REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 99766/15
Date: 30 January 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
30/01/2019 .....
DATE SIGNATURE

In the matter between:

SOMALI ASSOCIATION OF SOUTH AFRICA	**1st Applicant**
HASSAN ABDINASIR OSMAN	**2nd Applicant**
ALI JAMAC KHAYRE	**3rd Applicant**
ABDULKADIR MOHAMED OMAR	**4th Applicant**
ABDURAHMAN ALI MAHAMAD	**5th Applicant**
MOHOMED AHMED	**6th Applicant**
MOHAMED AHMED	**7th Applicant**
MARYAMA MAHUMED KAHIN	**8th Applicant**
ABDULLABASHIR HASSAN	**9th Applicant**

and

THE REFUGEE APPEAL BOARD	**1st Respondent**
CHAIRPERSON: REFUGEE APPEAL BOARD	**2nd Respondent**
THE MINISTER OF HOME AFFAIRS	**3rd Respondent**

THE DIRECTOR- GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**4th Respondent**
THE TSHWANE INTERIM REFUGEE RECEPTION OFFICE	**5th Respondent**
THE PRETORIA REFUGEE RECEPTION OFFICE	**6th Respondent**
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	**7th Respondent**

Summary: **Application for an order reviewing and setting aside decisions of the Refugee Appeal Board; Condonation in terms of section 9 of Promotion of Administrative Act 3 of 2000; Refugees Act – eligibility for refugee status in terms of Section 3; meaning and application of "persecution" in Section 3 (a); applicability of Section 3 (b) test; requirement of personal life threat exposure within context of "persecution" and compulsion to flee own country;**

JUDGMENT

MLAMBO JP

Introduction

[1] The displacement of persons as a result of armed conflict remains a challenge globally today. The challenge has become exacerbated by violent activities of extra parliamentary military organisations vying for power against other such organisations as well as against Government forces. Examples are the Syrian conflict and in this continent, the ongoing armed strife in parts of the Democratic Republic of the Congo. There are also widely publicised violent attacks carried out in other parts of the continent such as those by Boko Haram in Nigeria and by Al Shabaab in Somalia and Kenya. The inevitable consequence of such violent activities is that persons targeted by combatants or caught up in areas experiencing armed conflict become displaced, as they have no alternative but to leave their homes and seek refuge in other areas within the same countries or in other countries to escape harm and the inevitable loss of life. This displacement always results in humanitarian crises in terms of the accommodation of these refugees wherever they find themselves in.

[2] It was due to this refugee crisis around the globe, especially after the second world war that the United Nations adopted the ***United Nations Convention Relating to the Status of Refugees of 1951 ("Refugees Convention")***. This was followed by the adoption of a Protocol in

1967. On this continent the then Organisation of African Unity (OAU) also adopted a regional instrument to address the continental refugee crisis, known as the ***Organisation of African Unity Convention Governing the Specific Aspects of Refugee Protection of 10 September 1969 ("OAU Convention")***. The primary objective of these international instruments was to make provision for humanitarian principles regarding the treatment of refugees and asylum seekers in general and more importantly the treatment of refugee and asylum seeker applications lodged by persons alleging forced displacement from their countries of origin. An important principle common to the Conventions is the incorporation of the *non refoulement* principle which effectively means that no person may be refused asylum in another country where that person faces real threats to his or her life especially life threatening persecution in such person's country of origin should he be refused asylum.

[3] This country ratified the Refugees Convention and its 1967 Protocol as well as the OAU Convention. In addition, South Africa promulgated the Refugees Act 130 of 1998 (The Refugees Act). This act gives effect to the international conventions and incorporates them into South African domestic law. The Refugees Act provides the framework within which South Africa carries out its international obligations regarding refugees and asylum-seekers. The principle of *non refoulement* is firmly entrenched in the Refugees Act as the yardstick against which refugee and asylum seeker applications are to be considered and generally treated in this country. Section 2 of the Refugees Act provides:

> *"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 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 or disrupting public order in either part or the whole of that country."*

[4] In ***Ruta v Minister of Home Affairs***[1] the Constitutional Court affirmed the overarching importance of this provision in the following terms:

> *"[24] This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non refoulement, the concept that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.*
>
> *[25] It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees "the right to seek and to enjoy in other countries asylum from persecution".*

South African Courts have taken a keen interest in developing refugee law jurisprudence, as acknowledged by the Constitutional Court in ***Ruta***. This matter presents yet another opportunity to consider the evolution of our refugee law jurisprudence.

[5] In this application, in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), the applicants seek: (i) orders reviewing and setting aside the decisions of the RAB dismissing the asylum seekers' appeals; (ii) orders substituting the RAB decisions with decisions upholding the asylum seekers' appeals and granting them asylum; (iii) orders compelling the relevant Refugee Reception Offices to issue the asylum seekers with the necessary written proof of their refugee status. The applicants also seek, what they term systemic relief to the effect that certain declaratory orders be granted to ensure that the RAB does not commit certain alleged errors in its future decisions. The applicants further seek a structural interdict to require the Minister and Director General to investigate the causes and extent of these alleged errors and to create a plan to address the said alleged defective decision-making coupled with an order to report to this Court.

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1 (CCT 02 /18)[2018] ZCAA 52 (20 December 2018).

The Parties

[6] The first applicant is the Somali Association of South Africa (Somali Association), self-styled as a non-profit organization established to, amongst others; serve the interests of Somali refugees and asylum seekers in the Republic of South Africa. The second to the ninth applicants are the individual asylum seekers (the asylum seekers) on whose behalf the Somali Association acts in this matter. The first respondent is the Refugee Appeal Board (the RAB) and is the appellate entity established by section 12 of the Refugees Act, to hear and determine asylum seeker appeals from decisions made by Refugee Status Determination Officers (RSDO) rejecting and/or refusing to grant refugee status. RSDO's are established by section 8 (2) of the Refugees Act and are officers who consider asylum seeker applications at first instance.

[7] The second respondent is the Chairperson of the RAB and holds office as prescribed in section 13 (1) of the Refugees Act. The third respondent is the Minister of Home Affairs, the member of the Executive branch of the State charged with the responsibility to administer and direct the asylum and immigration obligations of the Republic of South Africa in terms of the Refugees Act. The Minister carries out his refugee and asylum responsibilities through the Department of Home Affairs which is charged with the responsibility of attending to the application and implementation of the provisions of the Refugees Act. The fourth respondent is The Director General of the Department of Home Affairs and is accountable to the Minister. The fifth respondent is the Tshwane Interim Refugee Reception Office and the sixth respondent is the Pretoria Refugee Reception Office. These offices were created by the Director General in terms of section 8 (1) of the Refugees Act, to attend and deal with asylum seekers and refugees who wish to apply for asylum and be granted refugee status in the Republic of South Africa. The seventh respondent is the Standing Committee for Refugee Affairs and is also a creature of the Refugees Act in terms of section 9 thereof. Nothing much turns on the provisions in terms of which these functionaries are established save perhaps for the RAB, as it is its treatment of the appeals of the asylum seekers that is central to this matter. In this regard Section 12 (3) provides that the RAB must function without any bias and must be independent.

