



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 20309/2021

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~.

Signature: 

Date: 15/12/2025

NZAU CHRISPIN NLANDU

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS Second Respondent

THE REFUGEE APPEAL AUTHORITY

Third Respondent

M D MOREBE N.O.

Fourth Respondent

C P SENOSHA N.O.

Fifth Respondent

JUDGMENT

STONE AJ

- [1] The applicant applies for relief that a decision of a single member of the Refugee Appeal Board (RAB), taken on or about 29 September 2009, to dismiss the applicant's appeal to the RAB against the rejection of his claim for refugee status, be reviewed and set aside.
- [2] The applicant also requests that such decision be substituted with an order upholding the appeal and granting the applicant's claim for refugee status.
- [3] The first respondent is the Minister of Home Affairs, the second respondent is the Director-General: Department of Home Affairs, the third respondent is the Refugee Appeals Authority of South Africa (RAA), and the fourth respondent is cited in his official capacity as the person (member of the RAB) who took the decision on behalf of the RAB to refuse the applicant's appeal against a decision of a Refugee Status Determination Officer (RSDO) to reject his main claim for refugee status. The fifth respondent is cited in his official capacity, as the RSDO who rejected the applicant's claim for asylum¹
- [4] This application pertains to a decision taken by the fourth respondent, whilst acting as a member of the RAB.
- [5] This case is extraordinary in that there was a 11-year delay between the decision to dismiss the applicant's appeal to the Refugee Appeal Board in

¹ The dissolution of the RAB and the establishment of the RAA was primarily governed by the Refugees Amendment Act 33 of 2008. See ss 8A, 12 and 34 of the Refugees Act 130/1998, as amended. The amendments came into operation on 1 January 2020. In terms of s 34(6) of the Amendment Act provisions were included that any matter pending before the RAB would be transferred to the RAA, who took over the role previously played by the RAB from 1 January 2020..

2009, and the date when he was informed of such decision on 26 October 2020.

CONDONATION APPLICATION

[6] Before dealing with the review application, it is necessary to deal with the condonation application which was filed by the respondents in respect of the late filing of their answering affidavit. The applicant responded in his replying affidavit that he would abide the decision of the court, but insists that the respondents pay the costs of such application. At the time of the hearing it was evidently accepted by the parties that the matter would continue on the papers as filed, including the answering affidavit, and the matter was argued on that basis. The applicant responded in full to the answering affidavit, and suffered no perceivable prejudice save for the delay caused thereby. In the premises, insofar as condonation has not formally been granted, and a cost order still remains to be made, I exercise my discretion herewith to formally grant condonation for the late filing of the answering affidavit, and order that the respondents are to pay the costs of such application.

EVENTS LEADING TO THE APPLICANT'S APPLICATION FOR REFUGEE STATUS IN SOUTH AFRICA

[7] The applicant's description of the reason for his application for asylum can be summarised as follows:

7.1 The applicant worked in the Democratic Republic of the Congo (DRC) as a truck driver in 2002. Whilst doing so, on 12 December 2002, his

truck almost collided with a motorcade which was driving the wrong way up a one-way lane on the National Road 1 of the DRC. He was able to stop his truck just in time to avoid a collision. It however turned out that the motorcade was transporting President Joseph Kabila. The applicant was immediately arrested. He was beaten severely, by the said former President's security guards, until he vomited blood.

7.2 He was then taken to hospital, but it did not take the authorities long to find out that the applicant's father was a senior security police officer who served under the regime of former president Mobuto Sese Seko of the DRC, who was removed from power by President Joseph Kabila. The association between the applicant and the Mobuto regime, and the traffic incident, were enough to sustain a suspicion that the applicant was involved in an attempt on the president's life.

7.3 He was placed in military detention, informed that he would be tried for the capital offence of attempting to kill the Head of State, and threatened with the death penalty. This was no idle threat, as attempting to kill or injure the head of state in the DRC carried the death sentence. It still carries the death sentence. At the time of his arrest, the authorities were carrying out executions in terms of the DRC's penal code.

7.4 Although this was a trumped-up charge, he feared for his life, and he realised that he had to flee. Through his family he arranged to sell his house, and he used the money to pay a bribe to induce the guards in

charge to let him escape. He managed to escape from detention, and he made his way to South Africa.

7.5 His evidence is further that he arrived in South Africa on 1 January 2003. He was married at the time. After he had arrived in South Africa, he heard that his wife had fled into the DRC's interior, over which the DRC Government had limited control.

7.6 His aforesaid rendition of events and reasons for his departure from the DRC, were not disputed in the written decisions of the fourth and fifth respondents, referred to below. Although these allegations were denied in the answering affidavit, deposed to by the Third Respondent, no factual basis to contradict these allegations was advanced by the respondents.

APPLICATION FOR REFUGEE STATUS

[8] The applicant applied for refugee status at the Crown Mines Refugee Reception Office, and he settled in Johannesburg. It is not disputed that the applicant was interviewed by a Refugee Status Determination Officer (RSDO), the fifth respondent, on 11 May 2005, and again on 24 May 2006.

[9] On 28 August 2006, the fifth respondent rejected the applicant's claim for asylum.

