

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 31862/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: 01/12/2023 Signature: _____

In the matter between:

D[...] R[...]

1st Applicant

P[...] M[...]

2nd Applicant

And

THE MINISTER OF HOME AFFAIRS

1st Respondent

THE DIRECTOR-GENERAL:

DEPARTMENT OF HOME AFFAIRS

2nd Respondent

THE CHAIRPERSON:

JUDGMENT

NYATHI J

Introduction

[1] The Applicants, who are husband and wife, are Rwandese nationals who had their application for refugee status rejected by the respondents. The proceedings were under file numbers PTARWA000020518 and PTARWA000010119 in which the third respondent confirmed the decisions of the fourth respondent regarding rejection of applicants' application for refugee status.

[2] The grounds for rejection were that the applications were “fraudulent and manifestly unfounded”. Hence, the applicants challenge the respondents' decision and seeks the court to review and set aside the decision, declare the decision unlawful and inconsistent with the Constitution, make a substitution order recognizing the applicants as refugees, alternatively remit the matter back to the respondents for reconsideration.

[3] The Applicants submit that as per the provisions of Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000, they have exhausted all internal remedies before approaching this Court. The First Applicant states in his founding affidavit that he takes issue with the administrative decision against him and the second applicant on the grounds of (lack of) procedural fairness, it is based on an error of law, the decision-making process and on the grounds of rationality and reasonableness.

Background

[4] The First Applicant is a male Rwandan national who was born in 1986 in Uganda to Rwandan refugees in Uganda. His parents fled Rwanda when the Tutsi dominated kingdom which they were part of, was being abolished in 1959.

[5] When the Hutu government collapsed in 1994, the First Applicant repatriated back from Uganda to his home country, Rwanda where he continued studying and finished high school in 2006 at Groupe Scolaire Apred Ndera with a high school diploma.

[6] Upon finishing high school, he was approached by the Rwandan Defence Force, RDF, which is the government army, with the purpose of recruiting him to the army.

[7] After the training, he was deployed in the Republican Guard, a division of Rwanda Defence Force in charge of the security protection of the President of the Republic, President of the Supreme Court, the Senate President, the Speaker of Parliament and the Prime Minister. The Republican Guard Division has its headquarters at Kimihurura barracks in Kigali where the first applicant worked in its administrative office as a clerk.

[8] In 2010, he was given an opportunity to continue his studies at University as an evening student at Independent Institute of Lay Adventists of Kigali, in its Law school. He would carry on his office duties during the day and would attend the University classes in the evening. He graduated in March 2014 and was awarded the Degree of Bachelor of Law and continued his office duties at the Republican Guard headquarters in Kimihurura.

[9] The First Applicant submits that due to prevailing politics at the time, all members of the Republican Guard Division of Rwanda Defence Force in charge of the security of the President and other top leaders, which he was part of, were told by the then Commanding Officer of the Republican Guard Division, to report if they have a relative among those who are opposing President Kagame. Reporting that you have a relative who fled and oppose President Kagame meant that you will be used in tracing him/her, hunting him and kill or kidnap him/her. Not reporting your relative had serious consequences.

[10] On an eventful day, in late April 2014, First Applicant became aware of a plan to kidnap one of the Republican Guard soldiers called Private S[...] A[...]. Private S[...] was known to him and as a result, he told him of the plan, and he fled.

[11] In May 2014 the First Applicant was kidnapped, blindfolded, driven to an unknown location and tortured on suspicion of having alerted Private S[...] of his impending kidnap.

[12] A fellow staff member who could not endure the torture falsely admitted that he was the one who informed Private S[...] A[...] that he was about to be kidnaped. After this "confession", they were released. Due to fear of continued persecution, the First Applicant decided to go into exile in Uganda where his wife joined him later with their first-born son.

[13] In Uganda he had decided not to ask for asylum because it was not safe anymore for someone who is fleeing from the Rwandan regime to tell his story and seek asylum and protection from the Ugandan authorities. He then bribed someone to get a Ugandan passport first for him and his son and they left for South Africa. On 25 May 2018, he applied for asylum at the Desmond Tutu Refugee Reception Office and appeared before the Refugee Status Determination Officer (RSDO), Mr. B[...] I[...] M[...], for the second interview on the 30 May 2018.

[14] In his interview with the said RSDO, Mr M[...] asked him what he has other than his mere so-called story. He interpreted this question as asking a bribe but not in clear terms. He answered that he has facts about why he was applying for asylum.

