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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 017967/22

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

25 JANUARY 2024 ______________________
DATE SIGNATURE

In the matter between:

K[...] M[...] **APPLICANT**

and

THE MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

DEPARTMENT OF HOME AFFAIRS **SECOND RESPONDENT**

REFUGEE STATUS DETERMINATION OFFICER **THIRD RESPONDENT**

THE CHAIRPERSON OF THE STANDING **FOURTH RESPONDENT**

COMMITTEE FOR REFUGEES

and

Case Number: 056910/22

N[…] J[…] U[…] **APPLICANT**

and

THE MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

DEPARTMENT OF HOME AFFAIRS **SECOND RESPONDENT**

REFUGEE STATUS DETERMINATION OFFICER **THIRD RESPONDENT**

THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE **FOURTH RESPONDENT**

JUDGMENT

MOGALE AJ:

Introduction

[1] These are two different applications enrolled on the unopposed roll by two different applicants against the same respondents. The applicants seek an order to review and set aside the respondent’s failure or refusal to renew their asylum seeker permit.

[2] Given the fact that the orders sought are similar and raise the same concerns, I find it crucial to deal with both applications together and only one judgment be delivered. For easy reference, these applications are referred to in this judgment as 'the first application' and the 'second application' respectively. Where the context dictates, these applications will be collectively referred to as 'the applications'.

The Parties

[3] The first applicant's name is U**[…]** J**[…]** N**[…]**, an adult male person with an asylum seeker permit number (**[…]**) and a Nigerian citizen. The second applicant is M**[…]** K**[…]**, an adult male person with an asylum seeker permit number (**[…]**) a Ugandan citizen.

[4] The first respondent is the Minister of Home Affairs, cited in his official capacity as such and to the extent that he is responsible for administering the Refugees Act.[1]

[5] The second respondent is the Director-General, Department of Home Affairs, cited in his official capacity as such and to the extent that he is responsible for administering the Refugees Act.

[6] The third respondent is the Refugee Status Determination Officer, an official appointed in terms of section 8 of the Refugees Act.

[7] The fourth respondent is the Chairperson, Standing Committee, and Appeal Board for Refugee Affairs, a committee established in terms of section 9 of the Refugees Act.

Applicants founding affidavits

[8] In their founding affidavits, applicants seek orders in the following terms:

[1] 130 of 1998.

a. That the proceedings before the respondents under file number ([…]) and ([…]**)** be reviewed and set aside.

b. That the failure and/or refusal of the second respondent to adjudicate and finalize the internal review referred to it by the third respondent within the prescribed period, be declared unlawful and as a decision in terms of the Promotion of Administrative Justice Act (PAJA).[2]

c. That the failure and/or refusal of the respondent to renew the asylum seekers permit and/or revert to the applicant within the prescribed period in terms of the Refugees Act, be declared unlawful and any decision contemplated therein be reviewed and set aside.

d. That the matter be referred to the second respondent for hearing de novo on the basis that the rules of natural justice and the provisions of the PAJA have to be complied with.

e. That respondents be ordered to notify the applicant in terms of section 8(1) of the Immigration Act[3] and in terms of the provisions of regulation 14(7) and regulation 16(1)(a) of the Refugees Regulations- with regards to the outcome of the application made to it.

f. That the respondent is ordered to issue a temporary asylum permit in terms of the provisions of regulation 10(4) of the Refugees Regulation to the applicants, pending the outcome of these applications.

g. That the costs of the application be borne by such respondent.

Refugee Status Determination Officer (RSDO).

[9] The RSDO rejected both applicants' applications and provided the following**:**

a. RSDO rejected the application in terms of section 24(3)(b) of the Refugees Act 130 of 1998.

b. In terms of section 18 of Act 33 of 2008 the Standing Committee for Refugees Affairs (SCRA) upheld the decision of the RSDO.

[2] 3 of 2000.

[3] 13 of 2002.

c. The application has been finally rejected by the SCRA, as foreigners, and they cannot stay in the country temporarily indefinitely. They will be handed over to the immigration Inspectorate to be dealt with in terms of the Immigration Act 13 of 2002, as amended in 2004.

