IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Holderness, AJ)

Case No: 15376/16

In the matter between:

O N	Applicant
And	
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	First Respondent
THE REFUGEE STATUS DETERMINATION OFFICER	Second Respondent
THE CAPE TOWN REFUGEE OFFICE MANAGER	Third Respondent
THE MINISTER OF HOME AFFAIRS	Fourth Respondent
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Fifth Respondent

JUDGMENT DELIVERED ON 16 MAY 2017

HOLDERNESS, AJ:

Introduction

[1] This is an application to review the decision of the first respondent, whereby it upheld the decision of the second respondent determining the applicant's application for asylum and refugee status to be manifestly unfounded, as well as the decision of the second respondent itself.

[2] In addition to prayers in her notice of motion for the review and setting aside of these decisions, the applicant seeks substitutive relief, and has asked the Court for an order declaring that she is a refugee as contemplated by the Refugees Act 130 of 1998 ('the Act'), as well as an order directing the third respondent to issue her and her daughter a document confirming her status as such in terms of section 27(a) of the Act. The applicant also seeks condonation for the late filing of this application for judicial review. I am indebted to Ms. de la Hunt for her most helpful and comprehensive heads of argument and supplementary submissions, which have been of great assistance to the court.

The Parties

[3] The applicant is O. N., an adult female national from the Democratic Republic of Congo ('the DRC'). She has one minor child, a daughter, conceived in 2009 when the applicant was seventeen years old, and as a result of rape by intelligence agents.

[4] The first respondent is the Standing Committee for Refugee Affairs ('the SCRA'). The second respondent is the Refugee Status Determination Officer, Shadrick Diamond N.O. ('the RSDO'). The third respondent is the Cape Town Refugee Office Manager, Thembi Ndlovu. The fourth and fifth respondents are the Minister of Home Affairs and the Director-General of Home Affairs, respectively.

Conduct of the respondents in these proceedings

[5] In view of the conduct of the respondents in the present matter, and in similar matters in this division, it is appropriate to set out what transpired prior to this matter proceeding, on an unopposed basis, on 8 March 2017.

[6] As is customary in review applications of this nature, the applicant initially applied, on 15 September 2016, for an urgent interim order directing the third respondent to issue asylum seeker permits to the applicant and her minor daughter, pending the review proceedings. By agreement between the applicant and the respondents, the interim relief was granted, and the review proceedings were postponed to 16 February 2017, on the semi-urgent roll ('the September order'). The respondents were ordered to file the Rule 53 record on or before 30 September 2016, and their answering affidavits, if any, on or before 21 November 2016. Heads of argument were to be filed in terms of the Rules of Court. It bears mentioning that, as a matter of practice in this division, only opposed matters are enrolled on the semi-urgent roll, and allocated to a judge for hearing, who is usually reserved to hear only one opposed application on such date, unless there is an indication from the parties that

argument is unlikely to take more than an hour or two, in which event a judge may be allocated two such matters for hearing on the semi-urgent roll on the same day.

[7] In breach of the provisions of the September order, the Rule 53 record was only delivered on 12 October 2016.

[8] On 13 February 2017, the applicant caused a practice note to be filed, recording that, notwithstanding the fact that the application is opposed, the respondents had not filed answering affidavits. According to the practice note, it was anticipated that argument should not take longer than half a day. As an aside, it appears from a cursory glance of the court file, that a notice of opposition was not filed by the respondents, formally placing their opposition on record.

[9] After the practice note had been filed, and shortly before the matter was to be heard, some five months after the application had been launched, the respondents were jolted into action. On 15 February 2017, the Deputy Judge President granted an order in terms of which the matter was to be finally postponed to 8 March 2017, on the fourth division roll. The respondents were ordered to file their answering affidavits, if any, by 24 February 2017, and their heads of argument by 5 March 2017. The applicant's heads of argument had been filed timeously and was directed to file her supplementary heads of argument by 6 March 2017. The respondents were ordered to pay the wasted costs occasioned by the postponement. This order was taken by agreement, as confirmed in an email addressed to the Deputy Judge President's registrar by Mr. Nacerodien, counsel for the respondents, to which the draft order was attached.

[10] On 3 March 2017, Ms. de la Hunt, counsel for the applicant, filed a practice note recording that the respondents had still not filed any documents and had been unable to advise the applicant's attorney of their instructions. Notwithstanding the failure by the respondent to file papers, at the request of the applicant the matter was allocated for hearing in the fourth division on 8 March 2017.

[11] On 8 March 2017, Mr. Nacerodien appeared on behalf of the respondents and informed the court that the respondents were no longer opposing any of the relief sought by the applicant, including the substitutive relief sought in terms of paragraphs 3 and 4 of Part B of the review application. He was not able to proffer any explanation for the late stage at which both the court and the applicant were informed of the respondents' decision to withdraw their opposition, which had never been formally placed on record.

[12] The manner in which the respondents conducted themselves in these review proceedings does not appear to be unusual in refugee-status-decision judicial-reviews. It appears from their conduct in this matter and in previous matters in this division, that the respondents do not appear to regard themselves as being bound by court orders, even if they are taken by agreement, and are seemingly undeterred by censure from the courts, despite repeated admonitions by judges in this, and other, divisions.