- [10] It appears from the written decision of the fifth respondent (RSDO), that in all material respects, the applicant's version of events was accepted, or in any event not rejected.
- [11] He stated that in his written decision that the burden of proof was on the applicant, and that the standard of proof is that of a real risk to the applicant, which must be considered in the light of all the circumstances. He professed to take "*the objective country information as well as subjective considerations*" into consideration. He stated in his decision that it "*is conceded that political opinion may be imputed to family members of an individual*". However, the fifth respondent still concluded that there were changes in the DRC. He referred to a 2006 country information report which was said to indicate that a transitional government was formed in 2003, with a new constitution, in 2005, yet he also indicated that President Joseph Kabila remained as president with four vice presidents. The fifth respondent however still concluded that there was no likelihood that the applicant would be under a threat of persecution if he returns to the DRC.
- [12] The applicant explains that the fifth respondent never put to him, nor asked him to comment on, the possibility that a new constitution or transitional government in the DRC might have alleviated the applicant's fear of persecution. It appears from the notes taken by the fifth respondent, of an interview with the applicant, that same do not record that he put the possibility that the legal or political situation in the DRC had changed since the applicant left to the applicant, nor that he enquired how it may affect the claim for asylum. This is not disputed.

- [13] The notes of the fifth respondent contain a few basic questions such as a question about the whereabouts of the applicant's family, whether military service was compulsory, and whether he was arrested before. It appears from the notes that the Applicant did relate in some detail the circumstances which led him to flee the DRC. It appears from the notes that, after such explanation, all that was further recorded was the question: "*Do you wish to go back to the DRC?*", to which a response of the applicant was recorded as follows: "*No - it is impossible Joseph Kabila is still in power and the same people who arrested me are still working for him*"
- [14] The applicant contends that in the most basic procedural sense, the fifth respondent's decision was flawed due to conclusions on facts which were not put to the applicant for comment.
- [15] The decision failed to address the substance of the applicant's claim, or to explain why the adoption of a new constitution would without more have anything to do with the fact that the applicant still faces the death penalty for allegedly trying to kill the DRC's Head of State. The applicant explains that the DRC's new constitution did not abolish the death penalty, nor did it create a reasonable prospect that the applicant would not face prosecution because of his links to the Maputo Regime. It is not disputed by the respondents that the DRC Constitution indeed retained the death penalty.

THE APPEAL BEFORE THE RAB

- [16] On 5 October 2006 the applicant appealed to the RAB against the decision of the fifth respondent. The appeal was heard on 24 January 2007 by the fourth respondent, the only member of the RAB who presiding over the proceedings.
- [17] At the time the applicant appeared in person. He explains that it was again simply never put to him that the situation in the DRC had changed in a way that was relevant to his claim for asylum. The possibility that he would face the death penalty on his return was also not considered or discussed with him. This is not disputed by the respondents. Indeed, neither the fourth nor the fifth respondent deposed to a confirmatory affidavit in this application. The applicant contends that the possibility of a death penalty was simply ignored.
- [18] At the end of the hearing, he was sent home to await the outcome of his appeal. It appears from documents, which were eventually released to the applicant's attorneys and mentioned in the application, that the fourth respondent did make a ruling on about 29 September 2009. A letter was sent from the RAB to the Crown Mines Refugee Office dated 29 September 2009, to record that the appeal has been dismissed and that the applicant should be handed a copy of the decision. The date stamped on the ruling is 29 September 2009, which date I will accept for purposes hereof as the date of the ruling, in the absence of evidence by the respondents to the contrary.
- [19] It is not disputed that the fourth respondent's ruling was however never given to the applicant, nor was he ever told that it was available. The applicant proceeded to regularly renew his asylum seekers permit. The fact that the

permit was renewed from time to time over the years following his appeal, led the applicant to believe that the appeal was still to be determined.

[20] During January 2019, the applicant once again attended at a Refugee Reception Centre. He went into the back office to renew his permit and enquired about the status of his appeal. He was however then taken down to the basement of the building, where he was locked up in a room and left there. He was thereafter taken to a Police Station and detained for four days, between 11 and 15 January 2019, whilst still not being told why he was being detained.

[21] Friends and family eventually obtained money to pay an attorney to try to secure his release. He was released, but he was subsequently diagnosed with tuberculosis, which had the result that he was too ill to leave home, except to go to a Clinic for medical checkups.

[22] When he had recuperated sufficiently, he obtained the services of his current attorney on a *pro bono* basis. The attorney immediately proceeded to try and establish the status of the appeal. The decision of the RAB was only made available to the applicant's attorneys on 26 October 2020, after a formal access to information request had to be made to obtain the outcome of the appeal. This was about 11 years after the appeal, and almost 16 years after he firstly applied for refugee status.

THE REFUGEE APPEAL BOARD'S DECISION

- [23] It appears from the written decision of the fourth respondent that he accepted, or did not dispute, the applicant's version of the events that led to his application for refugee status, including that the applicant was beaten repeatedly, that he was hospitalised, and that he was accused of an attempt on President Kabila's life because he was the son of an intelligence official in the Mobutu regime, and that he faced the risk of the death penalty upon his return, charged with an attempt on the life of president Kabila. The fourth respondent was therefore bound to accept that the applicant fled the DRC because he faced a reasonable fear of persecution.
- [24] The fourth respondent however resolved to dismiss the appeal.
- [25] In his written decision he intimated a warning to himself against impugning the applicant's credibility "*simply because of vagueness or inconsistencies in recounting peripheral details.*" He however noted neither vagueness nor inconsistency in the applicant's version.
- [26] He made reference in his decision to an excerpt from "*IAS Research Analysis dated September 2005*", on which he relied to find that the risk for those associated with the Mobutu regime has considerably lessened and that it was reported that close relatives of the Mobutu regime have returned to the DRC from exile. He noted that "*those not suspected of collaboration with the rebels*" would no longer be at risk and affiliation to the MPR would "*normally*" not involve political persecution.
- [27] He also made reference in his decision to "*Research Directorate, Immigration and Refugee Board*" dated 30 March 2006 wherein reference was made to a

telephone interview with the president of the African Association for Defence of Human Rights (ASADHO) who he stated having said in 2004 that his organisation is “*not aware*” of any treatment that would be imposed on a person merely because members of his family served with the Mobutu regime.