Applicable Law

[10] Rule 31(2)(a) of the Uniform Rules of Court[4] empowers the applicant to apply for a default judgment when the time period within which the respondent could serve and file his notice of intention to defend has passed without the respondent notifying the applicant of his intention to defend the matter. The respondents were served with the notice of motion, founding affidavit, and notice of set down. The respondents have failed to enter an appearance to defend within the prescribed period, therefore entitling the applicants to apply for an order to be granted on a default basis.

[11] With regard to the application for default judgment, there is a fundamental question that appears not to have been seriously ventilated by our courts. The question relates to whether a court faced with an application for a default judgment should simply be expected to function as a rubberstamp by granting the court order on the basis that the defendant has failed to enter an appearance to defend. I find that before any court order is granted, the court has the duty to investigate the matter and ascertain whether the relief sought is in accordance with the law and should be made an order of the court. I am of the view that, a court is duty-bound to approach the evidence with an inquiring mind, more particularly when a matter proceeds by way of a default judgment.

[4] Rule 31(2)(a) provides that: "Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit".

[12] For me to be able to consider the matter before me, I have requested the applicants' legal representative to provide me with brief heads of arguments dealing with the applicable law and the legal principles in support of their application. The applicants have failed to comply with the request. Therefore, the matter will be finalized without their heads of argument.

Background

[13] The applicants arrived as asylum seekers in South Africa wherein they fled from their country of origin for fear of persecution as it is listed as grounds stated under section 3(a) and/or 3(b) of the Refugees Act.

[14] They applied for refugee status in South Africa, but their applications were rejected by the RSDO and SCRA as being manifestly unfounded in terms of section 24(3)(b) of the Refugees Act.

[15] The decision of the second respondent is procedurally unfair in terms of section 6(2)(c) of PAJA, in that, the second respondent failed to exercise discretion in terms of section 24(2) of the Refugees Act which provides that:

“when considering an application for asylum, the RSDO officer-

a. Must have due regard to the provisions of the Promotion of Administrative Justice Act 3 of 2000 and in particular ensure that the applicant fully understands the procedures, his or her rights and responsibilities, and the evidence presented; and

b. May consult with or invite a UNHCR representative to furnish information on specific matters

[16] The second respondent did not comply with all mandatory and material procedures or conditions prescribed by section 24(2) of the Refugees Act. The second respondent took a decision without granting the applicant a hearing and due regard to their rights as set out in section 33 of the Constitution.

[17] The decision of the third respondent is unlawful in terms of section 6(2)(i) of PAJA

in that the decision violates section 2 of the Refugees Act. The second respondent has the effective effect of compelling them to return to the countries where they will face persecution on account of their political opinion, as well as my right to self-determination.

[18] The decision of the Standing committee is not rationally connected to the information that was before it. As a result, they will remain an asylum seeker until their asylum application has been finally and lawfully determined, up to when they have exhausted the review and appeal procedures that are available under Chapter 3 (section 24A and section 24B) of the Refugees Act and section 33 of the Constitution. They are protected from deportation by the universal principle of non-refoulement enshrined in the Refugees Act as well as several international conventions to which the Republic is a party. Therefore, South Africa is restrained from deporting them to a country where they will face a real risk of persecution or threat to their life, physical safety, and freedom.

Issues to be determined

[19] In considering the application, this Court has to determine whether the relief sought is in accordance with the law and should be made an order of court. In determining that, the following legal questions need to be addressed:

a. Can the court review and set aside the respondent's decision to reject the applicant's application for asylum?
b. Can the court order the respondent to start the hearing de novo based on PAJA?
c. Can the court order the respondent to issue a section 22 permit to the applicants?

Can the court review and set aside the respondent's decision to reject the applicant's application for asylum?

[20] The applicant seeks to review and set aside the decision of the respondents in terms of PAJA. The court must first make enquiries as to whether the applicant has exhausted the internal remedies available to him or not. Section 7(2)(a) of PAJA obliges a court to require that internal remedies be exhausted before it can review an administrative action. It is only where exceptional circumstances exist exempting the concerned person from the obligation to exhaust the internal remedies that the interest of justice demands that a court may entertain review proceedings before internal remedies are exhausted as envisaged in section 8(1)(c)(ii) of PAJA.