[13] In Tshiyombo v Members of the Refugee Appeal Board and Others[1], where the respondents also failed to comply with procedural directions in terms of a court order taken by agreement, Binns-Ward J

[1] 2016 (4) SA 469 (WCC).

pointed out that, when the State Attorney's office receives instructions to act in any instituted proceedings, it must formally place itself on record in terms of the applicable Rule of Court by delivering the appropriate notice. He went on to say that:

'[10] . . . Undocumented "guest appearances" are not only impermissible; they are also unprofessional.

[. . .]

[14] . . . It is plain that there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. Courts are frequently called upon to make, and it would appear from the cases cited to me by Ms *Harvey*, frequently do make substitutive decisions determining the refugee status of applicants in judicial review matters. This might be just and equitable in given cases, but it is far from ideal.'

[14] A similar situation arose in the unreported decision in Katsshingu v Chairperson of Standing Committee for Refugees Affairs and Others[2], where Bozalek J stated as follows:

'This situation in which no opposing affidavits are filed, despite the application being opposed, is one which this court has previously encountered in matters in which the third respondent [the Minister of Home Affairs] and officials of that department were brought to court. It reflects, in my view, a disturbing tendency to oppose litigation up till the door of the court, but without ever putting a version before the court. The implications of such an approach, particularly as regards the use of public funds and

[2] (19726/2010) [2011] ZAWCHC 480 (2 November 2011) at 13.

the office of the state attorney, are a matter of concern and indicate the need of the courts to be vigilant to ensure that such action does not become a norm and go unchecked.'

[15] The conduct of the respondents in the present matter, which could not be explained by their counsel at the hearing, when their opposition to all of the relief sought by the applicant, including the substitutive relief was withdrawn, is indicative of an attitude where the Department escalates costs, which are borne by the taxpayers, by going on record and agreeing to orders regarding the filing of opposing papers and heads of argument, and then withdrawing their opposition at the last moment, or abiding by the decision of the court, without having filed a single affidavit. This attitude warrants censure. Perhaps the day may be fast approaching when the courts will have to take some form of direct action regarding the systemic failure by the fourth and fifth respondents in the manner in which refugee applications are being dealt with.

Factual background

[16] I turn now to deal with the factual background, set out in some detail in the applicant's founding affidavit. The applicant was born in Kananga, Eastern Kasai, DRC on 17 February 1992. Her father, A. N., presently resides in South Africa and is a recognised refugee. As a law lecturer and member and spokesperson of the opposition party, the Union for Democracy and Social Progress ('the UDPS') in the Kananga district, he faced discrimination and persecution. In 2003, he was threatened with dismissal based on rumours that his lectures contained material that undermined the Joseph Kabila presidency.

[17] As a member and spokesperson of the UDPS in the area, the applicant's father hosted weekly meetings at the family home. On one occasion government soldiers came to the home and threatened that if he did not cease these meetings, he would be arrested. He did not heed the warning, and approximately one month later armed soldiers arrived during the night to intimidate her father and the family. The applicant was eleven at the time. Her father evaded arrest by four armed men who came to the house one Saturday evening after a UDPS meeting. Her father never returned to the family home.

[18] After her father left, the applicant's mother refused to allow UDPS meetings to be held in the family home. However, people nevertheless arrived, and held the meetings under the trees at the back of the house. Although the applicant's mother refused to participate in UDPS meetings, the applicant attended, and became aware of her father's involvement and the reason for his disappearance. She was informed that the governor of Eastern Kasai was a Kabila supporter and had sought to eliminate her father who was a prominent UDPS community leader, ahead of the elections.

[19] The applicant explains in her founding affidavit that, while UDPS members eventually stopped coming to the house, intelligence officers came to the house from time to time to question her mother about the whereabouts of her father. She came to recognise certain individuals.

[20] During the run up to the 2005 constitutional referendum, visits to the applicant's family home by officials became more frequent. In October 2006 intelligence officers came to the home and severely beat up her mother, who was not able to give any information about her father.

[21] Because of the very serious injuries suffered by the applicant's mother on this occasion, she now has difficulty walking. The applicant's mother left the applicant and her siblings to go and stay with her own mother. The children were cared for by neighbours and, although intelligence agents visited from time to time, they lived in relative peace, until 2009.

[22] By this stage several internally displaced people had come to Kasai, which was seen as a haven for opposition supporters. However, this in turn led to an increased military presence in the area. It was in this general climate of insecurity that in early 2009 the applicant was subjected to a brutal rape by two intelligence agents, in the presence of her siblings. Their home was ransacked, her brother was beaten, and her sister was threatened with rape. The agents threatened the applicant stating that should she not tell the truth about the whereabouts of her parents, they would 'come back for more'.

[23] The applicant, traumatised by the rape, sought assistance from her school principal, and her mother. Her mother was not willing to have her live with her and her grandmother, as she needed her to look after her younger siblings. Her suffering was exacerbated by the fact that rumours were spread in the community that she was promiscuous and had consented to sex with two soldiers. As she describes it, she became an outcast and was accused of being a 'prostitute for the government'.

[24] The applicant became pregnant as a result of the rape, and was unable to terminate the pregnancy. Not only was she an outcast in the community, but she lived in constant fear that the intelligence agents

might return to rape her again. She decided to flee to Lubumbashi in search of her father as she had heard that many people had fled Kinshasa and Kasai to this city in the province of Katanga. She was unable to find her father, but heard that he had fled to South Africa. In Lubumbashi she was destitute and had to live on the streets, notwithstanding her advanced pregnancy. She was not secure in Lubumbashi as rumours of opposition members being targeted continued.