The Facts

[8] The asylum seekers applied for asylum, in the Reception offices cited as respondents, at different times when they arrived in SA. their applications were rejected by the RSDOs, as unfounded in terms of section 24 (3) (c)[2] of the Refugees Act. They lodged appeals to the RAB against such rejections but the RAB dismissed their appeals. It is the RAB's decisions dismissing the appeals that are impugned in this application.

[9] The asylum seekers, in this application, rely exclusively on the situation in Somalia as a basis for their quest for refugee status in this country. They set out, in their affidavits, the history of the civil war in Somalia, as well as what they allege is the prevailing situation there impelling them to seek refugee status in South Africa. The asylum seekers further sketch the circumstances they allege caused them to flee Somalia. They each assert that the civil war situation in Somalia was the reason they left Somalia to seek refuge in South Africa. They all blame Al-Shabaab as the predominant cause of the instability in that country. According to a number of reports, cited by the applicants, Al-Shabaab is active predominantly in central and southern Somalia and has been blamed for several so-called terrorist attacks and is fingered as the primary instigator of political strife and instability in Somalia. All the asylum seekers resided in Mogadishu and in its surrounding areas, located in central and southern Somalia.

[10] The applicants assert that Somalia has been in a state of civil war since 1990 and they make reference to publications especially by the United Nations High Commissioner for Refugees (UNHCR) that between 500,000 and 1,000,000 civilians are estimated to have died in the conflict to date. According to this narrative the period between 2006 and 2012 was one of the most intense periods of the conflict, marked by Al-Shabaab's rise to power and which led to foreign military interventions by the African Union, Ethiopia and Kenya, among others. According to the reports cited by the applicants, Al-Shabaab still retains effective control of large swathes of southern and central Somalia and continues to launch attacks in and around Mogadishu. This is documented in the 2014 UNHCR Guidelines on conditions in Somalia which notes that approximately 80 per cent of Southern and Central Somalia remained under Al-

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2. Section 24 (3) (c) "(3) The Refugee Status Determination Officer must at the conclusion of the hearing-
(a) ...
(b) ...
(c) reject the application as unfounded; or..."

Shabaab control in 2013. The applicants refer to the report published in 2015 by the United Nations Human Rights Council's Independent Expert on the situation of human rights in Somalia who made, amongst others, the following statement:

> *"The Independent Expert remains of the view that in spite of the gains made by the SNA [Somali National Army] with the support of AMISOM troops to recover territory from Al-Shabaab, the security situation in many parts of Somalia, particularly in the south-central regions, is not safe or stable enough to receive returnees. Premature returns increase the likelihood of those refugees becoming displaced persons facing the same protection challenges as those that are currently displaced."*

Condonation

[11] This application was brought well outside the one hundred and eighty-day period envisaged in PAJA for the initiation of all challenges reliant on this act. For that reason, the applicants seek condonation for the late launching of this application. I am enjoined to consider whether the applicants have made out a case warranting the indulgence they seek. The approach to condonation applications is dealt with in a number of decisions of our appellate and apex Courts. See for instance ***Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)***[3] where our apex Court enunciated the so-called interest of justice yardstick to be applied to condonation applications. The applicants have provided some explanation for failing to comply with the applicable time period. Without traversing the reasons advanced it is so that this matter requires consideration of important constitutional rights within the context of refugee law. The matter involves judicial consideration of decisions of the RAB which impacts the rights of asylum seekers and refugees within the context of section 2 and 3 of the Refugees Act. It is for this reason that I have decided to exercise my discretion in favour of granting condonation for the failure to comply with the time limits found in PAJA. My view is that it is in the interests of justice that I grant condonation. The extent of the delay is not lengthy and I have also not been told of any prejudice occasioned by the failure to comply with the one hundred and eighty-day period. This is the type of matter that requires a full and thorough consideration by a Court especially considering the issues raised. Clearly condonation is warranted, and it is accordingly granted.

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3 2008 (2) SA 472 (CC).

The applicant's case

[12] The applicant's case is premised on four primary pillars which they refer to as common errors committed by the RAB when dealing with asylum seeker appeals from RSDO decisions. The applicants contend that the RAB's decisions are reviewable and liable to be set aside in view of these alleged common errors, in respect of all the decisions it took regarding the appeals of the asylum seekers. The applicants argue that the first common error is the application of the wrong test for refugee status by the RAB. In this regard it was submitted that the RAB misinterpreted and misapplied the test for refugee status under section 3 of the Act. The second alleged common error is said to be apparent in the RAB decisions through the application of the wrong burden of proof test. The third common error asserted is that the RAB failed to adopt and apply the correct approach to making credibility findings. The fourth alleged common error is said to be in relation to procedural unfairness allegedly evident in the RAB's decisions.

[13] The applicants further submitted that based on the common errors referred to above as well as the requirement to have credible decision making bodies, a case for structural relief has been made out. The case for structural relief is premised on the alleged common errors committed by the RAB which in the applicants' view, exposes many more Somali refugees to the same wrongful decision making. For this reason, the applicants argue that structural relief is appropriate to ensure that no further alleged injustices are committed by the RAB and RSDOs when handling refugee applications by Somali applicants. It was argued that the RAB's defective decision-making amounts to constructive *refoulement* as it exposes asylum seekers to the threat of being returned to their countries of origin where they face life threatening persecution. The defective decision-making by the RAB, it was argued, directly threatens the constitutional rights of asylum seekers.