[21] Chapter 3 of the Refugees Act makes provisions for internal remedies. Section 24A (Review by Standing Committee) allows the Standing Committee to review the decision of an RSDO to reject the application on the basis that it was manifestly unfounded. This is an automatic internal review by the Standing Committee of the Officer that rejects the application as 'manifestly unfounded, abusive or fraudulent'. Section 24B (Appeals to Refugees Appeals Authority)[5] allows any asylum seeker whose application has been rejected in terms of section 24 (3) (c) to lodge an appeal with the Refugees Appeal Authority. This provision creates a right to appeal to the Refugees Appeal Board if the application is rejected as unfounded.

[22] Applicants indicated in their founding affidavits that both applications were subject to review by the Standing Committee after RSDO rejected their application on the ground that they were manifestly unfounded, abusive, or fraudulent in terms of section 24(3)(b). Section 24A(1) provides an internal review where the decision was taken in terms of Section 24(3)(b). Under these circumstances, an appeal to the Refugees Act Authority is not available to the applicants, the appeal proceedings may only be lodged where the decision is rejected in terms of section 24(3)(c).

[23] In the present matter, it appears that the RSDO has concluded that the asylum seeker's application was manifestly unfounded in terms of section 24(3)(b) and therefore rejected it on that basis. The RSDO has however failed to furnish the applicant with the written reasons for the rejection as contemplated in terms of section 24(4)(a). Subsection (4) (a) provides that when an application has been rejected on the basis that it is

[5] Act No 130 of 1998 as amended.

manifestly unfounded, the RSDO must furnish the applicant with the written reasons within five working days after the date of rejection; and further inform the applicant of his right to appeal in terms of section 24B.[6]

[24] The decision of the RSDO to reject the applicant's asylum application constitutes an administrative action. As such, it must be lawful reasonable, and procedurally fair; and must have been accompanied by adequate reasons satisfying the requirement of rationality. Taken from the facts provided, one does not know why the asylum seeker's application was rejected by the RSDO. The RSDO ought to have provided the applicant with intelligible reasons justifying his decision.

[25] It was highlighted in *Refugee Appeal Board and others v Mukungubila*[7], that the RSDOs execute functions of particular importance, in that, they determine the fate of vulnerable asylum applicants who . . . usually lack resources and other meaningful skills to enforce their legal rights and face catastrophic consequences if their applications are wrongly rejected. Accordingly, it was held that the need for RSDOs to properly exercise their powers and meticulously observe principles of administrative justice in the execution of their functions cannot be overstated.

[26] In light of the above, it is evident in the present matter that the RSDO fails to comply with the provisions of section 24(4)(a), therefore the decision falls short of the required standard. His failure to furnish the applicants with reasons for rejecting their application is a fundamental flaw that constitutes a reviewable irregularity.

[27] Section 22 of the Refugees[8] deals with asylum seeker permits. Subsection (1) requires the Refugee Reception Officer, pending the outcome of an application for asylum to issue to the applicant an asylum seeker permit allowing the applicant to stay in the Republic temporarily, subject to any conditions, which are not in conflict with the Constitution or international law. Subsection (4) gives the Refugee Reception Officer the discretion to extend the period for which such a permit has been issued. The Officer is obliged to issue the asylum seeker with a permit, pending the outcome of that application.

[6] 130 of 1998.
[7] 2019 (3) SA 141 (SCA).
[8] Act 130 of 1988.

The permit simply allows the asylum seeker to ‘sojourn in the Republic temporarily. Furthermore, the asylum seeker must access basic services and be protected from arrests and deportation

[28] In *Minister of Home Affairs v Saidi*,[9] the respondents had been unsuccessful in their applications for asylum and in internal review and appeals. As a result, they instituted review proceedings in the High Court in terms of the PAJA, challenging the rejection of their applications. They further sought to extend their asylum seeker permit under section 22(3) of the Refugees Act (*now subsection (4) as amended*). The Refugee Reception Officer refused to extend their permits, taking the view that, after the exhaustion of internal remedies, a Refugee Reception Officer had no power to extend a temporary permit and that the permit could only be extended by means of a High Court order.

[29] Applicants then approached the High Court for an order compelling the Refugee Reception Officer to renew their permits until the finalization of the PAJA review. The High Court held that section 22(4) of the Refugees Act does empower a Refugee Reception Officer to extend a permit pending judicial review. However, the extension was not automatic, but subject to the exercise of discretion by the Refugee Reception Officer. In this case because of her view on the legal position – the Refugee Reception Officer had not exercised her discretion. The question of the extensions had to be left for decision by her. Accordingly, the High Court remitted the matter to the Refugee Reception Officer to decide whether to extend applicants’ permits.