[25] The applicant decided to leave the DRC to find her father in South Africa. A few months after giving birth to her daughter, she found a truck driver willing to take her to South Africa in exchange for sex. Not only was she forced to have sex with the driver (as were the other women who were smuggled or trafficked with her on the same truck), but the driver forced them to have sex with two men who joined the truck in Zambia.

Application for asylum

[26] After entering South Africa, the applicant travelled to Cape Town, where she applied for asylum at the Cape Town Refugee Reception Office in Maitland.

[27] According to the BI-1590 "Eligibility Determination Form for Asylum Seekers" ('the ED form'), which forms part of the Rule 53 record, the applicant applied for asylum on 19 July 2010, almost seven years ago. The applicant was assisted by a male interpreter, who was also from the DRC. She was not able to speak English, and was forced to rely on a male stranger for assistance. Although she was not comfortable going into the details of the persecution suffered by members of her family, and of her rape, she did say that she had been raped, and that the

baby with her was born because of the rape. She recalls informing him that her father was a prominent member of the UDPS, and that because of this fact her family had suffered harassment and persecution. She told him that she knew that her father had fled the DRC and sought refuge in Cape Town, although at this stage she had not found him.

[28] In response to the question 'Why are you applying for the asylum?', the following was recorded:

'I'm applying for asylum because I was very deceived with my country. (sic) Now is very normal to rape women in Kasai Occidental (sic), I was a victim of rape, now I'm the mother of an unknown child and father. That's why I left and came here for my protection.'

[29] On the form, the Refugee Reception Officer ('RRO') noted that the applicant required the services of an interpreter. The name of the interpreter is recorded, but no other details are filled in regarding his qualifications, address, contact number, or the institute which he is from. The applicant did not read English, and therefore had no way of knowing whether this information was correctly reflected in the ED form. It appears from the form, which was provided as part of the Rule 53 record, that only the most cursory of enquiries was undertaken by the RRO. The only information reflected in said form was that she was a victim of rape. The applicant stated that, to her knowledge, the interpreter was not a professional interpreter, nor was he an employee of either the Cape Town Refugee Reception Office, or the Department of Home Affairs. The applicant told him that her father was a prominent member of the UDPS and that because of this her family suffered at the hand of government

officials in the DRC, however this was never included in the reasons cited for her decision to leave the DRC.

[30] At the time of her interview with the RSDO, the applicant was still not able to speak much English, and relied on the interpreter. She explains that the questions posed to her via the interpreter were extremely short, and focused on when and how she left the DRC, rather than why she left. She was not given an opportunity to explain why she left, and assumed that the details were contained in the 2010 Eligibility Determination Form. Because of the way the hearing was conducted, the applicant was not given an opportunity to tell the full story of her rape and the persecution which she suffered due to her father's political opinion and occupation.

[31] The applicant goes on to say that she was not informed by the second respondent that her claim for asylum had been rejected, nor that she had the right to make representations to the first respondent. She received this information from other asylum seekers in the queue, who presumably could read the decision. She was advised to see an attorney. The applicant sought assistance from PASSOP, an NGO which assists migrants. However, the letter drafted on her behalf appears to be generic, and does not refer to her circumstances. It refers to persecution based on religion.

[32] The RSDO decision was given on the same day of the hearing, namely 15 April 2014. In the decision, the applicant's claim was recorded, *verbatim,* as follows:

‘**Claim**

The ic (sic) resided in Kananga, and she left her country of origin in 2010. She says she did not belong to any political party, and was never arrested in her country.

She claimed the reason for leaving her country is because in 2005 certain soldiers who were not paid went on a criminal spree. She says that these soldiers came to her family house and threatened her family. She state (sic) meanwhile a captain and his soldiers were patrolling outside heard the commotion, and went to help them.

She further claim (sic) when the captain recognized these soldiers a fighting erupted and he was killed. She says because of this the captain’s family was filled with anger and wanted to kill her father and his family.

She state because of this her father fled the country after three days. She claim after he fled they continued to received threats but she kept on staying in Kananga until 2009. After this she moved to Lubumbashi where she stayed for one year. She says the reason for leaving Lubumbashi is because she had no family there and no one to support her. (sic)

She is not willing to return because she might get killed.

She says she did not leave for the reasons stated in 4f of the BI1590.’

[33] The RSDO found that the applicant was credible but that there was ‘no need to establish these credibility concerns as required by the law in this case because these claims are made on the grounds other than those of the Refugees Act 130 of 1998.’ The reasons for the decision given were that the applicant’s claim was made on the grounds: ‘other than those on which such an application may be made under the Refugees Act. This means an application that is clearly not related to the criteria for the granting of refugee status laid down in the 1951 Convention, the 1969

OAU Convention and our own Refugees Act, 1998.' On this basis, her application was rejected as 'manifestly unfounded'.

[34] The first respondent upheld the decision of the RSDO. As the letter from PASSOP is not part of the Rule 53 record, these representations were not before the first respondent on 3 March 2015 when he made the decision to uphold the decision of the second respondent. This decision was communicated to the applicant on 7 May 2015. The applicant went on to set out, in some detail, the difficulties she experienced before she could bring this application. She states that she was rejected by her father, who believes that she has been cursed. And because of her previous trauma at the hands of her assailants, the trauma of her journey to South Africa, and the eventual rejection of her asylum application, she suffered a mental breakdown. She was hospitalised last July, and has been receiving ongoing counseling at the Trauma Centre.