[15] On hearing the First Applicant's answer, the RSDO told him that: "ok go ahead and tell me that story that you think is very convincing, we will see where it will lead you to". He then immediately started presenting the facts of his story as narrated in the above background but in even more detail.

[16] The Applicant states that the RSDO interviewed him for about 8 hours. Mainly he was interrogating how he could manage to escape the insurmountable danger

that he claims to have been in. He then issued him with an asylum seeker permit, section 22 with file number: PTARWA000020518 renewable after a month.

[17] On 24 October 2018, the RSDO showed the First Applicant a document to sign. He told him that the document was containing his decision of which he had rejected his application as fraudulent. He told him not to worry about his decision as it is not final. He neither gave him a copy of his decision nor let him read it. He just pointed where he must sign and told him to go and wait for the decision of a higher committee. He did not inform him that he must make representations of his submissions to the Third Respondent.

[18] The First Applicant got to know that he had the right to present his submission to the Third Respondent only when the Second Applicant was handed the decision of the RSDO on her application. That was when they went to the Lawyers for Human Rights to assist them in writing the Second Applicant's submissions to the Third Respondent.

[19] On 3 April 2019, the Lawyers for Human Rights drafted a letter to the RSDO to hand First Applicant his decision so that the latter may be able to also write his submission to the Third Respondent. The said letter from Lawyers for Human Rights is attached to this application.

[20] On 22 May 2019, a period of about seven months after he was first rejected, and after he went to the RSDO with the letter from Lawyers for Human Rights requesting that he hand him the decision, the RSDO first insisted that he will not give it to him, but eventually handed him his decision.

The Grounds Of Review

[21] The Applicants are challenging the decisions of the Third and Fourth Respondents on the grounds of procedural fairness, error of law, the decision-making process and on the grounds of rationality and reasonableness.

- a. It is argued that the process was procedurally unfair in that: The Fourth Respondent, after a harsh interview, had failed to investigate the situation of those considered as opponents of the regime of President Kagame in Rwanda and in Uganda. The Applicants have made available documented information about events concerning the Rwandese Government. This included references to websites chronicling some of the horrors and atrocities perpetrated by the incumbent government in that country. For example, Among many cases is the case of Lt J[...] M[...] which is well documented on <https://www.hrw.org/news/2013/11/04/uganda/rwanda-forcible-return-raises-grave-concerns>. Also, there is a case of Pte I[...] K[...] which appears on <http://www.inyenyerinews.org/politiki/another-rwandan-kidnapped-from-kampala-streets-and-again-police-has-no-answers/>. <https://www.monitor.co.ug/uganda/news/national/gen-kayihura-charges-how-rwandans-were-kidnapped-1774840>.
- b. The Third Respondent made many false and irrelevant claims in the respondents opposing affidavit among others; he claimed that there is no rank of private in the Rwanda Defence Force as First Applicant claimed, yet this is a public knowledge that there is a rank of "Private" in Rwanda Defence Force and he mixed up and misrepresented the facts pertaining to the history of the Applicants.
- c. The Fourth Respondent had shown bias in that during the interview he questioned First Applicant's claim of studying and working as a soldier at the same time as if this was a new phenomenon. He challenged his use of the words "arrested" and "kidnapped" at different times during the interview to suggest that he was being dishonest.
- d. The Applicants submit that in terms of section 33(1) of the Constitution of the Republic of South Africa, 1996, they were entitled to an administrative action that was lawful, reasonable and procedurally fair. The RSDO's decision does not meet the criteria of reasonableness in

that it failed to take into account all the facts of Applicants' claim as well as the political context in his country of origin and in Uganda.

- e. As a result, the Applicants aver that the Third and Fourth Respondents' decision are susceptible to be reviewed and set aside in terms of section 6(2)(c) of PAJA.

[22] The Third and Fourth Respondent committed **an error of law:**

- a. In that the Third Respondent upheld the RSDO's decision rejecting the Second Applicant's application for asylum. In the First Applicant's submission that he handed to the Third Respondent, he submitted to it that the RSDO erred in opening a separate file for the Second Applicant instead of joining her application to his. The RSDO should have taken into account the fact that the Second Applicant came to South Africa to join the First Applicant. Consequently, her asylum seeker application is based on section 3(c) instead of section 3(b) as the RSDO stated as the legal reason for his decision.
- b. A request to Home Affairs for family joinder which Home Affairs ignored is attached to the application. This non-joinder, is submitted by the Applicants, is an error of law.