[28] In his written decision the fourth respondent stated that the board has thoroughly assessed the claim with due regard to the objective background information on the appellant’s country of origin. The aforesaid were however the only sources mentioned for his findings.

[29] He held that the onus was on the applicant to show that he is entitled to refugee status, and that the standard of proof is that of “*reasonable risk that must be considered in all the circumstances i.e past prosecution and a forward-looking appraisal of risk*”. He found that the central issue was whether or not an individual can safely return to his country of origin, referring to *James Hathaway, The Law of Refugee Status* at page 69.

[30] He gave two reasons for dismissing the appeal. The first was a perceived change in the political situation in the DRC since the applicant left, with the result that he found that the applicant “*will not be at risk of persecution on return since those associated with Mobutu’s regime are no longer ill-treated by the government*”. The second was that the applicant had not exhausted his “*internal remedies*” before he decided to leave.

EVENTS AFTER THE REFUGEE APPEAL BOARD’S DECISION

[31] It is common cause that the decision of 29 September 2009 was only released to the applicant's attorney on 26 October 2020. It was only released to the applicant's attorney after the attorney was forced to make a formal request to obtain a decision, and to obtain the RAA's file content relating thereto, in terms of the Promotion of Access to Information Act, 2 of 2000.

[32] The applicant explains in his founding affidavit that neither the Director-General (second respondent) nor anyone else acting on behalf of the respondents, ever explained why the ruling was withheld from the applicant for over 11 years. In the present application, no proper explanation for this failure was provided either.

GROUND OF REVIEW

[33] The applicant relies on various grounds for review of the fourth respondent's decision. I proceed to deal with each ground in turn.

The Appeal Board only consisted of the fourth respondent

[34] The matter must be determined in terms of the Refugees Act 130 of 1998 and regulations as they stood at the time of the proceedings before the fourth respondent.² Thus, s13(1) of the Refugees Act 130 of 1998 applied to the proceedings before the fourth respondent.³ The second respondent points out in his answering affidavit that s 13 of the Refugees Act no longer applies, but

² **Somali Association of South Africa and Others v Refugee Appeal Board** 2022 (3) SA 166 (SCA) par 7.

³ S 13 of Act 130 of 1998 was repealed in terms of the Refugees Amendment Act 33 of 2008 with effect from 1 January 2020.

he raised no quarrel with the fact that it applied at the time of the fourth respondent's decision. Applicant's counsel correctly conceded in argument that the matter must be dealt with in terms of section 13(1) as it applied at the time. The Supreme Court of Appeal recently confirmed in **Somali Association of South Africa v Refugee Appeal Board**⁴ that reviews of refugee appeal decisions must be adjudicated on the basis of the legal framework at the time the decisions were taken, not as it now stands.

[35] S 13(1) and (2) read as follows:

“Section 13 – Composition of the Appeal Board

- (1) The Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly.*
- (2) At least one of the members of the Appeal Board must be legally qualified.”*

[36] Despite the requirement that S 13(1) of the Refugee Act at the time required him to sit with two other members of the Refugee Appeal Board, the fourth respondent made his decision sitting alone. This, he was not lawfully entitled to do. This Court has previously made clear in **Muyaya v Chairman: The Refugee Appeal Board**⁵, that non-compliance with such requirement vitiates any hearing presided over by only one member of the Board. Any decision

⁴ **Somali Association of South Africa and Others v Refugee Appeal Board** [2021] 4 All SA 731 (SCA), para [7].

⁵ 2016 JDR 0616 (GP) at paras [29] - [30].

emerging from such a hearing is *ultra vires* and falls to be set aside without further enquiry. This approach is also consistent with the findings in **Bolanga v Refugee Status Determination Officer**⁶ and in **Harerimana v Chairperson, Refugee Appeal Board**⁷.

- [37] The fourth respondent was therefore simply not empowered to take the decision on his own as he did, and it contravened section 13(1). It therefore also falls to be set aside in terms of s 6(2)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which provides that a court has the power to judicially review an administrative act if the administrator who took it was not authorised to do so by the empowering provision.
- [38] The respondents' counsel conceded that the RAB could not validly have acted with one member only. She however contended that the fact that only one member of the RAB presided over the appeal, had the result that there was no properly constituted body, and that there was therefore no reviewable decision. In my view this approach cannot be sustained.⁸ In any event, if she was correct that there was no reviewable decision, the result would be that the RAB had failed to take a decision for the best part of 20 years. Such a failure would in itself be reviewable in terms of section 6(2)(g) and on the basis of delay in terms of s 6(3) of PAJA, as the RAB had a duty to deal with the appeal and take a decision.

⁶ 2015 JDR 0286 (KZD) paras [15] - [16].

⁷ 2014 (5) 550 (WCC) paras [16], [19] & [20].

⁸ Compare the decisions mentioned in paragraph [42] above] where the absence of the required number of members of the RAB was held to be reviewable.

[39] Even if I am wrong in my finding that the fourth respondent's decision is reviewable on the aforesaid ground, in my view there are also other grounds, mentioned below, which support a review of his decision. I deal therewith in the paragraphs that follow.

The finding that the applicant no longer faced a risk of persecution

[40] S 3 of the Refugees Act provides:

"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 or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere"*

[41] The applicant relies on both s 3(a) and s 3(b) for its claim for refugee status.