THE LAW

Who is a refugee?

[35] South Africa is a party to the 1951 UN Convention Relating to the Status of Refugees ('the UN Convention'), the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ('the OAU Convention'), and is bound by these conventions.

[36] The UN Convention defines refugees as someone who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,

is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.[3] International law provides 'surrogate' protection for refugees where the country of origin is either unwilling or unable to provide protection.[4] In practice surrogate protection is provided by State Parties to the conventions, which have an obligation to provide protection for as long as the circumstances which gave rise to the flight in search of refuge persist in the country of origin.

[37] The provisions of the Act set out the circumstances in which one determines whether an individual qualifies for refugee status. In terms of section 3:

'(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; or

(b) owing to external aggression, occupation, forcing domination or events seriously disturbing or disrupting public order in either a part of 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;'

[3] Article 1 A(2)
[4] G Goodwin-Gill *The Refugee in International Law* 2nd ed (1996) Clarendon Press p 207.

[38] According to the UNHCR Handbook[5], whether a person is a refugee is an objective fact, and not a privilege to be accorded to those who deserve it:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'[6]

Well-founded fear

[39] The phrase *'well-founded fear'* contains both a subjective and an objective requirement. There must be a state of mind – fear of being persecuted – and a basis – well-founded – for that fear.[7] Protection is restricted to persons who can demonstrate a present or prospective risk of persecution, and therefore, the assessment of risk is forward-looking. The question to be answered by a RSDO is '*what might happen if [she] were to return to the country of [her] nationality…Whether that might happen can only be determined by examining the actual state of affairs in that country*.'[8] Put differently, is there is a reasonable possibility of the applicant being persecuted if returned to the country of nationality?[9]

[5] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ('the UNHCR Handbook) Geneva, January 1992 HCR/IP/4/Eng/REV.1 Reedited
[6] Part One – Chapter I – Paragraph 28.
[7] As per Dawson J in *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 para 16. quoted in F. Khan "Well-founded fear" in Kahn and Schreier *Refugee Law in South Africa* Juta at 45.
[8] *R v Secretary of State for the Home Department, ex parte Sivakumaran and conjoined appeals (UN High Commissioner for Refugees intervening)* [1988] 1 All ER 193 at 197. quoted on p 74 of Hathaway *op cit.* Chapter 3 deals with well-founded fear of persecution.
[9] See *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) paras 97-98.

[40] Evidence of past persecution, or evidence of persecution of others similarly situated is indicative of a well-founded fear of persecution. As Hathaway argues:

'The best circumstantial indicator of risks is the experience of those persons perceived by the authorities in the state of origin to be the most closely connected to the claimant, generally including those who share the racial, religious, national, social or political affiliations upon which the claimant bases her case. This information may be gleamed from human rights sources, the claimant's testimony or any other evidence adduced at the hearing.'[10]

[41] The standard of proof in refugee matters is one of a 'reasonable possibility of persecution', and not the normal civil standard, which has been held by our courts to impose too onerous a burden of proof.[11] In Tshiyombo[12], Binns-Ward J found that s 3 of the Act falls to be read with s 2, which incorporates the international-law principle of non-refoulement:

'[28] . . . Both provisions are to be construed generously in favour of persons seeking to qualify for asylum. That much follows from the statute's long title and preamble. The long title describes the statute as an Act to "give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith".'

[42] Regulation 11(2) of the Regulations to the Act[13] provides that '*[i]n the absence of documentary evidence, an applicant's credible testimony, in*

[10] Hathaway *The Law of Refugee Status* 89.
[11] *Fang v Refugee Appeal Board and others* 2007 (2) SA 447 (T) and *Van Garderen N.O. v Refugee Appeal Board* TPD case no 30720/2006, 19 June 2007(unreported decision) quoted with approval by Murphy J in *Tantoush* n 9 paras 97 – 98.
[12] *Tshiyombo* n 1 para 28.
[13] Refugee Regulations (Forms and Procedure), 2000 GN R366, *GG* 21075, 6 April 2000.

consideration of conditions in the country of feared persecution or harm, may suffice to establish eligibility for refugee status.'[14]

Persecution

[43] Although *'persecution'* is not defined in the 1951 Convention or the Refugees Act, *'being persecuted'* has been defined as *'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection'*.[15] In the case of R v Immigration Appeal Tribunal and another; ex parte Shah[16] the House of Lords held that persecution is serious harm, together with the failure of state protection.[17]

[44] While threats to life, liberty and freedom are included, so are significant human rights abuses.[18] There must be a fundamental failure of the state to provide protection against harm. The state need not necessarily be the agent of persecution, but must be unable to protect the refugee, or such protection must be ineffectual.

[14] The Regulations follow the recommendations at paragraph 196 the UNHCR Handbook: *'It is a general legal principle that the burden of proof lies on the person submitting the claim. Often, however, an applicant may not be able to support his statements by documentary or other proof….Even [if] such independent research….[is] not….successful and…[the applicant] may….[have made] statements [which] are not susceptible to proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."*

[15] *Refugee Appeal No. 76044* (New Zealand Refugee Status Appeals Authority, 11 September 2008) para 61.

[16] (United Nations High Commissioner for Refugees intervening); Islam and others v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening) [1999] 2 All ER 545.

