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

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D3492/2019

In the matter between:

L E K	**APPLICANT**

and

CHAIRPERSON: STANDING COMMITTEE FOR REFUGEE AFFAIRS	**FIRST RESPONDENT**
REFUGEE STATUS DETERMINATION OFFICER	**SECOND RESPONDENT**
CENTRE MANAGER: DURBAN REFUGEE RECEPTION OFFICE	**THIRD RESPONDENT**
CHIEF DIRECTOR: ASYLUM SEEKERS MANAGEMENT	**FOURTH RESPONDENT**
THE MINISTER OF HOME AFFAIRS FOR THE REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	**SIXTH RESPONDENT**
THE MINISTER OF POLICE FOR THE REPUBLIC OF SOUTH AFRICA	**SEVENTH RESPONDENT**

J U D G M E N T

SHAPIRO AJ

[1] The applicant is an orphan from the Democratic Republic of Congo ("DRC"), who was born on […] May […]. Her parents were killed when she was very young, and she resided for several years in the DRC with a married couple who were friends of her late parents. When she was apparently compelled to leave their home, the applicant travelled to South Africa and was reunited with her sister, K S K.

[2] Ms. K is likewise a refugee from the DRC, who appears to be resident in the Republic in terms of a temporary asylum permit originally issued to her in 2008. The applicant arrived in the Republic when she was sixteen years old and has been living here since then. Attempts by the applicant, together with the assistance of Ms. K and a social worker to finalize the foster care process were abortive and no concrete steps had been taken by the time the applicant attained majority.

[3] Once she was a major, the applicant applied for asylum in terms of the Refugees Act 130 of 1998 ("the Act"). The applicant alleged that she was a dependent of Ms. K, who together with Ms. K's husband, was her sole source of support and her only relative. The applicant alleged that she qualified for asylum because her late parents were the victims of political violence and she herself had fled the threat of violence when she was accused unjustly of having an affair with the husband of the couple to which I have already referred.

[4] The applicant's application was refused on 26 March 2018 on the basis that she had come to South Africa because there were better prospects in the Republic and not because she was a genuine "refugee" as defined in the Act.

[5] The applicant was detained on 26 March 2019 ahead of a contemplated

deportation and kept in custody, appearing before a Magistrate in terms of section 34 of the Immigration Act on 28 March and again on 18 April 2019. On 18 April 2019, the applicant's detention for the purposes of her deportation to the DRC was extended for a further 90 days.

[6] This detention was the genesis of the application that served before me.

[7] On 29 April 2019, the applicant's attorneys launched an urgent application for orders directing that the applicant be released from detention and that such release order operate in effect as an interim interdict with immediate effect against her further arrest pending the outcome of Part B of the application, which was a review of the first respondent's decision to reject the applicant's application for asylum.

[8] This Court granted the interim order on 3 May 2019 and the applicant has remained in the Republic in terms of that order since then.

[9] The applicant's grounds of review of the first respondent's decision are premised on an alleged error of law that was made in not granting her refugee status as well as relevant facts that were allegedly ignored when the decision was made.

[10] The applicant argued that she was destitute and was a "dependent" of her sister, Ms. K and therefore qualified for the granting of asylum.

[11] This attack on the first respondent's decision is premised on the provisions of section 3 of the Act which says the following:

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

(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion, or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the

protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable, is unable or, owing to such fear, and willing to return to it; or

(b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or

(c) is a spouse or dependent of a person contemplated in paragraph (a) or (b).'

[12] In turn, a dependent is defined in section 1 of the Act to mean "in relation to an asylum seeker or refugee… the spouse, any unmarried dependent child, or any destitute, aged or infirm member of the family of such asylum seeker or refugee".

[13] Essentially, the applicant argued that her status as a dependent of Ms. K (being a destitute member of Ms. K's family) entitled her to be granted asylum in terms of the Act.

[14] The applicant criticized the first respondent for failing to take relevant factors into account, including that administrative problems delayed the foster application to which I have referred, and that if this issue had been determined timeously, she would have qualified as Ms. K's dependent simply based on her age.

[15] The respondents opposed to the application, although they took no further steps in the review after delivery of the answering papers.

[16] The respondents argued that the applicant did not qualify for refugee status as defined in the Act and they denied that she was destitute. The respondents formed the view that the applicant's "desire" to be reunited with her sister was an after-the-fact construction to support an application for asylum in circumstances where there were no legitimate grounds for the application at all.

[17] It is unfortunate that the respondents did not deliver Heads of Argument or appear when the application served before me as an opposed application on 18 January 2023. Their assistance in this difficult matter would have been helpful.

[18] Apart from being provided with Ms. K's Asylum Seeker Temporary Permit, which was renewed on 11 March 2019, I was not given any further information about the status of Ms. K's application or its contents (including whether or not Ms. K referred to the applicant either in general terms, or specifically, as her dependent).

[19] I raised these concerns with the applicant’s counsel, Mr. Mthethwa and enquired whether these gaps in the information could be remedied.

[20] Given the consequences to the applicant if her application was unsuccessful, I postponed the application to 9 February 2023, so that Mr. Mthethwa and his attorneys could provide seek documents and/or make further submissions to me (including in respect of Ms. K's application for asylum) before I determined the application.