[42] The fourth respondent's first reason – that there was, at the time of the appeal, no longer a risk that the applicant would face persecution if he returned to the DRC – implicitly entails an acceptance that there was such a risk when the applicant fled. Such acceptance is also evident from the fact that the credibility of the Applicant regarding his personal circumstances and the events that led to his application for asylum was not disputed in his report. In my view, in the absence of a finding that the applicant's version lacked credibility, on the

undisputed facts relied upon by him, the applicant has met the requirements of s 3(a), having a well-founded fear of persecution by reason of political opinion or membership of a particular social group, being unable or unwilling to avail himself of the protection of the country of origin, and being unable or owing to fear unwilling to return. He arguably also meet the requirements of s 3(b) by virtue of the evident disrupting or disturbing of public order as contemplated in such provision, which compelled him to seek refuge elsewhere, that is evident from his circumstances.

[43] Dodson AJ held in **FNM v Refugee Appeal Board**⁹, that once it is found that an asylum seeker qualifies for refugee status it must be given. In my view his assessment that the conditions that prevailed at the time of an applicant's departure from the country of origin must be considered. The decision of the fourth respondent ignored the fact that what mattered was whether the applicant had a reasonable fear of persecution at the time he left the DRC, not whether he had such a fear at the point of application or appeal¹⁰.

[44] I am also in agreement with Dodson AJ that the question whether the situation has improved to the extent that a refugee may safely return or whether s 36 of the Refugees Act can be applied, is a separate and independent inquiry that may only be undertaken once asylum has been granted. The decision whether to return a refugee to their home country raises fundamentally different considerations to the decision whether they ought to have been granted asylum in the first place. Asylum applications are generally processed very

⁹ 2019 (1) SA 468 (GP), paras [86] and [87].

¹⁰ **FNM v Refugee Appeal Board** 2019 (1) SA 468 (GP, par [87].

slowly. In this case it took until 2020 to finalise the applicant's application and communicate the outcome to him. The reality is in any event that the mere fact that the situation in a refugee's home country has improved will not in itself be dispositive of the question whether they ought to be returned.

[45] It follows that the fourth respondent was wrong to have regard to what he understood to be the situation in the DRC years after the applicant left. The fourth respondent's decision accordingly falls to be set aside in terms of s 6(2)(e)(iii) of PAJA.

[46] If I am wrong in this regard, I am still of the view that the material that the fourth respondent did have regard to when he made his decision, in any event could not reasonably have supported his finding, for the reasons set out below.

Decision not rationally connected to the information before the fourth respondent

[47] Even if the abovementioned two sources relied upon by the fourth respondent in his decision are taken into consideration, it still do not support the respondents' contention that the fourth respondent correctly found that the applicant would no longer face prosecution if he returns to his country of origin. If the matter is approached on the basis that the RAB could consider the matter based on the circumstances prevailing when the appeal was heard, the two sources quoted by the fourth respondent appears to have been out-of-date at the time of the appeal by three to four years. In argument it was submitted on behalf of the applicant that he and his legal team do not know what "IAS" stands for or what the source of the research analysis is, and that they were

thus unable to deal with either the veracity or objectivity of this information, or indeed to confirm that it actually exists and if it does, that the summation of its contents was correct. Similarly, it was argued that it is entirely unclear what the “*Research Directorate Immigration and Refugee Board dated 30 March 2006*” (the second source relied upon by the RAB regarding conditions in the DRC) was, and that the status, origin and objectivity thereof was unknown to the applicant. It was also noted that neither document was included in the Rule 53 record filed by the respondents. The respondents simply repeated these sources in the answering affidavit, but they did not attach same thereto. The fourth and fifth respondent also provided no confirmatory affidavit for clarification.

[48] Accepting for present purposes that such documents existed, that it was credible, and that it had the content as mentioned in the fourth respondent’s written decision, it is however evident that the decision was based on information of a highly generalized nature, that had no rational connection to the specific facts of the applicant’s case. Same at best only dealt with the risk of persecution that associates of President Mobutu faced in a general way¹¹. It was evident that the assessment of a diminished risk in any event only included those *not suspected of collaboration with the rebels*”.

[49] These sources did not address nor individualize the applicant’s particular and unique situation: that of a person arrested pursuant to an unfortunate incident, suspected of an attempted murder of President Kabila, and facing capital

¹¹ See paras [25] – [27] *supra*.

charges and persecution because of his involvement therein and pursuant to his association with the Mobuto regime.

[50] To suggest that a person who has already been persecuted faces no risk merely because there are other people with similar attributes (yet different personal circumstances) who in general have not been persecuted, in my view could not have justified a finding that the applicant himself faced no further risk. The applicant's counsel argued that, by analogy, it would make no sense to refuse to treat a person for an illness on the grounds that people with similar characteristics to the patient had not contracted it.

[51] Simply put, the mere fact of a general political change in the DRC, does not mean that the applicant will not be arrested and imprisoned upon his return. It does not mean he will not die in prison. It does not mean that he will not be executed. The fourth respondent simply did not consider the critical need for a connection to be made between any changes in the political situation of the DRC, and the likely effect of those changes on the applicant personally, and to properly individualize the circumstances of his case.

[52] In **FNM**¹², in circumstances comparable to the present matter, Dodson AJ explained that whilst the enquiry in terms of section 3(b) is predominantly objective, there is also a subjective element that must take into account how the given, objective circumstances impacted on that particular applicant and

¹² Supra, at paras [65] to [69].

his or her assessment why he was compelled to leave his country of origin. In my view this must be the correct approach.