[17] *Ibid* at 565.

[18] Paragraph 51 of the UNHCR Handbook.. In the matter of *Tantoush* n 9 Murphy J held at paras 97-98 that the UNHCR Handbook may be used as an interpretive tool in interpreting he Refugees Act. This follows the practice in a number of jurisdictions in which it, together with UNHCR ExCom Conclusions is regarded as "soft law".

[45] Harassment is not in itself considered as persecution, but when sustained, systemic or relentless it may be considered as such.[19]

Social group

[46] A '*particular social grou*p*'* normally comprises of persons of similar background, habits or social status. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status.[20]

[47] In the matter of Fang v Refugee Appeal Board and Others,[21] Seriti J associated himself with the categories social groups enumerated in the Canadian case of Canada (Attorney General) v Ward:[22]

'(1) groups defined by an innate or unchangeable characteristic;

(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;

(3) and groups associated by a former voluntary status, unalterable due to its historical permanence.'

[48] Membership of a family is involuntary, and a family may therefore be categorised as a social group.[23]

[19] See the New Zealand and South African Refugee Appeal Board cases cited by Khan in *Refugee Law in South Africa* at 52 -54.
[20] Paragraphs 77 to 79 of the UNHCR Handbook.
[21] 2007 (2) SA 447 (T) at 460E.
[22] [1993] 2 SCR 689 at 739. See also paragraph 4.5.7 in Chapter 4 of *Refugee Law in South Africa.*
[23] Goodwin-Gill & McAdam *op cit* at 85.

Gender-based claims

[49] Although the refugee conventions do not make specific reference to gender-related persecution or women refugee claimants, the UNHCR[24] has issued gender guidelines, in terms of which two of the recognised categories are women who fear persecution solely for reasons pertaining to the status, activities or views of their family members, and women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned person (domestic violence or situations of civil war). Sexual violence has also been recognised in other jurisdictions as a ground which may form a basis for refugee status.[25]

[50] UNHCR has developed guidelines on women asylum seekers which heightened awareness to the plight of these women, in particular, by adopting ExCom No. 73 (XLIV) 1993 on Refugee Protection and Sexual Violence, which goes on to recognise '*the fact that women refugees often experience persecution differently from refugee men*'[26] and *'recommends that in procedures for the determination of refugee status, asylum-seekers*

[24] UNHCR 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" 7 May 2002 [HCR/GIP/02/01]

[25] R v Immigration Appeal Tribunal and another, ex parte Shah (United Nations High Commissioner for Refugees intervening), Islam and others v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening) [1999] 2 All ER 545 (heard together). The House of Lords provided a comprehensive analysis of the meaning of "membership of a particular social group".

[26] See para (e). For a discussion on this and other aspects of gender in the status determination process see R Haines "Gender-related persecution" in Feller et al *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* Cambridge 2003 pp 319 – 350

who may have suffered sexual violence be treated with particular sensitivity'.[27]

[51] Not all women who are subject to sexual violence, domestic violence or female genital mutilation, and who cross borders, are refugees. Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the state's willingness or ability to respond effectively to that risk.[28]

The refugee definition and status detetmination

[52] Section 3(a) of the Act refers to base the definition of a refugee on a well-founded fear of persecution linked to the enumerated grounds, including that of a particular social group. The Act gives effect to South Africa's international obligations as stated in the Preamble: '*to receive and treat in its territory refugees in accordance with the standards and principles established in international law*'. The definition clause of the Act defines *'social group'* to include persecution based on the applicant's gender.[29] The question to be answered by a RSDO is *'what might happen if [she] were to return to the country of [her] nationality…Whether that might happen can only be determined by examining the actual state of affairs in that country.'*[30]

[53] The use of credible and updated country of origin reports is vital to fair refugee status determination procedures. Although such reports might be said to constitute hearsay, in Tantoush Murphy J pointed out that '*it is*

[27] *Ibid* para (g).
[28] J Hathaway *Law of Refugee Status* Butterworths 1991 p 125
[29] Section 1 (xxi).
[30] *Ex parte Sivakumaran* n 8 at 197; quoted on p 74 of Hathaway *op cit.* Chapter 3 deals with well-founded fear of persecution.

not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights.'[31] In Kaunda and Others v President of South Africa and Others,[32] the Court noted that whilst it would not be proper to make a finding on the state of affairs in a particular country based only on reports provided, it is also not proper to ignore the 'seriousness of the allegations that have been made'. In accepting a UNHCR report on the situation in the DRC and the North Kivu Province before the court in the matter of Katsshingu *supra*, Bozalek J pointed out that the UNHCR report to which the applicant referred was *'from a reputable source, if not the best available source and it is one which must be given due weight'*, and held further that it contained sufficient information to enable the court to make a reasonably informed decision on an aspect of the applicant's claim for asylum.[33]

[54] The Act specifically provides for RSDOs, the Refugee Appeal Board and the Standing Committee for Refugee Affairs to conduct an inquiry to verify information (which would include considering country of origin reports) and to consult with the UNHCR representative, if necessary, in order to obtain relevant information. In the present matter there is no indication that either the RSDO or the SCRA called for any information or evidence regarding the state of affairs in the DRC at the relevant time, despite having a duty to gather evidence where necessary, and to conduct the interview in an inquistorial manner. In so doing, they failed to take into account relevant considerations in determining the applicant's claim. The

[31] *Tantoush* n 9 para 19. The judge referred to Chaskalson CJ in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at para 123, who commented on such reports of Equatorial Guinea.
[32] 2005 (4) SA 235 (CC) para 123.
[33] Katsshingu n 2 at 15 (last paragraph).

respondents elected not to file any affidvaits, including in opposition to the substitution order sought, and there is accordingly nothing to gainsay the applicant's evidence regarding the manner in which the interview and the SCRA hearing were conducted, or the inadequate interpretation provided.