[30] The respondents appealed against the decision of the High Court to the Supreme Court of Appeal (SCA). The SCA upheld the High Court’s ruling. It found that the Officer had the power to extend any asylum seeker permit after an internal review or appeal had been exhausted. The SCA also found that s22(4) did not oblige the RSDO to extend the permit but permitted her to exercise discretion whether or not to extend the permit. In that regard, the SCA concluded that the High Court could not have substituted its own extension decisions for those of the Refugee Reception Officer. The appeal was therefore dismissed. The parties then approached the Constitutional Court.

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[9] 2017 (4) SA 435 SCA

[31] The first issue before the Constitutional Court was whether the provisions of s23(4), which provided that the Officer may from time to time extend the period for which an asylum seeker permit has been issued, obliged an Officer, on being asked, to extend a permit. It held that the Officer was obliged both to use the power and to use it to extend the permit. It was highlighted that the Officer could not refuse to use such power and that she was given no discretion to extend or not to extend. The second issue was the duration of the Officer's power to extend the issue period of a permit. The court reasoned that the Officer had the power until the outcome of the judicial review. The orders of the SCA and the High Court were thus set aside and substituted with a declaration that pending the judicial review of a refusal of an asylum application, an Officer has the power to extend the permit and is obliged to do so. Jafta J, dissenting, held that s22 (4) obliged an Officer, on being asked to extend a permit, to make a decision, but gave the Officer the choice of decision, either extension or non-extension.

[32] In *Dorcasse v Minister of Home Affairs and Others* [2012] ZAGPJHC 184; 2012 (4) All SA 659 (GSJ) para 19, the applicant had been unsuccessful in both her application for the asylum seeker permit and appeal to the Refugee Appeals Authority (RAA). Unaware of this fact, the applicant visited the RSDO a year after the RAA decided to have her permit renewed. Instead, she was arrested, declared an illegal immigrant, and sent to Lindela detention facility pending her deportation. The High Court upheld her claim on the ground that her asylum status remained valid until she had received the outcome of the RAA dismissing her appeal and exercised her rights to apply to the High Court for judicial review of the decision of the RSDO.

[33] Concerning the above decisions, it is my humble conclusion that the applicant is entitled to a section 22 permit until the outcome of his refugee application. That is when she has exhausted all his internal remedies and his right to judicial review. Until that time, the RSDO has no option but to issue or extend the permit. I am convinced that this conclusion finds support in the above authorities, and it also promotes the purpose of the Refugees Act as it appears from its preamble and long title.

[34] Considering the irregularity stated above, I find that the applicant's application for asylum should be considered afresh by the relevant authorities. Having regard to the

passage of time since the submission of the applicant's application for an asylum permit and the intervening events that need to be taken into account in considering whether the applicant is entitled to a refugee's status in terms of the Refugees Act, the applicant's application for asylum seeker permit must be remitted for consideration afresh.

Conclusion

[35] The decision of the RSDO to reject the applicant's asylum application constitutes an administrative action. The Officer ought to have provided the applicant with intelligible reasons, justifying his decision to refuse the asylum application. The applicants were not informed of their right to appeal in terms of section 24B of the Refugees Act or allowed to exercise their rights to appeal. The applicants are entitled to a Section 22 permit until the outcome of their refugee application.

[32] As a result, the following order is made:

1) The proceedings under file numbers **[...]** and **[...]** in which the second respondent confirmed the decision of the third respondent regarding the application for refugee status be reviewed and set aside.

2) That the matter be remitted back to the second respondent for hearing on the basis that the rules of natural justice and the provisions of the Promotion of Administrative Justice Act have to be complied with.

3) The Respondent is ordered to issue and/or extend the temporary asylum permit in terms of Regulation 12(3) to the applicants pending the outcome of this application.

4) The respondent is hereby interdicted from deporting and/or arresting both applicants pending the finalization of this application.

5) The costs of this application will be borne by the respondents.

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K J MOGALE

Acting Judge of the High Court, Pretoria,

Gauteng Division

Electronically submitted.

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 25 January 2024

Date of hearing: 06 December 2023

Date of the judgment: 25 January 2024

Appearances

Counsel for the Applicant	:	Mr. Nwobi
Instructed by	:	Nwobi Attorneys
Counsel for the Respondents	:	No appearance