[53] The flaw, that the applicant's personal circumstances were not sufficiently individualised and taken into account, is at the core of the fourth respondent's decision. It renders the decision irrational. Even if it is accepted that there were changed circumstances in the DRC which were relevant to the fourth respondent's decision, it could only be rational and rationally connected to the decision if, given his unique circumstances, evidence was found that the real and imminent threat to the applicant specifically had been removed by some change in the DRC's political situation. The fourth respondent cited no such evidence. He jumped to conclusions based on the general meagre evidence of an improved situation in the DRC. The applicant's unique circumstances and his credibility were not disputed by the fourth respondent.

[54] Even if the changed circumstances in the DRC was to be considered, in the absence of evidence regarding a change in the risk carried by the applicant personally, and in the absence of proper individual consideration of the applicant's personal circumstances, the decision lacks any rational basis. as contemplated in s 6(2)(f)(i)(cc) and (dd) of PAJA.

Procedural unfairness

[55] Even if the evidence relied on by the fourth respondent when taking his decision was relevant, the considerations on which the decision was based were never put to the applicant, nor was he given an opportunity to comment

on it. This is inconsistent with procedural fairness, the *audi alteram partem* principle, in its most basic sense. The applicant was not afforded a fair hearing.

[56] This failure must be assessed against the RAB's duty to assist and obtain relevant information and its entitlement in terms of s 21(2)(c) of the Refugees Act to make enquiries.

[57] This failure renders the fourth respondent's decision procedurally unfair and reviewable in terms of 6(2)(c) of PAJA.¹³

Failure to have regard to relevant considerations

[58] It was submitted by the applicant that the fourth respondent had no due regard at all to the real possibility that the applicant faces the death penalty on his return to the DRC, nor did he consider that the applicant faces prison conditions so harsh that they could kill him before the state has any opportunity to carry the death sentence out.

[59] In the absence of a finding by the RAB at the time that the applicant's version of his own circumstances was to be rejected, the fact that President Kabila was still one of the presidents in the country was not disputed. This would have informed that the risk to the applicant of being incarcerated and faced the death penalty was not excluded. This real remaining risk was not duly considered. This failure would support a review in terms of s 6(e)(iii) of PAJA.

¹³ **Somali Association**, *supra*, at par [86].

Internal remedies

- [60] It was contended on behalf of the applicant that the obligation to exhaust internal remedies that the fourth respondent cast upon the applicant cannot be reconciled with the fourth respondent's acceptance that the applicant faced a real risk of persecution on his departure from the DRC. This contention is well founded. If the applicant faced a real risk of persecution upon his departure from the DRC, he could not reasonably have been required to exhaust remedies internal to the DRC and controlled by those in power.
- [61] It was submitted on behalf of the applicant that there is a clear risk that the applicant will die in prison while awaiting execution, as prison conditions in the DRC – especially at Makala Prison, where the applicant would likely be held – are truly appalling. As healthcare is “virtually non-existent” and overcrowding is rife, being detained in a DRC prison could, on the undisputed facts, result in death. It was submitted that the “internal remedies” to which the fourth respondent referred are plainly not remedies at all.
- [62] In my view the inference is justified that those remedies would have been tainted by the very risk of persecution, and indeed execution, that drove the applicant's departure from the DRC in the first place.
- [63] On that basis alone, there is no rational connection between the fourth respondent's decision and the applicant's alleged obligation to exhaust internal remedies in the DRC. In my view the fourth respondent could not reasonably have come to a conclusion that internal remedies could or should have been exercised.

[64] The decision therefore falls to be reviewed for this reason in terms of s 6(2)(f)(ii)(cc) and (dd) of PAJA.

APPROPRIATENESS OF SUBSTITUTION

[65] Having found that the decision of the fourth respondent should be set aside, the question remains whether this court should go further, and substitute the decision with its own, granting the applicant's claim for refugee status.

[66] The Constitutional Court confirmed in **Trencon Consulting (Pty) Ltd v Industrial Development Corporation of South Africa Ltd**¹⁴, that pursuant to an administrative review under s 6 of PAJA, and once administrative action is set aside, s 8(1) affords courts a wide discretion to grant any order that is just and equitable. S 8(1)(ii)(c) affords courts the discretion to make a substitution order in exceptional circumstances. With regards to the exceptional circumstances test, it was held in **Trencon**¹⁵:

“Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order for substitution.”

[67] In **Trencon**¹⁶ Khampepe J further explained¹⁷:

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be

¹⁴ 2015 (5) SA 245 (CC), paras 46 to 55. par [34].

¹⁵ *Id*, par [35].

¹⁶ *Id*, paras 46 to 55.

¹⁷ *Id* paras [47] – [49].

considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances — if the court has all the relevant information before it — it may very well be in as good a position as the administrator to make the decision.

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and 'it would merely be a waste of time to order the [administrator] to reconsider the matter'. Indubitably, where the administrator has not adequately applied its unique expertise and its experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.

- [68] The court must also consider other factors, such as delay and the implications thereof, applicant's circumstances and other considerations of justice and equity¹⁸

Are there special circumstances justifying a substitution order?

¹⁸ *Id* paras [51] to [53]; **Tshiyombo v Refugee Appeal Board** 2016 (4) SA 469 WCC; **FNM v Refugee Appeal Board** 2019 (1) SA 468 at paras [92] – [97].

(a) Is the court in as good a position?

[69] This court has available to it a full rendition of the material facts relevant to the applicant's claim for refugee status. The court does not have available to it the opportunity to conduct an oral interview with the applicant. However, the relevant information on which his claim is based is on the record, and it is essentially undisputed. Neither the fourth or fifth respondents have challenged the applicant's version of the facts that led to his departure from the DRC and his application for asylum. The applicant's version of events and the reasons for this application for refugee status were equally not refuted in the respondents' answering affidavit by way of evidence to the contrary.