The status determination process

[55] The process at first instance is set out in Chapter 3 of the Act. It is a two-step process. An asylum seeker presents themselves at a Refugee Reception Office, where a RRO is obliged to assist her to complete the application form when this is necessary, and must ensure that the form is properly completed.[34] In terms of Regulation 4(1)(a), the RRO must also ensure that the asylum seeker is provided adequate interpretation according to Regulation 5.

[56] Thereafter, a RSDO conducts a non-adversarial hearing to elicit information bearing on the asylum seekers' eligibility for refugee status. Section 24(2) provides that 'when considering an application the [RSDO] must have due regard for the rights set out in section 33 of the Constitution, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.'

[57] Regulation 5, which deals with interpretation, is relevant at both stages of the decision at first instance. In terms of this regulation the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process. Where it is not practicable for

[34] Section 21 (2)(b).

the applicant to provide an interpreter and interpretation is needed, the applicant will be required to provide an interpreter.

[58] Section 24(3) provides that the RSDO must, after the hearing, either grant asylum; or reject the application as manifestly unfounded, abusive or fraudulent; or reject the application as unfounded; or refer any question of law to the Standing Committee SCRA.

Manifestly unfounded

[59] A 'manifestly unfounded application' is an application for asylum made on grounds other than those on which such an application may be made under this Act.[35]

[60] In terms of section 25(1), the SCRA must review any decision by an RSDO rejecting a claim as being manifestly unfounded. Before deciding, the first respondent may –

'(a) invite the UNHCR representative to make oral or written representations;

(b) request the attendance of any person who is in a position to provide it with information relevant to the matter being dealt with;

(c) on its own accord make such further enquiry and investigation into the matter being dealt with as it may deem appropriate; and

(d) request the applicant to appear before it and to provide such other information as it may deem necessary.'[36]

[35] Section 1(xii).
[36] Section 25(2).

Is the applicant a refugee?

[61] The applicant contends that in the context of the events which transpired prior to her leaving the DRC, namely the attempted arrest of her father and his flight from Kananga in 2003 or thereabouts, the harassment and persecution of her family for years thereafter, the assault on her mother leading her to abandon her home and children, and the abuse which she suffered, she is at risk of future persecution should she return due to the families' perceived political opinion. The applicant avers that her persecution was due to a political opinion imputed to her, and the fact that her father has asylum in South Africa.

[62] In the alternative, she contends that this persecution was due to her being part of a social group – her family. The applicant asserted that it is a notorious fact that rape has been used to silence dissent in the DRC, and is a tool in the ongoing civil war.[37] In this context it was argued that her persecution is also based on the grounds of her social group – her gender.

[63] The applicant attached a UNHCR report to her founding affidavit in support of her claim of her fear of persecution, which on her uncontroverted evidence certainly appears to be well-founded. Apart from her evidence of the persecution of others similarly situated (her mother), these reports indicate that she is unlikely to be protected from similar harm should she be compelled to return to the DRC.

[63] The applicant has also provided compelling reasons as to why, in terms of section 5(2) of the Act, she should not be forced to return to the

[37] *Amnesty International* November 2015 report referred to in paragraph 92 of applicant's founding affidavit. Record 33.

DRC. I am in agreement that the nature of her persecution, and the subsequent trauma of rejection by her community and her father, must be taken into account in determining whether she should be forced to return, even if the situation were to improve in the DRC.

[64] I am satisfied that the applicant's fear of being persecuted by reason of her imputed political opinion or as a woman belonging to a family which has been repeatedly and persistently persecuted in her country of origin is well-founded, and has the result that she is a refugee as defined in section 3(a) of the Act.

Grounds for review

[65] In Tshiyombo, it was pointed out that:

'Refugee reception officers are permitted, indeed expected, to ensure that the allegations that an applicant relies on in support of the application are adequately set out, and may carry out such enquiry as they deem necessary in order to verify the information in the application. Refugee status determination officers may request further information and, where appropriate, consult with or seek information from a UNHCR representative. The statutory appellate tribunals, namely the Standing Committee for Refugee Affairs and the Refugee Appeal Board, have similar powers and responsibilities of enquiry, including the power to request input from a UNHCR representative. Appropriate investigation and enquiry in any given case might well expose an apparently plausible application for refugee status to actually be unmeritorious, or *vice versa*.'[38]

[66] Furthermore, section 33 of the Constitution provides, inter alia, that everyone is entitled to administrative action that is lawful, reasonable and

[38] *Tshiyombo* n 1 para 15.

procedurally fair. As stated above, this right is specifically referred to in section 24(2) of the Act, which was passed before the Promotion of Administrative Justice Act 3 of 2000.

[67] It appears that in breach of his duties to the applicant, to fully investigate the claims of the applicant in an inquistorial manner, the RSDO failed to give her a fair hearing, as she was not provided proper information, assistance or competent interpretation. The facts supporting her claim, as set out in the RSDO decision, are lacking in detail, and are not in all respects consistent with the facts set out by the applicant in great detail in her founding affidavit.