Discussion

[14] This being a review the issue is whether a case has been made out showing that the RAB decisions are unjust and unfair within the contemplation of PAJA, as asserted or at all, that vitiate the RAB decisions. The RAB derives its authority and powers from section 14 of the Refugees Act which provides –

> *"14. (1) The Appeal Board must-*
>
> *(a) hear and-determine any question of law referred to it in terms of this Act;*
>
> *(b) hear and determine any appeal lodged in terms of this Act;(c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Appeal Board.*
>
> *(2) The Appeal Board may determine its own practice and make its own rules."*

[15] Clearly whilst the RAB is by nature an administrative entity, it is essentially performing an adjudicatory function when it hears and determines appeals from RSDO decisions. It is the only entity given such powers by the Refugees Act. In undertaking its responsibilities in terms of section 14, the RAB is essentially performing a public function. It is prudent therefore when considering the grounds upon which the RAB's decisions are sought to be set aside, to keep in mind the provisions of section 14. Section 33 (1)[4] of the Constitution gives a right to administrative action that is "*lawful, reasonable and procedurally fair*".[5] This being a review brought under PAJA, it is also important to keep in mind the applicable principles governing the judicial parameters within which the impugned decisions should be considered. Lawful administrative action means that "*administrative actions and decisions must be duly authorised by law and that any statutory requirements or preconditions that attach to the exercise of the power must be complied with.*"[6] The courts have translated this idea of legality into a number of more detailed grounds of review and PAJA has codified the common-law grounds of review. The Constitutional Court described the interplay between the performance of public functions and the latitude to challenge such performance under PAJA in ***Giant Concerts CC v Rinaldo Investments (Pty) Ltd***[7] in the following terms –

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4 33. (1) Just administrative action. — Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5 C Hoexter, *Administrative Law in South Africa* 2nd ed (Juta & Co Cape Town 2012), p 253.

6 C Hoexter, footnote 4, p 253.

7 2012 JDR 2298 (CC) at para 29.

"[29] *The Promotion of Administrative Justice Act ("PAJA"), which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that "adversely affects the rights of any person and which has a direct, external legal effect". PAJA provides that "any person" may institute proceedings for the judicial review of an administrative action.*"

[16] In any review challenge to the performance of a public function, at the core of the investigation is the necessity to consider the impugned decision in the light of material that was before the administrative functionary when it considered the matter. This means that in this case, the RAB was constrained to the material before it when considering the appeals. The RAB cannot be criticised nor can its decisions be attacked or sought to be set aside based on material that was not before it when it considered the asylum seekers' appeals. I point this out in relation to the applicants' assertion that the respondents have not disputed the extensive evidence presented in this application. Indeed, it is clear from the papers before me that most of the documents relied on by them and the facts set out in the supporting affidavits of persons other than the applicants, were not before the RAB when it considered the appeals. One must therefore consider the material that was before the RAB and how it treated same when it considered and determined the asylum seekers' appeals.

[17] One of the documents that features in the record is the so-called DHA 1590 form (DHA form). All persons wishing to apply for asylum are obliged to complete this form. This form featured prominently in the asylum applications and appeals initiated by the asylum seekers. It is in this form that all the asylum seekers put to paper the circumstances that led them to flee Somalia and why they were in South Africa seeking asylum. The record also contains the RSDO and RAB determinations. The RSDO and RAB determinations set out the facts placed before these decision makers by each asylum seeker as well as the views of the RSDOs and RAB. Considering the review grounds advanced, the RAB determinations provide an important factual repository from which to consider the legal arguments advanced especially in relation to section 3. In my view the appropriate manner of considering this matter is to consider the RAB's treatment of each individual appeal and how it dealt with the evidence placed before. After all the appeals by the asylum seekers were lodged individually and at different times.

The RAB proceedings

[18] The second applicant informed the RAB that he left Somalia in January and arrived in South Africa in March 2011 and applied for asylum. This applicant stated in his DHA Form that he left Somalia due to the civil war there. He also mentioned this when he applied for asylum, and this much is evident in the hearing notes of the RSDO who dealt with his asylum application. The RAB also recorded that it appeared from the RSDO hearing notes that the second applicant was never persecuted by Al-Shabaab or by Government forces, that he left Somalia because *"there is a lack of peace and stability. He fled his country of origin and came to SA to seek protection."*[8] During the RAB hearing, the record shows that the second applicant also asserted the civil war as the reason why he left Somalia. He is recorded as having stated that his life was in danger and that he was invited by his brother to come to South Africa. It is also recorded that he was never recruited by either Al-Shabaab or by the Somali Government forces.

[19] The RAB then, in assessing the second applicant's appeal stated –

> *"The applicant claims that he left his country of origin because of civil war. He failed to demonstrate that he was harmed or persecuted in any way. He merely relied on the fact that he feared to be killed. There was nothing which shows a sustained and systemic violation of his human rights. The appellant managed to stay in country for eight months nothing happened to him."*

The RAB then went on to find, that the appellant had suffered no *"persecution or harm in terms of section 3"*.

The RAB concluded with the following statement –

> *"The Board finds that he does not have a well-founded fear of persecution. The appellant was not compelled to leave his country of origin, he managed to stay in the same region after his brother's death, 2007 nothing happened to him. There is nothing from his evidence which indicated that he was persecuted in his country of origin. The board finds that he came to South Africa seeking a better life."*

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8 RAB hearing notes.

[20] In respect of the third applicant, the RAB recorded that he was a resident of Mogadishu. According to this recordal, this applicant told the RAB that he left Somalia in 2010 as a result of the war and to feeling insecure. It is also recorded that he mentioned that one of his acquaintances in Mogadishu was allegedly killed by Al-Shabaab after having received a phone call two weeks prior to being killed. The third applicant also allegedly received a phone call subsequent to his acquaintance's demise and assumed that whoever was phoning him intended to kill him as well. This applicant then, fearing for his life decided to leave Mogadishu for South Africa.

[21] The RAB summed up the matter by first finding that the factual background sketched in the paragraph above, is what compelled the applicant to flee Somalia. To the RAB the killing of the applicant's acquaintance could not have compelled him to leave Mogadishu. The RAB stated –

> *"The irony of the appellant's claim is that his entire family currently resides peacefully in Mogadishu; the Board therefore infers that it is safe for appellant to return to Mogadishu. The appellant is however not prepared to go back to Somalia as he fears that whoever phoned him will kill him, fears nursed by the appellant in this regard Is not reasonable and or "well-founded".*

According to the RAB this applicant never made out a case to justify persecution on the grounds envisaged in section 3 of Act. The RAB then concluded that the applicant had not mentioned that he feared being persecuted, *"be it the past, present and or the future"*. The RAB also concluded that nothing happened to this applicant which compelled him to flee Somalia for South Africa and dismissed his appeal.