[70] In the answering affidavit the respondents have simply again referred to the two sources mentioned by the RAB, which, as indicated, did not support the RAB's findings to refuse refugee status. Such documents were, however, not presented by the respondents, and they did not indicate that further evidence was available regarding the applicant's personal position and the events that led up to his flight from the DRC. If the Respondents wanted to dispute the applicant's contentions, they definitely needed to say more.¹⁹ The respondents failure to produce or even mention further sources which could form part of a renewed appeal process, rather demonstrate that no further evidence will be forthcoming. In my view a renewed process could present a

¹⁹ Similar to what was found in FNM, *supra* par [79].

variety of difficulties, such as the inability to the procurement of evidence , and would in all probability not result in a fair hearing.

[71] Any remaining disputes are rather of a legal nature, and within this court's competence.

[72] On the whole I am of the view that the court is on balance in as good a position as the RAA to make a decision.

(b) Is the decision a foregone conclusion?

[73] In **Somali Association** the Supreme Court of Appeal held, with reference to the UNHCR Handbook, that although the onus is on an applicant for refugee status to show that he meets the requirements for refugee status, that does not mean that the standard which would conventionally apply in civil cases, namely that he who asserts must prove, is, without more, to be applied to refugee cases. They find themselves in a peculiar situation, and corroborative documents or evidence might not be available. A more flexible yardstick and a less strict approach is appropriate. So, too, in assessing credibility, these factors must be considered against the totality of evidence and information obtained and presented. Thus, the assessment of refugee status is more flexible than would otherwise be the case.

[74] The material evidence regarding the applicant's circumstances were not disputed. As indicated above, the reasons for refusing the applicant refugee status were not sound, and it fall to be rejected. If further evidence to the contrary was available, it would surely already have been presented by the

respondents. I am of the view that the applicant has proved that he has met the requirements of section 3(a) and (b) of the Act, bearing in mind the less strict approach to the issue of onus. I am of the view that the only outcome of a proper decision-making exercise would be to grant refugee status to the applicant, and that the decision is a foregone conclusion

(c) Further considerations

Delays on the part of the respondents

- [75] Primary amongst the additional factors that this court considers are incompetence and delay on the side of respondents. These considerations take on a unique and compelling character in this case.
- [76] More than two decades after the applicant made application for refugee status, it is still unresolved. It has taken about 11 years for the RAB to even communicate the decision to the applicant, and only after he had to obtain legal representation and had to make a formal request for information.
- [77] To date no cogent explanation for this delay has been provided by the respondents.
- [78] After the application was issued, the respondent further delayed the matter by filing their answering affidavit late and failing to file heads of argument for a period of about 2 years. It was only filed after an application to compel the filing of heads and an application to strike out the respondents' defence was submitted by the applicant.

- [79] Even if the situation in the DRC were such that the applicant need no longer fear persecution, and even if that fact, if established, was relevant at this stage, the delay in processing the applicant's appeal – which results exclusively from the respondents' incompetence or failures - would in my view in itself militate against a refusal to grant the applicant refugee status now.
- [80] The delays caused that the applicant was left undocumented because of the failure of the Department to renew his asylum seeker visa. This rendered him and his family vulnerable, amongst others to arrest and detention. The uncertainty that the applicant has faced for decades pending his application for refugee status had been prejudicial, unjust and unfair.
- [81] He had to apply again in 2024 for a court order to direct the first and second respondents to renew his asylum seeker visa pending this review application.
- [82] To now, again, allow the application to be referred back, with the potential of further delays by the decision makers on a re-consideration of his appeal would equally be unjustified and unfair to him.

Bias and incompetence

- [83] Applicant's counsel submitted that, based on numerous spurious and prejudicial averments in both the respondents' answering affidavit and belatedly filed heads of argument, there exists more than a reasonable apprehension that the applicant will not receive a fair hearing should the matter be remitted. It was submitted that the court should for this reason also exercise its discretion to make a substitution order.

[84] In my view the contentions of the applicant's counsel are justified. In the answering affidavit the deponent on behalf of the respondents avers that the application is ill-conceived and meritless. He then goes on to make a more serious averment that there are fundamental legal principles which have been flouted by the applicant in bringing this application, without making any attempt in the answering affidavit to explain what principles he refers to or how same were flouted. The respondents accuse the applicant in their papers of being untruthful, malicious and abusing the process of the Court. They also accuse him of abusing the process of court and wasting taxpayers' money with his application.

[85] The RAA itself joined cause with the other Respondents to resist this review application. None sought to distance themselves from these arguments or to, instead of defending the RAB's decision, abide the decision of this Court. With reference to **Tantoush v Refugee Appeal Board and Others**²⁰ and **Harerimana v Chairperson Refugee Appeal Board and Others**²¹ it was argued that the conduct of the RAB actively opposing the application (rather than abiding the court's decision) indicates a bias on the part of the RAB. In **Harerimana**, in similar circumstances, Davis J found:

“33]In my view the conduct of first and second respondents in actively opposing this application rather than abiding the decision of this court, and allowing fourth and fifth respondents to raise the necessary opposition, disqualifies the RAB from being perceived as a sufficiently fair and impartial body in this case. This is thus an exceptional case in which substitution by this court is justified.

²⁰ 2008 (1) SA 232 (T) at para [87].

²¹ 2014 (5) SA 550 (WCC) at par [33].

[86] In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd** 2015 (5) SA 245 (CC) at para 54 the Constitutional Court emphasized the importance of bias or gross incompetence by an administrator as a factor to be considered by a court when determining whether exceptional circumstances exist justifying substitution as a remedy:

"If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order."