[23] The decision of the Standing Committee (Third Respondent) is not rationally connected to the information that was before it in terms of section 6(2)(f)(cc). The Third Respondent conveniently ignored the information on Applicants' country of origin when taking a decision on their application for asylum.

[24] Having already held that there were two grounds for review that have been successful, it is not necessary to consider every ground of review raised in the application as there is enough evidence to set the decision aside.

The Applicable Law

What are the internal remedies available in the Refugees Act and did the applicant exhaust those internal remedies?

[25] The Refugees Act¹ sets out two different internal remedies where an application is rejected. The internal mechanisms are created for the decision to be reviewed or appealed. In terms of section 24(3)(c) read with s 24B(1)², if an application is rejected as manifestly unfounded, abusive or fraudulent, then it is automatically reviewed by the Standing Committee. Where an application is rejected as unfounded, an applicant may lodge an appeal with the Refugee Appeal Board.³

[26] Section 7(2) of the Promotion of Administrative Justice Act (“PAJA”)⁴ creates an obligation upon applicants to exhaust all internal remedies before a court or tribunal may review any administrative action. The section reads:

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

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

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

[27] In *Gavrić v Refugee Status Determination Officer, Cape Town and Others*,⁵ the Constitutional Court held that “the obligation to exhaust internal remedies should not be rigidly imposed or used by administrators to frustrate an applicant's efforts to review administrative action.”. At times, an order for an exemption not to exhaust the

¹ Act 130 of 1998.

² Id.

³ Section 24B(1) note 1.

⁴ Act 3 of 2000.

⁵ [2018] ZACC 38 para 56.

internal remedies may be granted where there are exceptional circumstances and an application for exemption from the obligation of exhausting internal remedies has been made.⁶

[28] In *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as amicus curiae)*⁷ the court encouraged the exhaustion of the internal remedies before approaching the court. In paragraph 36 the court stated that:

“First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution”.

[29] The First Applicant’s application was rejected by the RSDO as fraudulent in terms of section 24(3)(b) of the Act. The internal remedy available was an automatic review of the application by the Standing Committee. It is common cause that the Standing Committee reviewed the First Applicant’s application and confirmed the decision of the RSDO. The Second Applicant’s application was rejected as manifestly unfounded in terms of section 24(3)(b) of the Act. Similarly, if an application is manifestly unfounded the internal remedy available is automatic review of the application by the Standing Committee. In my view, the applicants exhausted all the internal remedies available. The next step that the applicants had was to bring the matter to court. Therefore, this court is permitted to review the administrative action.

Can a court overrule the decision of the respondents rejecting the applicants’ application for an asylum?

⁶ Section 7(2)(c) note 4 above.

⁷ [2009] ZACC 23 para 37–38.

[30] The powers of the review court are set out in section 8 of PAJA. Section 8(1) of PAJA provides:

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders:

(a) directing the administrator

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires.

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation".

[31] The Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*⁸ sets out the test to be applied in determining whether the Court may make a substitution order and step into the shoes of an administrator. In paragraph 47 to 50 the court *stated* that:

⁸ 2015 (5) SA 245 (CC) para 47.

“[47] ...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 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...

[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 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.

[50] ...even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator.”.

[32] Moreover, in *Refugee Appeal Board of South Africa and others v Mukungubila*⁹ the court highlighted that “the doctrine of separation of powers requires courts to exercise judicial deference in applying their constitutional powers to avoid trespassing on the terrain of other organs of state where they are exercising their powers appropriately”. In addition, in *Somali Association of South Africa and others v The Refugee Appeal Board and others*¹⁰ the court held that:

“It must also be emphasised that courts adhere to the doctrine of the separation of powers and are cautious not to trespass on the terrain of other arms of State, not least of all because the administrative functionaries and bodies vested with the power to make decisions are expected to have the experience and specialist knowledge pertaining to their areas of operation and the necessary resources to enable them to perform their functions and execute their duties. It is only in exceptional cases that a court will exercise a power of substitution and will only do so when it is in as good a position as an administrator to make such a decision and the decision by the administrator is a foregone conclusion”.

[33] Moreover, in *Refugee Appeal Board of South Africa and others v Mukungubila*¹¹ the court highlighted that “the doctrine of separation of powers requires courts to exercise judicial deference in applying their constitutional powers to avoid trespassing on the terrain of other organs of state where they are exercising their powers appropriately”. In addition, in *Somali Association of South Africa and others v The Refugee Appeal Board and others*¹² the court held that:

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⁹ [2018] ZASCA 191 para 31.