[22] In the case of the fourth applicant the RAB recorded that he did not belong to a political party nor was he ever arrested, that at all material times he resided in Mogadishu. He testified that Al-Shabaab recruited young men to join the organisation and that they killed those who refused to join the organisation. The RAB recorded that he decided to leave Somalia before being so approached by Al-Shabaab, in search of a safe and or better life. He was assisted by his uncle, financially to leave Somalia. The RAB further recorded that his uncle was subsequently allegedly killed by Al-Shabaab during December 2013, apparently after he admitted to Al-

Shabaab operatives during interrogations that he had assisted the fourth applicant to go to South Africa. The RAB recorded the following –

> *"It was put to the appellant that the death of his uncle was irrelevant to his asylum claim due to the long lapse between events. The irony of the appellant's claim is that his entire family currently resides peacefully in Mogadishu, the Board therefore infers that it i[s] safe for appellant to return to Mogadishu. Appellant raised new evidence that he was arrested and or abducted by Al-Shabaab (between Jan – April 2009) for a period of two weeks where after he managed to escape. Appellant blamed the new evidence firstly on the interpreter & secondly admitted that he forgot to mention it at an earlier stage. During the course of the proceedings it also transpired that in addition to Al-Shabaab the Government also wanted appellant to join them; in fact, the Government offered appellant a job if appellant joined them & fought against Al-Shabaab in turn".*

[23] In its conclusion the RAB stated that –

> *"The appellant never made out a case to justify persecution on the grounds envisaged in section 3 of the act... [t]he appellant failed to make out an individual claim of what compelled him to leave Mogadishu...In the circumstances the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him. The appellant is unwilling to return to Mogadishu as he claims that the presence of Al-Shabaab is everywhere in Somalia and that they are still killing people, conceding at the same time that his entire family is still residing peacefully in Mogadishu. It was the appellant's testimony that he left before anything could happen to him. The Appeal Board finds that the appellant's case is not coherent and plausible and appellant does not deserve to be given the benefit of the doubt."*

[24] Regarding the fifth applicant, the RAB recorded that he also did not belong to a political party and that he was at no stage arrested. The RAB recorded that he testified that there was a civil war in Somalia; that there were a lot of political parties in Somalia; that the political parties were fighting with the Government; that Al-Shabaab came to appellant's house during the beginning of 2010 and ordered him to join the organisation and he refused. The RAB further recorded that he left for Kenya where he remained for ten days. Furthermore, the following was recorded by the RAB –

"Appellant in his DHA-1590 & RSDO hearing stated that he left Somalia as a result of lack of peace and stability; that he came to SA to get peace and an education; that he cannot stay in SA without proper documentation."

The RAB referred to this applicant's evidence as:

"not entirely consistent with appellant's oral evidence. Appellant in his notice of appeal amongst other things averred that when the situation in Somalia became unbearable for him, he decided to leave looking for a place of safety and security away from persecution. Appellant was silent on what happened to him in Somalia that compelled him to leave."

[25] The RAB concluded its' assessment of this applicant's appeal with the following findings

"The Board is satisfied that appellant does not face a reasonable possibility of persecution should be return to Mogadishu. It was not appellant's testimony that he left Mogadishu as a result of events seriously disrupting and or disturbing the public order in Mogadishu. The once-off attempt by Al-Shabaab did not compel appellant to leave Mogadishu. The Board cannot exclude the possibility that appellant is an economic migrant in that he voluntarily left Somalia to take up residence and employment elsewhere. The Board finds corroboration of this fact when appellant in his DHA-1590 and RSDO hearing makes mention of the fact that he came to SA to get an education and that he is applying for asylum as he cannot stay without proper documents in SA. In the circumstance the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him."

[26] It appears from the record that the sixth applicant informed the RAB that he left Somalia during 2007, then aged 26, claiming that the Government in Somalia was defeated in 1991, that Somalia has been uncontrollable ever since and that different tribes were fighting with each other in the whole of Somalia and Mogadishu. The applicant told the RAB that he was personally affected by the fighting in that different tribes wanted him to join them but he refused. The RAB then states –

"Appellant embarked on his journey to SA 16 years post 1991 as he was too young to leave earlier. This is background information of what made appellant leave Somalia

during 2007. The standard of proof is that of a "reasonable risk" and must be considered in the light of all the relevant circumstances i.e. past persecution and a forward-looking appraisal of risk. The appellant in casu needs to show that he left his country for specifically politically motivated reasons, should appellant fail to show this, appellant's refugee claim will be rejected. Taking into account that refugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution on political grounds or opinion exists. Appellant failed to highlight an incident in Mogadishu that compelled him to leave for SA. Appellant made an informed decision to move to SA as an adult. Appellant's family is currently residing in Mogadishu. The Board finds that nothing happened to the appellant that compelled appellant to leave Mogadishu. Appellant did not explain when, how & under circumstances the different tribes wanted appellant to join them. Appellant was only threatened to be beaten when he refused to join the respective tribes. The appellant never made out a case to justify persecution on the grounds envisaged in S3 of Act, 130 of 1998. Appellant throughout his case was silent on the issue of his fear of being persecuted, be it the past, present and or the future. The Board cannot exclude the possibility that appellant is an economic migrant. The perception is that people in SA have better life & that SA is an economically viable country to reside in. It was a planned & calculated move on the part of the appellant to come to SA during 2007. In the circumstance the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him."

[27] The seventh applicant informed the RAB that he fled Somalia, in December 2009, because of the civil war, that his brother died in the year 2007 as a result of the war between Al-Shabaab and the Government. The RAB recorded that the applicant stayed for two years in Somalia after the death of his brother and that nothing happened to him during that time and that he never relocated elsewhere in Somalia during that time. It is also recorded that he stated that he subsequently fled to Kenya, Mozambique, Zimbabwe until he arrived in South Africa. The RAB recorded the following –

"The appeal Board finds the appellant did not suffer persecution or harm in terms of section 3 of the Refugee Act. The Board further finds that he does not have a well-

founded persecution. The Appellant was not compelled to leave his country of origin, he managed to stay in the same region after his brother's death in 2007 and nothing happened to him. There is nothing from his evidence which indicated that he was persecuted in his country of origin. The Board finds that he came to South Africa seeking a better life. It is unlikely that the appellant will face a reasonable possibility of harm or persecution were he to return to Somalia. The appellant on appeal records can return safely to his country origin, there are areas which are identified not to be affected by civil war and are government's control."

[28] In so far as the eighth applicant is concerned the RAB recorded that in the DHA form and RSDO's notes this applicant stated that there was a civil war between Al-Shabaab and the Government since 2006, that her family house was bombed and destroyed due to the civil war, that her father, brother and daughter were killed. She told the RAB that because of the civil war she left Somalia and went to Kenya, settling on the border area between Kenya and Somalia for a period of two years during which nothing happened to her. She told the RAB that she left Kenya because of the poor and unbearable living conditions and starvation. The RAB recorded that she stated that subsequent to leaving Kenya during 2008, she went to Tanzania where she was arrested and imprisoned for a year and three months because she was an illegal immigrant. The RAB further recorded that she stated that in January 2010, she returned to Kenya and then went back to Somalia arriving there in April 2010. The RAB further recorded that she stated that upon her arrival in Somalia she noticed that there was still instability although nothing happened to her upon her return. Due to this instability she decided to leave Somalia and travelled to South Africa.