[87] That there has been ongoing and gross incompetence in the handling of the applicant and his application for refugee status is evident from the facts of this matter, and the grounds for review as discussed above. This is especially evident from the following:

87.1 Contrary to the provisions of the Refugees Act at the time, the applicant's appeal was determined by an improperly constituted RAB;

87.2 During the period of 11 years during which the RAB and subsequently the RAA failed to provide the applicant with the RAB ruling, members of the relevant Refugee Reception Office (RRO) were apparently themselves unaware of the ruling and continued to renew his asylum seeker visa.

87.3 The sudden unlawful arrest and detention of the applicant at the hands of the Department's officials when officers belatedly became aware of the RAB's decision. This at a time when the decision had yet to be communicated to the applicant himself.

87.4 A 4 month delay by the respondents in filing their answering affidavit in this review application.

87.5 The 2 year delay by the respondents in filing their heads of argument in this review application.

87.6 The unlawful, prolonged and again unexplained failure of the Department to renew the applicant's asylum seeker visa once he instituted this review application.

87.7 Unmeritorious contentions and unjustifiable, unsubstantiated attacks by the respondents on the applicant in their affidavit.

[88] Given the decades of abuse that the applicant has had to suffer at the hands of the Department, its various organs, functionaries, and legal representatives, there is a very real likelihood that if the matter is to be remitted back to the RAA he will simply be subjected to similar further delays, and unfair and unlawful treatment. It cannot be in the interests of justice to require the applicant and his family to face such risk again, after so many years. Certainly, the attitude to the applicant and his case displayed by the respondents in their defence of this matter, inspires no confidence that he will receive timely, fair, competent and unbiased treatment should the matter be remitted.

[89] The recent decision of the Constitutional Court in **Walus v Minister of Justice and Correctional Services and Others** 2023 (2) SA 473 (CC) in which the Court held that it would be just and equitable to direct that the applicant in the matter be released on parole and not remit the matter back to the Minister,

given the long history of a failure by the Minister to grant the applicant parole despite him being eligible for it, illustrates the importance of a court taking into account considerations of justice and equity when determining if exceptional circumstances exist for a court to substitute its decision for that of an administrator.

Recent evidence regarding the applicant's country of origin.

[90] Applicant's counsel referred me three documents to demonstrate the circumstances in the DRC: In the first place, *Amnesty International Report (24 April 2024) - The State of the World's Human Rights, Democratic Republic of the Congo*, secondly *US Department of State (23 April 2024)- 2023 Country Report on Human Rights Practices: Democratic Republic of the Congo*, and a report of *Human Rights Watch (2024): "World Report 2024 – Democratic Republic of Congo*. The Respondents' counsel did not object to the court having regard thereto, and that same were from credible sources, yet she pointed out that the dates of the reports.

[91] These reports, concerning the conditions in the DRC in 2023/2024, all raise numerous concerns about escalating conflicts claiming the lives of many civilians in 2023/2024. In the first-mentioned report, compiled in April 2024, the opening remark is that the human rights situation in the DRC remains dire. In such document reference is *inter alia* made to armed groups continuing to carry out widespread attacks and the killing of thousands of civilians, with scores of others being wounded. It specifically makes mention of extrajudicial

executions which are politically and religiously motivated. Furthermore, arbitrary detention and unfair trials are mentioned. Inhumane detention conditions is also mentioned as a concern.

[92] In the second report mentioned, dated April 2024, it is stated that there were no significant changes in the human rights position in the DRC over the preceding year, and that the human rights situation remains dire. It also speaks of credible reports of arbitrary or unlawful killings, including extrajudicial killings, torture or cruel and inhumane or degrading treatment or punishment, and other human rights abuses. It also mentions numerous reports of arbitrary and unlawful killings being committed by the government and of torture, cruel and inhumane treatment, arbitrary arrest and detention, denial of a fair public trial. It also mentioned the continuing conflict between armed groups especially in the East of the Country, and large-scale displacement of civilian due to the armed conflict.

[93] The information contained in such undisputed documents provide an updated picture of the circumstances in the DRC. It is relevant to the issues of justice and equity, which require consideration in an exceptional circumstances enquiry.²² They illustrate that the applicant and his children will invariably face material risks and hardship if they are to return to the DRC at present. I discuss this further below.

²² See **Kennedy Tshivombo v Members of the Refugee Appeal Board and Others** 2016 (4) SA 469 (WCC) paras 42 to 44, quoted in par [100] *infra*; and **Trencon** at par 35.

[94] It confirms ongoing instability in 2023/2024, which period was proximate both to the date when the application was launched in 2021 and heard in 2025. The ongoing instability is also supported by the facts in **FNM** where the court, with reference to inter alia a report of *Human Rights Watch* and a 2016 *Secretary General report to the UN Security Council* along with *UN Security Council Resolution 2293 of 2016* concluded that all these documents “*point to ongoing instability*” in the Eastern DRC. I have taken cognisance of the fact that conflict in the DRC was still ongoing in 2025.

Applicant's circumstances

[95] The applicant has been in South Africa now for about 23 years. At all stages he has sought to the best of his ability, in difficult circumstances, including through serious illness, to comply with and abide by the provisions of the Refugees Act in asserting his right to apply for asylum.

[96] During this time, including the 11 years it has taken the respondents to make the fourth respondent's decision available to him, the applicant made a life in South Africa and raised two children here. They were twelve years old in 2021 at the time of the founding affidavit. The applicant says that they speak English and Isizulu, and cannot communicate in the DRC. To return him to the DRC in these circumstances – to a country that his children have never known – would, respectfully, be wholly unjust and inequitable, and to the detriment of the children.

