THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Somali Association of South Africa and Others v The Refugee Appeal Board and Others (Case no 585/2020) [2021] ZASCA 124 (23 September 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs, an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court).

This is an appeal, against a decision of the high court, dismissing an application by the first to ninth appellants, asylum seekers who allegedly fled Somalia due to civil war, for an order reviewing and setting aside decisions of the Refugee Appeal Board (the RAB). The RAB had dismissed appeals by the second to ninth appellants (the eight asylum seekers) against decisions of Refugee Status Officers.

The SCA accepted that there is a legitimate State interest and concern to ensure that refugee status is granted only to those who qualify, to disqualify unfounded applications and to provide for the cessation of refugee status. It warned that the inclination to be skeptical in relation to applications for refugee status should be tempered by the gist of the following two quotes:

'Migrants and refugees are not pawns on the chessboard of humanity. They are children, women and men who leave or who are forced to leave their homes for various reasons, who share a legitimate desire for knowing and having, but above all for being more.'[1]

'Refugees are mothers, fathers, sisters, brothers, children, with the same hopes and ambitions as us – except that a twist of fate has bound their lives to a global refugee crisis on an unprecedented scale.'[2]

There were four issues considered in this appeal. First, whether the RAB misinterpreted and misapplied section 3 of the Refugees Act 130 of 1998 (the Act). Second, whether the RAB erred in relation to the burden of proof. Third, whether the RAB adopted the wrong approach to credibility findings. Fourth, whether the RAB's decisions breached the principle of *audi alteram partem* and therefore, whether the RAB decisions were all procedurally unfair.

On the issue of whether the incorrect test was applied, the appellants contended that s 3 of the Act makes it clear that persecution is not the sole criterion for the grant of refugee status. Furthermore, the appellants contended that the RAB unjustifiably limited itself to considering whether the eight asylum seekers fled Somalia on the basis that they were persecuted on grounds of political opinion. In this regard, the appellants complained that the RSDOs and the RAB took a narrow view of persecution when it considered the applications for refugee status.

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[1] Pope Francis 'Migrants and Refugees: Towards a Better World' (2014), complete speech available from *www.vatican.va.*

[2] Khaled Hosseini, quote available from: *www.unhcr.org.*

On the issue relating to the burden of proof, the RAB was accused of wrongly placing the burden of proof, in relation to satisfying the requirements for refugee status, exclusively and unfairly on the shoulders of the eight asylum seekers. In this regard, it was contended that our courts have endorsed the concept of a 'shared burden, which places a duty on a decision-maker to adopt an inquisitorial and proactive approach in evidence gathering'.

A third and further ground of review was that the RAB had adopted the wrong approach in assessing the credibility of the eight asylum seekers and over-emphasised its importance. On the issue of procedural unfairness, the appellant contended that there was no indication that prejudicial country of origin information was placed before the eight asylum seekers to enable them to contest it. The appellants also sought a structural interdict, based on what they considered to be sufficient proof of systemic deficiencies in the decision-making processes of the RAB.

The SCA held that the obligation, presently, on the part of the RSDO, to observe the provisions of PAJA confirms that the Refugee Reception Officers, the RSDOs and the Appeals Authority must be scrupulous in observing a fair procedure, the first part of which is to assist an asylum seeker at the outset and then to assist in gathering evidence to enable as full a picture as possible, on which to predicate a decision. In this regard, the SCA held that the statutory scheme, the decisions of our courts and international best practice as reflected in the Handbook, consonant with our Constitutional values, all dictate that an asylum seeker should be assisted to present as full a picture as the circumstances permit. On this score, the SCA held that the RAB had failed in its duty to assist the asylum seekers to obtain relevant information and evidence on which to predicate a decision for refugee status.

Furthermore, the SCA held that the appellants also justifiably complained that the RSDOs and the RAB took an impermissibly narrow view of persecution when it considered the applications for refugee status. The SCA held that s 3*(a)* provides that refugee status may be afforded to any person who has a well-founded fear of persecution on wider grounds, namely, 'by reason of his or her race, tribe, religion, nationality, political opinion or membership of a political social group'. This too, ought to have been recognised by the high court. The SCA held further that the RSDO and the RAB failed to consider the applicability of s 3*(b)* of the Act, which provides for refugee status on the grounds of 'seriously disturbing or disrupting public order in either in part or the whole . . . country'.

On the issue of the RAB's failure to apply the principle of *audi alteram partem,* the SCA held that the eight asylum seekers were not afforded an opportunity to respond to that which the decision makers considered adverse to their case. Fundamental fairness dictates that such an opportunity should be afforded to an asylum seeker. They need to know the substance of alleged adverse information and provided an opportunity to controvert it.

On the issue of a shared burden of proof, the SCA held that The UNHCR Handbook, not unsurprisingly, accepts that, in principle, in meeting the standard for refugee status an applicant bears the burden of proof. That, however, does not mean the standard we would conventionally apply in civil cases, namely that he/she who asserts an entitlement must prove it on a balance of probabilities, is without more, to be applied in refugee cases. In this regard, the UNHCR Handbook, consonant with our Constitutional values, is helpful. As a result of the peculiar situation that refugees find themselves in, corroborative documentation or evidence might not be available and that this factor should be considered. In addition, in paragraph 197 of the UNHCR Handbook, it is postulated that the requirement of evidence 'should thus not be too strictly applied'. A decision-maker is also enjoined in terms of paragraph 198 of the UNHCR Handbook to consider that an applicant for refugee status, given what he or she might have been subjected to, might very well be reluctant to speak freely. The inquisitorial and facilitative nature of the proceedings, statutorily dictated, means that an assessment to determine an entitlement to refugee status is more flexible than would otherwise be the case. So too, in assessing credibility, these factors must be considered, against the totality of the evidence and information obtained and presented. It is thus a more flexible yardstick.

The SCA reaffirmed that an appeal before the RAB is an appeal in the wide sense and that the high court ought not to have held that the RAB was bound to the record placed before it.

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