[29] During her appeal hearing she stated that she came to South Africa to seek protection. The RAB recorded the following in respect of this applicant –

"The appellant claims that she was persecuted because of the civil war that occurred in the year 2006, she claimed that her life was in danger. Her story lacks substance and she failed to demonstrate that she was harmed or persecuted in any way. She has merely relied on the general instability in her home country but there is nothing which shows a sustained and systematic violation of her human rights. She was in Kenya for a period of

two years where nothing happened to her and she left Kenya because of unbearable living conditions and starvation...The Board finds that the appellant did not suffer persecution or harm in terms of section 3 of the Refugees Act. The Board further finds that she does not have a well-founded fear of persecution. The appellant in April 2010, she availed herself to the protection of her country of origin when she went back to Somalia. The Board finds that nothing happened to her upon return to her country of origin. She was not compelled to leave her country of origin. The Board further finds that she stayed in Kenya for a period of two years and was given protection by that country. There is nothing from her evidence which indicated she was persecuted in Kenya because of her nationality. She left Kenya because she was seeking a better life for herself and her children. It is unlikely that the appellant will face a reasonable possibility of harm or persecution if she were to return to Somalia. The appellant on appeal records there is nothing that indicates that she was either tortured, physical attacked or arrested while she was in her country during 2010. She can return safely to her country of origin, there are areas which are identified not to be affected by civil war and are under government's control."

[30] As far as the ninth applicant is concerned the RAB recorded that he mentioned that his mother died in 2008 and that he does not know the whereabouts of his father, that he had no education, did not belong to a political party and was never arrested by Government forces. The RAB further recorded that this applicant herded camels when he lived in Somalia and that he left due to the fighting between Al-Shabaab and Government soldiers. The applicant informed the RAB that he was personally affected by the political instability in Somalia when Al-Shabaab and Government soldiers fought in the area where he was herding camels, just outside Kismayo, but neither he nor the camels were harmed in that shootout.

[31] The RAB then, with reference to the version mentioned above, records –

"This is in essence what compelled the appellant to leave his country of origin. The appellant never made out a case to justify persecution on the grounds envisaged in S3 of Act, 130 of 1996. The appellant throughout his case was silent on the issue of his fear of being persecuted, be it the past, present and or the future. There was no link between the

appellant's mother death & appellant's relocation to SA more than four years later. Appellant entered SA to benefit from the rights afforded to refugees under the Refugees Act, 130/1998. Appellant fabricated his claim to fall within the parameters of refugee law. In the circumstances the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him. The appellant's unwillingness to return to the Somalia, based on this factual enquiry, is not based on a well-founded fear of persecution. Appeal Board accordingly finds that the appellant does not have a reasonable fear of persecution should he return to the Somalia. The appellant when asked what would happen to him should he return to Somalia replied that the fighting problem still exists even now in Somalia. The Appeal Board finds that the appellant's case is not coherent and plausible & appellant accordingly does not deserve to be given the benefit of the doubt."

Submissions

[32] The applicants argue that the RAB adopted an overly restrictive interpretation of "*persecution*" in applying the section 3 (a) definition of refugee status. It was argued that the RAB made political persecution the sole determinant of whether a case had been made out to consider the refugee status of each of the asylum seekers. This, it was submitted rendered the RAB's approach too exceedingly narrow and unjustified. Section 3 (a) provides –

> "(3) *Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person –*
>
> > *(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;..."*

[33] The applicants then argued that even if a person has not experienced persecution, section 3(b) requires the RAB to determine whether the applicant for asylum was compelled to leave their country of origin due to "*external aggression, occupation, foreign domination or events*

seriously disturbing or disrupting public order", either in part or the whole of the person's country of origin. Section 3 (b) provides –

> *"b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere..."*

The argument here is that the RAB only focussed on the section 3 (a) requirement and didn't consider whether the asylum seekers had satisfied the section 3 (b) requirements to qualify for asylum. The applicants submitted that the RAB had failed to apply the expanded definition of refugee status under section 3 (b) of the Refugees Act.

[34] The applicants argued that section 3 makes it clear that proof of persecution under section 3 (a) is not a necessary precondition for refugee status. It was argued that in ***Tshiyombo v Refugee Appeal Board and Others***[9], it was found that it is not only political persecution that is required to be shown to the exclusion of other grounds of persecution. Further reliance was placed on the decision in ***Radjabu v Chairperson, Standing Committee for Refugee Affairs and Others***[10], to the effect that it was fatal to the RAB's decision making process to ignore section 3 (b) of the Refugees Act. These submissions are made by the applicants to buttress their case that refugee status does not only hinge on proof of persecution in terms of section 3 (a) but that even in the absence of such proof, it was sufficient if the refugee applicant could show that section 3 (b) was applicable. The applicants further rely on the decision of the Supreme Court of Appeal (SCA) in ***Abdi and Another v Minister of Home Affairs and Others***[11]. In this case at para 27 the SCA said –

> *"[27] By the same token, refusing a refugee entry to this country, and thereby exposing her or him to the risk of persecution or physical violence in his home country is in conflict with the fundamental values of the Constitution."*

This statement of the law is important but it does not avail the applicants of any basis to succeed in this matter. The asylum seekers clearly failed to persuade the RAB that they

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9 2016 (4) SA 469 (WCC).
10 [2015] 1 All SA 100 (WCC) at para 6.
11 2011 (3) SA 37 (SCA).

were compelled to leave Somalia due to persecution on any of the grounds listed in section 3 (a) or due to the circumstances mentioned in section 3 (b).

[35] I must at the outset deal with the argument that the RAB applied a restrictive interpretation to the term "*persecution*" as in section 3 (a). It is immediately apparent that when considering each appeal, the RAB focussed on whether the asylum seekers were personally exposed to conduct amounting to persecution. The RAB considered whether each of the asylum seekers was exposed to any personal threat or harm leaving them with no option but to flee Somalia. It is this approach that is criticised as an overly narrow approach to "*persecution*" as found in section 3 (a). It is clear in the RAB's reasoning that it considered whether each asylum seeker had at any stage faced any personal threat. It considered the situation in Somalia in so far as it related to each applicant. In this regard the RAB considered if the asylum seekers had other family members living with them when they decided to leave Somalia. The RAB also considered the situation of those family members who, in its view would have experienced similar threats as alleged by the asylum seekers. The basis for this approach is clear, if the civil war was the reason for the asylum seekers to flee Somalia, clearly the violent circumstances presented by that armed conflict cannot be selective, everyone living in the affected area would have been under threat. The RAB's finding that the applicants failed to show that they were reasonably at risk of harm in Somalia is based on the view that it cannot be only the asylum seekers who were exposed to risk but others living with them there were unaffected. It was for this reason that the RAB found that there was no threat to the applicants' lives if they were to be returned to Somalia. This finding is clearly based on the evidence presented by each asylum seeker before the RAB.