¹⁰ [2021] ZASCA 124 para 93

¹¹ [2018] ZASCA 191 para 31.

¹² [2021] ZASCA 124 para 93

execute their duties. It is only in exceptional cases that a court will exercise a power of substitution and will only do so when it is in as good a position as an administrator to make such a decision and the decision by the administrator is a foregone conclusion”.

[34] In *Johannesburg City Council v Administrator, Transvaal, and Another*¹³ the Court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts would depart from the usual course in two circumstances:

“(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context. (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. Similarly, the minority in *Gavric*¹⁴ highlighted that “the general rule when administrative action is set aside is to remit the matter to the decision-maker for reconsideration. It was only in exceptional cases that the court may substitute, vary or correct a defect in the administrative action. An application for determination for asylum required special qualifications, experience and knowledge which the courts did not possess”.

[35] Additionally, in *Koyabe*¹⁵ the court mentioned that “once an administrative task is completed, it is then for the court to perform its review responsibly to ensure that administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards”. O Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*¹⁶ cautioned courts to be

¹³ 1969 (2) SA 72 (T) at 76D-G.

¹⁴ Note 1 above at 5.

¹⁵ Note 11 above.

¹⁶ 2004 (4) SA 490 (CC).

careful not to attribute to themselves to superior wisdom in relation to matters entrusted to other branches of government.

Conclusion

[36] It is my considered view that in as much as the administrator's expertise is required in administrative matters, this court is in a good position to make a substitution order because it has all the information before it. The applicant provided facts as well as evidence which include pictures showing his military involvement in Rwanda, education and identity.¹⁷ Thus, the court can decide based on this same information that was presented to the RSDO. It will be a waste of time to order the RSDO to reconsider the matter because the decision was confirmed by the Standing Committee and Home affairs.¹⁸ Furthermore, looking at the tone it used in the papers before this court, the RSDO seem to be highly convinced that the applicant facts are not true, they highlight inconsistencies in the description of events made by the applicants.¹⁹ The RSDO could at the very least, have called upon a UNHRC representative and elicited the relevant information on the situation in Rwanda as provided for in section 24(1)(b) of the Refugees Act, as well as the abductions in Uganda, before conclusively rejecting the applications. It is thus unlikely that if the matter is remitted back to the RSDO a different outcome will ensue.

[37] Having regards to the evidentiary material supplied by the First Applicant which is attached to this application and was made available to the Third and Fourth Respondents, it is abundantly clear that they failed to exercise their discretion properly or at all. In line with the principles set out in *Trencon*,²⁰ there now exist exceptional circumstances permitting this court to grant an order substituting or varying the administrative action by the Respondents.²¹

Costs

[38] From the papers filed of record it is apparent that whilst the Applicants were initially legally represented, they could not sustain the situation. The First Applicant

¹⁷ Caselines 014-29 to 014-46.

¹⁸ Ibid at 001-56.

¹⁹ Caselines 022-12 to 022-15.

²⁰ *Trencon Construction (Pty) Ltd v Industrial Dev Corp of SA Ltd* supra.

²¹ *Trencon Construction (Pty) Ltd v Industrial Dev Corp of SA Ltd* supra par 91.

then took matters onto his own hands and prepared the documents as became necessary for both himself and the Second Applicant. He appeared in person before me and argued the Application, quite satisfactorily I may say. Having regard to the nature of the application and circumstances, it is beyond argument that the applicants, whether successful or not, cannot be saddled with costs.²² The Respondents were also conspicuously absent from the hearing.

Order

[39] In consideration of the aforementioned discussion, the following order is warranted:

- 1 The proceedings under file numbers PTARWA000020518 and PTARWA000010119 in which the Third Respondent confirmed the decisions of the Fourth Respondent regarding rejection of Applicants' application for refugee status, are reviewed and set aside.
- 2 That the decisions of the Third and Fourth Respondents aforesaid be substituted with an order that: Applicants and their children be recognised as refugees in terms of the refugee laws of South Africa.
- 3 I make no order as to costs.

J.S. NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 01 December 2023.

For the Applicant:

For the Respondent:

²² *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC); *Organisation Undoing Tax Abuse v Minister of Transport and others (City of Cape Town as amicus curiae)* [2023] JOL 59996 (CC); [2023] ZACC 24 (CC).

in person

No appearance

State Attorney, Pretoria