[68] The review by the SCRA did not cure these irregularities. The SCRA appeared to accept, without making further inquiries, the incorrect statement in the RSDO's decision that the reference to her rape was not the reason for her flight from the DRC. There is nothing before me to indicate that any further enquiries were made by the SCRA to gather information in an inquistorial manner, or clarify any aspect of the applicant's claims. It appears to have been nothing more than a rubber-stamping of the decision of the RSDO. I can only assume were this not the case, that evidence of a proper investigation and hearing would have been placed before the court by the respondents.

[69] The following grounds of review were relied upon by the applicant.

Unlawfulness

[70] The principal of legality is the basis on which any body or individual exercising public power must perform that power. Such power may not be exercised beyond that which is conferred by law. [39]The decision of the RSDO was taken in an unlawful manner in that he did not comply with his duties in terms of the Act and the Regulations.

[71] The RSDO failed to ensure that the applicant understood her rights, the procedures and the evidence to be presented. He failed to ensure that a competent interpreter was present at the hearing. He failed to conduct a proper hearing or to apply his mind to her circumstances and failed to properly exercise his discretion by taking into account irrelevant considerations and failed to take into account relevant ones.

[72] There is no indication from the record that the SCRA applied its mind to the application when reviewing the RSDO's decision, nor that it used its powers in terms of section 25(2) and Regulation 13 to obtain relevant information, notwithstanding the reference to rape, and prevalence of credible country of origin information regarding the treatement of political opponents, and the use of rape to silence opposition.

Decisions procedurally unfair

[73] The procedure observed in reaching the impugned decisions was unfair, improper, and did not afford the applicant a proper opportunity to be heard. By not providing the applicant with the correct information and

[39] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58.

assistance, and more importantly a competent interpreter, the RSDO failed in his duty to her.

Incompetent interpreter

[74] As stated in the matter of Mabitsela v Department of Local Government & Housing and Others*:*

'The right to interpretation is a key element of both the right of access to courts and the independent impartial dispute resolution bodies as provided for in terms of section 34 of the Constitution.'[40]

[75] It is clear from both the extracts from the applicant's Eligibility Determination Form and the RSDO decision that neither of the interpreters provided were competent. This resulted in materially incorrect information being recorded in the decision of the RSDO. By not allowing the applicant to tell the interpreter more details of the persecution suffered by herself and her family, and restricting his inquiry to details of how and when she left the DRC, she was not afforded a fair hearing.

Relevant factors not taken into account

[76] The applicant asserted that the following relevant factors were not taken into account:

(i) Neither the RSDO or SCRA refer to any human rights reports or country of origin information. It is argued that it would be

[40] (JR 1006/11) [2012] ZALCJHB 28; [2012] 8 BLLR 790 (LC); (2012) 33 ILJ 1869 (LC) (7 February 2012) para 16.

impossible to assess the applicant's claim without assessing the human rights situation in the DRC. The fact that she stated that it was unsafe for her to return and that she had been raped required the RSDO and SCRA to assess the situation in the DRC against her claim.

(ii) If the RSDO or SCRA did in fact rely on relevant sources, the applicant was not given the opportunity to rebut or to comment on conclusions they drew or sources relied upon.

(iii) The RSDO and SCRA did not apply their minds to the facts and circumstances of the applicant's claim and failed to take into consideration, amongst other things, the well-documented facts concerning the position of women in the DRC, and particularly those women who do not have the protection of family.

No reasonable decision-maker would have made the decisions

[78] The fact that the actions and decisions of the RSDO and SCRA were unlawful and procedurally unfair has resulted in the final review ground – that no reasonable decision-maker would have made such a decision at first instance, or upheld it on review.

[79] As argued on behalf of the applicant, even if the asylum application process and review process been procedurally fair, on the sketchy facts recorded on the ED Form, the RSDO's decision and the interview notes, no reasonable decision maker would have found that the applicant's claim is not a claim for the reasons set out in section 3 of the Act.

[80] On the record before me, read together with the founding affidavit of the applicant and the reports annexed thereto, there is no rational connection between the statement in her eligibility form, the summary of her claim as given by the RSDO, and his conclusion that she left the DRC for reasons unrelated to those set out in section 3. Therefore, his reason for rejecting her claim as manifestly unfounded as it is not based on the grounds under the Act – imputed political opinion and/or gender-based persecution – is patently unreasonable. Likewise, the decision of the first respondent is also unreasonable in that no reasonable decision maker would have rejected her claim for asylum, let alone found it to be *'manifestly unfounded'*.

Substitution

[81] The applicant is seeking an order declaring that she is a refugee in terms of section 3 of the Refugees Act, and granting her refugee status and asylum. Therefore, she is asking that this court substitute its decision for that of the RSDO and SCRA.

[82] The Constitutional Court, in Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another[41], has given guidance to courts who are called upon to grant substitutive relief, as provided for in section 8(1)(*c)*(ii)(*aa)* of the Promotion of Administrative Justice Act. The section provides that:

'(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-

[41] 2015 (5) SA 245 (CC).

[. . .]

(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 . . .'