[34] Clearly, in my view, the criticism of the RAB's approach is misconceived. There is no foundation whatsoever to the assertion by the applicants' that the RAB applied a restrictive interpretation of the term "*persecution.*" The asylum seekers applied as individuals and it is necessary that they provide a basis for why each of them, in their personal capacities, fled their country. In the context of this case a generalised approach to the issue of persecution is not the correct yardstick. The applicants had to persuade the RAB why they, as opposed to others who were living with them, felt the need to flee. Clearly a personalised threat approach to persecution is not misplaced and is necessary especially in this case where there is evidence that other family

members' of these asylum seekers never fled and by all accounts are still living in Somalia. What these applicants failed to present was any personalised threats they endured giving them no choice but to flee Somalia. They also failed to explain why they elected to leave Somalia rather than relocate to other safer parts of that country. By all accounts it was the central and southern parts of Somalia that were under Al-Shabaab onslaught. These are important considerations, especially the personal threat element, that cannot be ignored especially in determining whether section 2 is applicable. Section 2 has a clearly discernible personal element to it. My view is that this is not an overly restrictive interpretation of the section 3 (a) "*persecution*". It is either a person is facing persecution or not. Properly considered, section 2 is person focussed i.e. does the particular person (refugee or asylum seeker) face any threat to his or her life if he or she was to be denied refugee status resulting in them having to be returned to their country.

[35] It is also misconceived to accuse the RAB of only deciding the asylum seekers appeals on the basis of the section 3 (a) requirements only. The applicants' submission suggests that the RAB never applied section 3 (b). That this is misconceived is clear from the circumstances set out above, relevant to each asylum seeker. The recordal of the RAB's conclusions and reasons regarding each individual asylum seeker shows that the RAB was alive to the applicability of both legs of section 3. What is more telling being that it is clear from each asylum seeker appeal that none of them presented evidence showing that they left Somalia due to section 3 (b) factors i.e. *"external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order"* The common thread running through the asylum seekers cases was that they left Somalia because of the civil war.

[36] Whilst the RAB used the term "*persecution*" predominantly in its reasoning, it is clear that it had both section 3 requirements in mind when it determined the appeals. The RAB was duty bound to focus on the evidence presented to it regarding each appeal. At the end of the day it is this evidence that would determine which decision was called for under the circumstances. It was important and necessary for the RAB to determine if personal safety was at issue and to also determine that, absent political persecution, whether the asylum seekers were compelled to flee Somalia due to external aggression or external occupation. The RAB refers to section 3 holistically in assessing the appeals, and this to me means that the RAB considered the appeals

through the lens of the entire section. In doing so the RAB didn't ignore any of the requirements in (a) and (b). It is clear that the RAB was alive to the need to apply the requirements of both subsections in considering the appeals. In each of its decisions the RAB explicitly acknowledged the applicability of section 3 (a) and (b). It is clear from the record that the RAB applied its mind to the facts before it and made a decision based thereon. It clearly had in mind both legs of section 3 when it considered the asylum seekers appeals and made its decision. Having made the explicit acknowledgement of the applicability of both legs of the section, the RAB then assessed each individual appeal. In doing so the RAB focussed on the particular facts and circumstances as presented by each asylum seeker. It is also clear that the RAB was at all times alive to the implications of section 2 i.e. the need not to return the asylum seekers to Somalia if they faced certain persecution, i.e. the *non refoulement* scenario. I can find no plausible basis why this approach should be criticised.

[37] Purely considering the factual matrix relevant to each asylum seeker considered by the RAB, it is apparent when considering the RAB decisions that it focussed on what each asylum seeker presented in support of his or her appeal. In respect of all the asylum seekers the RAB specifically referred to their reliance on a generalised civil war basis as a reason why they left Somalia. They failed to mention any circumstance or fact that suggested that their personal safety was at risk nor any that showed compulsion forcing them to flee Somalia. The second to fourth applicants simply asserted a generalised civil war reason. The fifth applicant also referred to the civil war and mentioned that Al-Shabaab visited him and tried to recruit him but he refused. On the basis of this Al-Shabaab visit, he decided to flee Somalia. The RAB found that this applicant did not reveal any facts suggesting that he fled Somalia due to *"events seriously disrupting and/or disturbing the public order in Mogadishu"*. The RAB further found that the once off attempt by Al-Shabaab to recruit him did not compel him to flee Somalia. The seventh applicant had actually stayed in Somalia for some two years after his brother was killed and left for South Africa even though nothing in the form of persecution or compulsion to leave had intervened. The ninth applicant had decided to leave based on a single firefight between Al-Shabaab and Government forces during which he wasn't hurt not any of the camels he was tending. Clearly the RAB found that the asylum seekers never mentioned any circumstance suggesting persecution or being compelled to flee or forced out of Somalia.

[38] In respect of the eighth applicant the RAB focussed on the fact she left Somalia and stayed in Kenya for some two years and then went to Tanzania. From Tanzania she returned to Somalia and suffered no persecution whatsoever. She simply decided that it was still unsafe and then left for South Africa. Clearly this is another case where the RAB considered her appeal through the lens of section 3 holistically and found that she had not made out a case that entitled her to refugee status in South Africa. This applicant simply presented no evidence showing that her personal safety was at risk through persecution and/or was compelled to leave Somalia through external aggression or occupation. The RAB can also not be faulted on any basis for finding that this applicant enjoyed the protection of Kenya and her own country Somalia when she went back. In the case of the ninth applicant his situation is simply that he was a camel herder and the closest he came to violence was when there was a clash between Al Shabaab operatives and Government forces in the same area where he was herding camels. He was not injured nor was he the target of the clashing forces. At no stage was he ever personally targeted for recruitment or violence. Clearly the RAB cannot be faulted for finding that these applicants suffered no persecution nor were they compelled or forced to flee Somalia. They simply decided to leave Somalia and come to South Africa. This suggests that it was their choice to simply leave Somalia when they did and that they were not compelled to leave due to external or internal aggression.

