal remedies before resorting to review proceedings. Allegations of procedural or substantive administrative irregularities per se are not 'exceptional' in review proceedings.'³³

[55] In view of the above *dicta*, the argument that the strength of the review or its merits amounts to an exceptional circumstance of itself, is rejected. Similarly, alleged copying of the written decision and alleged forgery by one officer of the other's decision which may constitute procedural or administrative irregularities, do not constitute exceptional circumstances for purposes of section 7(2)(c).

[56] Returning to the applicants' reliance on **Link** to support their view that they may approach this Court directly without first exhausting the internal remedies, this argument is fraught with problems. The facts in **Link** are distinguishable from the facts presented by the applicants in this matter. **Link** dealt with permanent residency

³² Supra, FN 13

³³ My emphasis

applications which were refused, and despite a further request for reasons for the refusal, same were not provided to the respondents, who could not formulate an appeal in terms of section 8(4) of the Immigration Act 13 of 2002.

[57] The Court in **Link** per Sher J, exempted the respondents from exhausting the internal remedies on the basis that no reasons, let alone proper reasons, were given for the refusal of the permanent residency applications. Thus, the Court held that in those circumstances, there were consequently no decisions subject to a review or appeal as contemplated in section 8(3) and 8(4) of the Immigration Act. In this matter, written decisions were furnished³⁴ but there was no subsequent request for adequate reasons. Concluding on this aspect, the applicants were able, notwithstanding the written decisions provided in NR4, to nonetheless formulate an appeal.

[58] To the extent that the applicants in this matter allege that the RSDOs should have relied on the UNHCR country of origin status in the war and should not have relied on other media reports and broadcasters, the issue relates to the merits of the review but may be capable of a challenge on appeal, unlike the situation faced by the respondents in **Link**.

[59] Insofar as reliance is placed on **Gavric**³⁵ for the view that the requirements of section 7(2)(a) are flexible, I point out that in Theron J's discussion in the majority judgment, it is evident from the facts that there was no explicit application for exemption but given the exceptional circumstances where not even the decision maker was aware of the internal remedy, to expect a formal application from Mr Gavric, who applied for refugee status, would have resulted in being too formalistic in the application of section 7(2) of PAJA.

[60] The exceptional circumstances in **Gavric** were that Mr Gavric was imprisoned for 6 years already by the time the matter came before the Constitutional Court and had the matter been referred either to the Refugees Appeal Board or Standing Committee, after already having gone through three RSDO processes plus the fact

³⁴ The applicants consider the reasons to be objectively unintelligible

³⁵ Supra, FN 22, para [54]-[65]

that Mr Gavric would have remained in detention for a further period, the Constitutional Court found that the circumstances were “*sufficiently exceptional*”³⁶ to relax the section 7(2)(c) requirements. An exemption from exhausting internal remedies was thus granted.

[61] In view of the above assessment of **Gavric** and the circumstances in this matter, the applicants’ reliance on **Gavric** as a general proposition that section 7(2)(a) does not contain strict requirements, is misplaced. The circumstances in **Gavric** were indeed exceptional and in stark contrast to those in this matter. In my view, in the circumstances of this matter, the obligatory requirements of section 7(2)(a) read with 7(2)(c) of PAJA do not frustrate these applicants nor protect the administrative processes from judicial scrutiny³⁷.

[62] Having regard to the above assessment and discussion, my finding is that the applicants do not prove any exceptional circumstances which warrant the granting of an exemption to them from the duty of exhausting internal remedies in terms of section 7(2)(a). On the question of the interests of justice, a further part of the section 7(2)(c) enquiry, it is so that the applicants have temporary status in South Africa pending the outcome of the appeal process.

[63] The principle of *non-refoulement*³⁸, as stipulated in section 2 of the Act, grants all three applicants protection from being returned to their country of origin³⁹ and serves as a fundamental safeguard and protection for the applicants in these circumstances. Given that the applicants have this protection, as well as the protection of sections 10, the right to human dignity, and 11, the right to life, of the Constitution⁴⁰, and have an appeal pending, it cannot be said that they have proved that the interests of justice require the granting of an exemption from the obligation to exhaust internal remedies.

Findings

³⁶ Gavric, par [65]

³⁷ Gavric, par [58]

³⁸ Minister of Home Affairs v Tsebe [2012] ZACC 16 par [67]-[68].

³⁹ The principle applies where there is a real risk of torture, persecution or serious harm – note, I make no finding that these risks exist as no finding is made on the merits of the review

⁴⁰ Constitution of the Republic of South Africa, 1996 – Chapter 2, Bill of Rights

[64] In conclusion, I thus find that the application for exemption must fail. The applicants are required in terms of section 7(2)(a) of PAJA to exhaust their internal remedies available to them in this matter. Accordingly, it is further held that the review application is thus premature, and the merits of such application are thus not considered. As for the non-joinder of the Appeal Board, having considered the point *in limine* and the parties' submissions, I am of the view that there was no need for the applicants to have joined the Appeal Board in the review application.

[65] As the appeal body before which the appeal is pending, it has no substantial interest in the review, which is a different process. As it is, the finding regarding non-joinder is ultimately not material to the outcome of the section 7(2) issue and the exemption application and shall be dismissed with no order as to costs. The effect of the refusal of the exemption application is that the review application falls to be dismissed.

[66] The final aspects relate to the complaint about the respondents not having knowledge of the RSDO decisions and the appeal, to which my response is that the applicants attach both decisions and both appeal documents to the founding papers in the review and the respondents raised technical points in opposition and specifically stated that they do not address the merits. In those circumstances, therefore, a perceived lack of knowledge of the merits is not fatal to the opposition of the application. Finally, insofar as costs are concerned, I see no reason why costs should not follow the result.

Order

[67] In the result, I grant the following order:

- a. The point *in limine* (non-joinder) is dismissed. No order as to costs.
- b. The application for exemption in terms of section 7(2)(c) read with section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is refused.

c. The review application is dismissed with costs (scale B)

M PANGARKER
JUDGE OF THE HIGH COURT

Appearances:

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Per: Mr N Nene