[21] When Mr. Mthethwa appeared before me on 9 February 2023, he was unable to take the matter any further. I am however grateful to him for his efforts, and his assistance.

[22] The gravamen of the applicant's application is that being a dependent of a refugee as contemplated in section 3(c) of the Act is a self-standing category under which asylum can be granted to an applicant.

[23] For the reasons that follow, I do not agree with this proposition.

[24] Applications for asylum are made in terms of Chapter 3 of the Act.

[25] Section 21(2A) requires every applicant, when making an application, to declare "all his or her spouses and dependents, whether in the Republic or elsewhere, in the

application for asylum".

[26] Similarly, section 21B obliges a person who applies for refugee status and "who would like one or more of his dependents to be granted refugee status" to include the details of such dependents in the application when applying for asylum.

[27] These provisions are consistent with the definition of a "dependent" in section 1 which, whilst referring *inter alia* to any destitute member of the family of such asylum seeker, defines a dependent "*in relation to* an asylum seeker or refugee" [my emphasis].

[28] Therefore, it seems to me that the Legislature intended that an asylum seeker could not only apply or qualify for refugee status themselves if there was a well-founded fear of persecution or if their country of origin was an unsafe place to live because of external aggression and the like but could also apply for asylum for and on behalf of their dependents.

[29] This interpretation is also consistent with the procedural requirements on an asylum seeker which are set out in section 21, and which I have described above.

[30] The legislative scheme therefore recognises that one genuine refugee is sufficient to gain asylum for their immediate family as well. This is a salutary principle that allows families who quite probably have gone through searing challenges individually or collectively to remain together or to be reunited. However, at the same time, the Act creates an understandable and added level of verification to avoid a situation where non-qualifying applicants later manufacture a familial connection or rely on a refugee's status and lawful presence in the Republic to benefit their own applications.

[31] In summary then, and as long as full disclosure about that spouse or dependent is made up front, if an asylum seeker qualifies for refugee status, their spouse or

dependents will likewise be granted asylum – as an adjunct to the applicant for asylum.

[32] That is quite different to the proposition that someone who factually may be a dependent of a refugee who has been granted asylum can then use that dependence as a stand-alone and separate qualifying criterion to be granted asylum themselves.

[33] Such a proposition, as contended for by the applicant, is inconsistent with the express provisions of the Act and the obvious procedural scheme that the Legislature intended. It requires that the “dependent” as it appears in section 3 is interpreted in a vacuum and ignores not only the context in which that provision appears but also the introductory words to section 3 – being “*Subject to Chapter 3*”.

[34] By definition, a person who applies for refugee status is an "applicant" who then must comply with the peremptory provisions of the Act. Therefore, such an applicant can only be granted refugee status if they themselves qualify under section 3(a) or (b) of the Act and then also comply with the provisions contained in Chapter 3.

[35] In these circumstances, Ms. Kapata would have had to demonstrate a well-founded fear of persecution by reason of her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group or an inability to remain in her country of origin because of external aggression, occupation, foreign domination and so on.

[36] The applicant did not establish either of these grounds: on her own version, she departed the DRC because she was thrown out of her home due to allegations of infidelity. However unfortunate or unfair these reasons may be, the applicant was not compelled to flee for any of the reasons contemplated in section 3 of the Act.

[37] In this regard, the criticisms of the respondents were well made, and I cannot find fault with their reasons for refusing the applicant’s application for asylum.

[38] I readily accept that the applicant is in a difficult financial position and does not have support or an infrastructure in the DRC. That may well constitute a ground upon which she could apply to immigrate to the Republic, but it does not mean that she is a "refugee" as defined in the Act or that she is entitled to asylum in terms of the Act.

[39] Even if I am wrong in my interpretation of the Act, and the applicant is entitled to be granted asylum if Ms. K was granted asylum, there is a fundamental and fatal gap in the information provided by the applicant.

[40] Ms K's temporary asylum permit records that she was entitled to "reside temporarily in the Republic of South Africa for the purpose of applying for asylum in terms of" the Act and that permit expired on 2 September 2019.

[41] No information was placed before me that establishes whether Ms. K did actually apply or was in fact granted asylum or that her temporary permit was extended past the stated expiry date.

[42] Therefore, there is no evidence that Ms. K qualified for the granting of refugee status which, on any interpretation, would have been the gateway for the applicant then to have been granted the same status, as Ms. K's dependent.

[43] In all the circumstances, I must conclude that the first respondent's decision to refuse Ms. L K’s application for asylum was legitimate and reasonable. There are no grounds to review the decision or to set it aside and the review application must fail.

[44] It follows that the interim order permitting the applicant by implication to remain in the Republic pending the determination of the application must also now be discharged.

[45] In the exercise of my discretion, and notwithstanding the conclusions to which I have come, I do not believe it to be in the interests of justice to make any order in respect of the costs of the application.

I grant the following orders:

(1) the Order of this Court granted on 3 May 2019 under case number D3492/2019 is discharged;

(2) the applicant's application for the review of the first respondent's decision of 26 March 2018, and the consequential relief sought, is dismissed.

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SHAPIRO AJ

APPEARANCES

Date of Hearing:	Thursday, 09 February 2023
Date of Judgment :	Wednesday, 15 February 2023
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First Respondent's Counsel:	No appearance
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