[39] The arguments advanced by the applicants seek to straightjacket the RAB when dealing with refugee appeals involving Somali asylum seekers. This approach would effectively take away the effectiveness of the RAB. This approach would mean that there should be a blanket approach to all Somali nationals who have left Somalia to the Republic of South Africa and that all of them should be granted asylum simply by mentioning the civil war. If that were so, the role of the Refugees Act, would become superfluous and the RSDO function would cease. This approach would entail that anyone coming from Somalia in particular, would simply have to allege that there is civil war in Somalia and that he or she felt threatened hence the flight to South Africa. This cannot be. The RAB has an important function to play in assessing and determining refugee appeals. Courts should be careful and avoid trying to dictate to the RAB how it should undertake its functions.

[40] It is necessary to also restate some of the key principles applicable in reviews of this nature. It must be emphasized at the outset that the overriding principle in review applications is that Courts must show deference to entities created to perform specific and specialist functions when reviewing their decisions. Courts should not substitute their opinions for those of tribunals such as the RAB, in whom the decision making powers regarding refugee appeals, has been vested. In review proceedings deference towards statutorily established entities, such as the RAB, and their institutional specialist nature, is essential. This will include the recognition of administrative expertise and knowledge within the sphere of policy formulation and decision making. This principle ensures that Courts desist from laying down hard and fast rules for administrative tribunals when performing their functions. In the same vein it is not open for Courts, when called upon to review decisions of administrative tribunals, to expect such tribunals to operate as if they are Courts of law. The role of Courts is to determine if the impugned decisions of such bodies are lawful and rational.

[41] In this matter the yardstick is whether it is apparent in the determinations of the RAB that it failed to apply the requirements of one or both legs of section 3. The cases of ***Tshiyombo*** and ***Radjavu*** are relevant in so far as they enunciate the law that both section 3 (a) and (b) requirements must be considered when determining an asylum seeker's appeal. However insofar as those decisions seek to dictate to the RAB how to undertake its functions, I respectfully differ and will not go down that path. This is clearly disavowed in authoritative decisions of our apex Court in particular. It is not for the Courts to dictate to the RAB how it should perform its functions, it is the legislatively ordained entity with the responsibility to determine these issues. Courts must show respect for the legislative design which creates a specialist body such as the RAB to undertake the task of adjudicating refugee appeals.

[42] Therefore, Courts of law cannot and should not seek to impose their opinions and views on the correctness or otherwise of decisions of administrative functionaries. Although it is the function of the Court to control the exercise of administrative power, the question is how far this control should extend. The Supreme Court of Appeal in ***Logbro Properties CC v Bedderson NO***

and Others[12], warns against the adoption of unbridled judicial activism, and held that a judicial officer must demonstrate:

> *"[21]... a judicial willingness to appreciate the legitimate and constitutionally- ordained province of administrative agencies to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and practical and financial constraints under which they have to operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration action, but by a careful weighing up of the need for and the consequences of – judicial intervention".*

[43] In ***Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others***[13], Chaskalson P said –

> *"[89]...*
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> *The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational , a Court cannot interfere with the decision simply because it disagrees with it or and considers that the powers exercised inappropriately".*

[44] In ***Gauteng Gambling Board v Silverstar Development Ltd and Others***[14], the SCA remarked:

> *"[29]An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court typically has none of these advantages and is required to recognise its own limitations"*

The RAB is a statutory body which performs its functions impartially and independently and in accordance with the dictates of fairness and the law.

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12 2003 (2) SA 460 (SCA).
13 2000 (2) SA 674 (CC).
14 2005 (4) SA 67 (SCA).

[45] The issue is not whether RAB is thought to be wrong. It is whether it has acted unlawfully because it has not complied with the Refugees Act to the level required. In ***Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd***[15], the SCA said -

> *"[51]...[F]or the reason stated by Chaskalson P in Bel Porto in para [45] at 282 F-G (distinguishable) 'The fact that there may be more than one rational way of dealing with a particular problem does not make choice of one rather than others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable'."*

[46] In ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***[16], the Constitutional Court stated:

> *"[48] In treating the decisions of administrative agencies with appropriate respect, a Court is recognizing the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person with specific expertise in that area must be shown respect by the Courts".*

[47] It is clear in the submission of the applicants that they also seek to have the RAB determinations reviewed and set aside as they are wrong. This is not the acceptable yardstick in the review of administrative functionaries such as the RAB. It is not open for Courts of law when hearing review applications against administrative action to position themselves as umpires of

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15 2003 (6) SA 407 (SCA).
16 2004 (4) SA 490 (CC).

what is right or wrong about the administrative action at stake. This cannot be countenanced within the framework of our Constitution and it does not bode well for the role and responsibilities of administrative tribunals. This in a way will box these important administrative bodies into following a tick box approach, fashioned by Courts. At the end of the day the issue that Courts should consider is whether the administrative body whose decision is under scrutiny, has brought its mind to bear on all the material before it and rendered a decision that is fair, just and rational.

[48] In the final analysis, the issue in such matters is whether the RAB's determinations are clearly deficient in respect of the section 3 (a) or 3 (b) requirements. The evidence placed before the RAB and relied on by the asylum seekers is clear that all of them left Somalia because of the civil war. It is clear further that RAB adopted a holistic approach to section 3 when determining the applicants' appeals. What is also clear is that the asylum seekers did not provide any evidence showing or demonstrating personal persecution presenting a threat to their lives. Nor did they present evidence demonstrating that they faced compulsion to flee Somalia, presented by external forces. Clearly these applicants did not persuade the RAB that they were entitled to asylum on both of section 3 requirements. Perhaps it is instructive to consider the submission that the RAB committed an error of law in how it approached the asylum seekers appeals i.e. allegedly applying only section 3 (a) and ignoring section 3 (b). I have already found that this is not so, on the basis of what is in the record and how the RAB reached its decisions. In ***City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others***[17] the court held:

> *"[91] a mere error of law is not sufficient for an administrative act to be set aside. Section 6 (2) (d) of [PAJA] permits administrative action to be reviewed and set aside only where it is 'materially influenced by an error of law. Clearly an error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law."*

This decision has been upheld by the Constitutional Court in ***Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle***

17 2010 (6) SA 182 (CC).

Estate (Pty) Ltd and Others[18] and more recently in ***Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others***[19].

[49] The second common error asserted by the applicants is that in determining refugee status the RAB applied the wrong test regarding the burden of proof. In this regard the applicants argue that the RAB consistently applied the wrong burden of proof, by ignoring its "shared burden". It was argued in this regard that the RAB placed the burden of proof squarely and exclusively on the shoulders of the asylum seekers, akin to the burden of proof in civil proceedings. This, it was argued was a further reviewable irregularity. It is ill conceived to suggest that applicants have a shared burden with the RAB regarding proof of refugee status eligibility. It is the applicants who seek refugee status and it is upon them to persuade the RAB that they are entitled to refugee status. Clearly the burden on proof rests on the applicants to establish his. The burden of proof does not change and neither has it been altered by the Courts.