[97] If forced to return, the applicant and his family will probably suffer severe hardship, in a country which, according to the abovementioned documents, is

still fraught with instability, conflict, uncertainty and danger. His children will be uprooted from the schools they are attending and will be forced to relocate to a country that they have never visited and whose languages they may not be able to speak, and where access to education, healthcare and other amenities of life appear to be precarious. This would clearly not be in their best interests.

[98] Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Their removal could also result in an infringement upon their rights in terms of section 28(1) of the Constitution to basic nutrition, shelter, social services and to be protected in times of armed conflict.

[99] Furthermore, no new information has been put up in either the answering affidavit or the heads of argument by the respondents to support the finding made by the RAB on the flimsy information (the evidentiary status of which was questionable) that it would be safe for the applicant to return to the DRC and that there was no reasonable risk the applicant may face arrest, detention and ultimately the death penalty should he return to the DRC.

[100] In the matter of **Kennedy Tshivombo v Members of the Refugee Appeal Board and Others**²³ the Court held that it would be just and equitable that it substitutes its decision for that of the RAB and grant the applicant refugee status, in circumstances similar to this case. The Court found that the inordinate length of time it took to process the applicant's application for asylum coupled with the fact that while living in South Africa awaiting the

²³ 2015 (4) SA469 (WCC)

decision in his application, the applicant and his wife had had two children and established roots in the country, gave rise to exceptional circumstances justifying a substitutive order being made. The Court's reasoning is encapsulated in the following paragraphs of its judgment:

“[42] [In Trencon] [t]he Constitutional Court emphasized that the term 'exceptional circumstances' in s 8(1) of PAJA must be read contextually with the words 'just and equitable' in the opening words of the subs. As Khampepe J stated at paragraph 35 'Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances'. The notion of justice and equity incorporates a notable degree of flexibility.

[43] In the current matter I consider that the following characteristics of the case make it just and equitable that the exceptional remedy sought by the applicant be considered. The processing of his application for refugee status has taken an inordinate length of time. He has been in the country on an asylum seeker permit for seven and a half years before the determination of his appeal. A delay of that length cannot be ascribed to the ordinary vicissitudes of litigation or bureaucracy. The respondents have put nothing before the court to justify or explain it. Constitutional principles enjoin administrative efficiency; not as an abstract norm, but for the benefit and protection of all of us who are unavoidably affected by various forms of administrative action to a greater or lesser degree. The principle is reflected in the preamble to PAJA itself, in acknowledgement of the prescript in s33(3)(c) of the

Constitution. It is also implicit in the basic values and principles governing public administration set forth in s195 of the Constitution.

[44] The implications of the delay are that it was long enough for the applicant to establish roots in the country. Two children have been born to him and his wife during that period. The administration of the Refugees Act falls, according to its own precepts, to be imbued with a humanitarian approach. The adverse effect on the applicants' family's sense of security of further extending the delay in respect of determining their right to live here is obvious. The holder of an asylum seeker permit furthermore does not enjoy the access that a refugee does to travel documentation, health and education benefits and eventual qualification for permanent residence. In these circumstances it would be just and equitable for a substitutive order to be made if the requirements for granting such exceptional relief have been met."

[101] In my view similar considerations are present in respect of the applicant.

[102] In conclusion, based on my findings and the legal principles mention herein, I find that the requirements for exceptional circumstances have been met, and that it will be just and equitable that substitutive order be made.

COSTS

[103] Counsel for the Applicant submitted that the respondents' conduct in dealing with the applicant's application for refugee status and in these proceedings,

and their opposition to the application, has been reprehensible and has amounted to an abuse of the process of this Court.

[104] It was contended that their inexplicable delays in filing their heads of argument prejudiced the applicant and constituted a flagrant disregard of the rules and the authority of this Court. It was submitted that the prejudice suffered by the applicant has furthermore been compounded by spurious, defamatory and vexatious averments made in the respondents' papers.

[105] As the Constitutional Court has held, the Constitution imposes a higher duty on state organs/public litigants when litigating and as a result the state is required to observe the highest standards of conduct in litigation (**Public Protector v South African Reserve Bank**²⁴ and **MEC for Health, Eastern Cape and Another v Kirland Investments**²⁵).

[106] In argument counsel for the respondent agreed that the matter should have been handled better by the respondents. She conceded, in my view correctly so, that the respondents should pay the costs, whatever the outcome of the application.

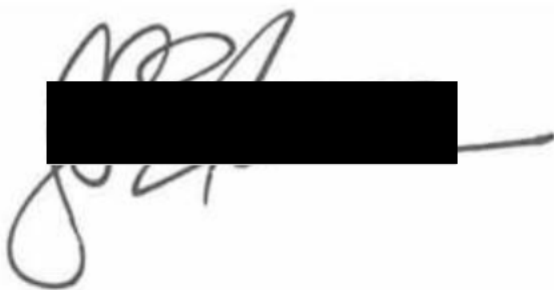
I GRANT AN ORDER IN THE FOLLOWING TERMS:

- 1. The respondents' condonation application for the late filing of their answering affidavit is granted.**

²⁴ 2019 (6) 253 (CC).

²⁵ 2014 (3)SA 37(CC).

2. The respondents are ordered to pay the costs of such condonation application.
3. The decision of the fourth respondent, taken on or about 29 September 2009, refusing the applicant's appeal to the Refugee Appeal Board against the rejection of his claim for refugee status (the decision), is reviewed and set aside.
4. The decision is replaced with an order upholding the appeal, and granting the applicant's claim for refugee status.
5. The respondents are ordered to pay the applicant's cost of the application, including the cost of two counsel, on scale C.



STONE AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv M Mpya & Adv S Mchunu

Counsel for the Respondents: Adv Ntingane

Date of hearing: 07 May 2025

Date of Judgment: 15 December 2025