[50] The applicants have clearly misquoted or misinterpreted the passage reproduced in paragraph 196 of the UNHRC Handbook. This passage does not at all altar the legal burden of proof which rests with the one who alleges. In fact, it says so in the first two lines of the passage. It is correct that the handbook states that there is a duty to ascertain and evaluate all relevant facts which is the shared responsibility of the applicant and the examiner. That does not mean that the burden of proof regarding refugee status eligibility is now shared. What is shared is the responsibility to put all the relevant facts before the RAB which is then required to provide information at its disposal and conduct research in respect of the state of affairs in the country of origin of the applicant. However, at the end of the day, the burden of proof still rests with the applicant and not with the RAB. It is correct that the RAB has a duty to gather information should this be necessary. Information gathering is done when it becomes apparent that such information could assist in deciding the application or appeal. An asylum seeker has the burden of placing the necessary facts before the RSDO or RAB why he/she should be granted asylum. Failure to present a case that entitles an asylum seeker asylum cannot be cured by the RAB, in this instance, coming with its own facts why asylum should be granted. It cannot be said in this

18 2014 (1) SA 521 (CC) at para 67.
19 2017 (6) BCLR 773 (CC) at para 84.

case that the asylum seekers presented appeals that required the RAB to look for further or other facts. The fact of the matter is that the asylum seekers presented cases that lacked any substance regarding their qualification or entitlement to refugee status in South Africa. There is therefore no merit to the submission of the applicants that the burden of showing entitlement to asylum status was shared between them and the RAB.

[51] The third common error attributed to the RAB was that it applied the test to credibility as if it was hearing a civil claim in a Court of law. It was argued by the applicants that Courts have held that credibility is but one factor in the evaluation of evidence and must be considered alongside the reliability of the evidence and the inherent probabilities. Reference was made to the ***Tantoush*** v ***Refugee Appeal Board and Others***[20] decision, where the Court noted the following in respect of an asylum-seeker who had previously been untruthful:

> "*[T]he fact that a witness has been untruthful on one or other aspect on another occasion does not mean that he was untruthful in relation to the enquiry at hand, or that his entire testimony should be rejected on account of any admitted untruth. The credibility and reliability of his testimony for the purpose of establishing whether he has a well-founded fear of persecution must be weighed looking at the inherent probabilities, the presence or absence of external or internal contradictions, its consistency or otherwise with the other evidence, his candour and overall performance in testifying, and so on.*"

Reference was also made to the UNHCR Handbook that credibility should be resorted to in the absence of external evidence supporting an applicant's case. This argument has no merit. The RAB found that it could not believe the applicants on their versions that they were personally at risk and that they were forced to flee Somalia. In fact, where the RAB made credibility findings this is borne out by the facts before it. The applicants' submission suggest that the RAB shouldn't have paid any attention to that aspect. This cannot be and I fail to find a basis that gives a Court the latitude to dictate to the RAB, as the specialist appellate tribunal in refugee status determination matters, how to assess the material placed before it especially where the issue of credibility features. On the objective facts before it, the RAB found inconsistencies and it was entitled to consider them and their impact on its decisions. That Courts may approach

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20 2008 (1) SA 232 (T) at para 102.

those same issues differently is no acceptable yardstick to set aside the decisions of the RAB which are contrary to those of the Courts.

[52] The fourth common error attributed to the RAB was that it adopted a procedurally unfair process when it considered the asylum seekers appeals. The argument in this regard was that Section 3 (1) of PAJA provides that any administrative action which materially and adversely affects rights or legitimate expectations must be procedurally fair. It was pointed out in this regard that the dismissal of an appeal by the RAB impacts the rights of asylum-seekers. For this reason it was argued that while procedural fairness depended on the circumstances of each case,[21] section 3 (2) (b) of PAJA prescribes certain prerequisites of fairness. An important prerequisite, it was argued was the that the *audi alteram* principle must be observed whenever the RAB has to decide an appeal by an asylum seeker. The argument was that an asylum seeker was entitled to be granted a reasonable opportunity to make representations before a decision was taken regarding his/her appeal. To buttress this argument, it was pointed out that there was no indication on the record that any country of origin evidence was considered by the members of the RAB and also put to the asylum seekers. This, it was submitted, displayed a serious reviewable procedural irregularity by the RAB. It is clear from the factual matrix regarding each asylum seeker that the RAB committed no procedural irregularity when dealing the appeals. The asylum seekers were each provided with ample opportunity to participate in their appeal hearings. They were allowed to present their cases and to answer any questions that arose. The country of origin information argument is misplaced. There was no need on the RAB to confront the asylum seekers with country of origin information as the asylum seekers' failed on their own to come up with substantive bases justifying the grant of refugee status. They presented hopelessly inadequate cases and the RAB can therefore not be faulted for denying them refugee status.

[53] The applicants also assert that procedurally the RAB's decisions deserve to be set aside on the grounds of the alleged insistence by the RAB that asylum seekers supply their own interpreters is unfair and has rendered the decision procedurally deficient. The applicants rely on

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21 PAJA, section 3(1)(a).

the decision in ***M v Minister of Home Affairs***[22], which suggested that it is a fundamental right to be afforded interpretation services in a language one understands. In this case all the applicants were assisted by their own interpreters during the appeal hearings before the RAB. There can therefore be no suggestion of any prejudice to any of them due to lack of interpretation services.

[54] The applicants have failed to show any basis on which the decisions of the RAB should be reviewed and set aside by this Court. Theirs was an attempt at bringing an appeal under the guise of a review application. Their whole basis was that that the RAB decision making process is fraught with error. It has been exhaustively shown that that no such error is present and further that the fact based approach of the RAB in this matter led to just and equitable decisions being made in each case. It goes without saying that no case has been made for a structural interdict in this matter.

[55] With regard to the question of costs, I'm mindful of the injunction in the ***Bio Watch Trust v Registrar Genetic Resources and Others***[23]case not to visit losing parties with costs where they assert Constitutional rights. This case deals with important questions of Refugee law underpinned by the Constitution. For this reason and exercising the discretion I enjoy on such issues, I find that an appropriate order as to costs is that each party must bear its own costs.

[56] In the circumstances the following order is granted –

1. The application for condonation by the applicants is granted.
2. The application for review is dismissed.
3. Each party is ordered to pay its own costs.

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22 [2014] ZAGPPHC 649 (22 August 2014).
23 2009 (6) SA 232 (CC).

D MLAMBO
Judge President, Gauteng Division of the High Court of South Africa, Pretoria

Heard on:	**20 June 2017**
Date of Judgment:	**30 January 2019**

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