[83] In Trencon it was held that the factors to be taken into account in deciding if a case was '*exceptional*' were:

'(1) whether the court would be in as good a position as the administrator to make the decision;

(2) whether the decision was a foregone conclusion;

(3) delay; and

(4) bias or incompetence on the part of the administrator.[42]

If factor (1) were established, the court had to consider factor (2), and thereafter (3) and (4). In assessing (1), a court had to consider whether the administrator's expertise was required to make the decision, and whether it — the court — had all the information that was pertinent to making the decision. As to (2), there would be a foregone conclusion if there could only be one proper decision; and in regard to (3), delay caused by litigation had to be considered with caution.[43]

Even if there were exceptional circumstances, substitution could only be ordered if it would be just and equitable. This required considering the fairness of substitution to all of the parties involved.[44]

[42] *Trencon* n 41 para 47.
[43] *Trencon* n 41 paras 48-49 and 52-53.
[44] *Trencon* n 41 paras 35, 47 & 53.

General considerations to be taken into account were that substitution was an extraordinary remedy — and remittal is still the ordinary course; and that courts had to be appropriately deferent to the administrators concerned.'[45]

[84] Also in issue was the nature of the discretion in section 8(1) to grant any order that was just and equitable. The court in Trencon held that it was a discretion in the true sense, and should not be interfered with unless there is some defect inherent in the exercising thereof.

[85] In determining what constitutes 'exceptional circumstances', the courts must be 'guided by an approach that is consonant with the Constitution . . . [which] should [include] appropriate deference to the administrator.'[46] This is of course in accordance with the doctrine of separation of powers, based on which the Constitutional Court held that '[r]emittal is still almost always the prudent and proper course.'[47]

[86] In light of the uncontroverted evidence of the applicant, and the independent information relating to the DRC annexed to her affidavit, this court is in as good a position as the first and second respondent to make the decision under review in this application and should do so. There is no indication that if the matter were to be remitted, it could be dealt with expeditiously and in an inquistorial manner, with the necessary information being collated by the RSDO, and if necessary by the SCRA, if the application is again found to be manifestly unfounded. Indeed, if past experience is anything to go by, after a seven year delay, it is improbable that her application will be managed any differently to how it was in the first place. To remit would, to my mind, be a waste of time and resources,

[45] *Trencon* n 41 paras 42-43.
[46] *Trencon* n 41 para 43. Emphasis added.
[47] *Trencon* n 41 para 42.

particularly as the result will be a foregone conclusion. In Katsshingu the court granted the relief of substitution against the RSDO, in similar circumstances.[48] Bozalek J relied on a number of authorities, including Gauteng Gambling Board v Silverstar Development Limited and Others[49] in deciding to substitute his own decision on the basis that exceptional circumstances existed on the basis of the incompetence of the respondents; the fact that the Court was in as good a position as the first and second respondent to make the decision; and that considerations of fairness and practicality justified the Court not remitting the decision back.[50]

[87] In this matter the respondents have demonstrated incompetence and insensitivity in considering the applicant's application and it would be unfair to subject her to a fresh process presided over by them. It appears that as a result of the systemic failure of this branch of the Department of Home Affairs, they lack the will or administrative capacity to make a competent and timeous decision.

[88] In my view it is a foregone conclusion that, if the impugned decisions are set aside and the applicant's case is remitted back to the respondents for consideration afresh, she will be granted refugee status. The situation as described in the human rights reports attached to the founding affidavit, and the merits of the applicant's case are such that she cannot be compelled to return to the DRC at this stage without South Africa being in contravention of its obligations as set out in the UN and OAU Convention and section 2 of the Refugees Act.

[48] *Katsshingu* n 2 - the only significant difference is that the first respondent had been dilatory in providing the applicant with the record and the delay was consequently longer.
[49] 2005 (4) SA 67 (SCA).
[50] *Katsshingu* n 2 page 14-16.

[89] The applicant first applied for asylum in July 2010. The delay is similar to that in the matter of Katsshingu[51] the applicant will be *"back to square one"* without the additional relief, and unable to access her rights as a refugee until her status is eventually determined.

[90] There will be no prejudice to the respondents, who have themselves elected not to oppose an order of substitution, should such an order be granted.

Costs

[91] The applicant has asked for costs in her favour against 'whomsoever of the respondent oppose the granting of the relief sought.'

[92] The respondents' opposition to the application was withdrawn at the 11th hour. In view of the fact that the applicant had no choice but to file heads of argument and to cause counsel to be briefed to argue the matter in the fourth division, on an opposed basis, there is no reason why she should not be entitled to such costs.

Conclusion

[91] In the result, the following order is made:

(a) The decision of the second respondent in terms of section 24 of the Act on 15 April 2014, rejecting the applicant's application for refugee status and asylum to be manifestly unfounded, is reviewed and set aside;

[51] *Katsshingu* n 2 page 14.

(b) The decision of the first respondent in terms of section 25 of the Act on 3 March 2015, upholding the decision of the second respondent and finally rejecting the applicant's application for refugee status and asylum, is reviewed and set aside;

(c) In terms of s 8(1)*(c)*(ii)*(aa)* of the Promotion of Administrative Justice Act 3 of 2000, the decision of the first and second respondents are hereby substituted with a decision setting aside the decision of the second respondent and substituting it with a decision in terms of s 24(3)*(a)* of the Refugees Act, granting asylum to the applicant;

(d) The third respondent or her delegee are directed to issue to the applicant and her minor daughter written recognition of refugee status in terms as provided in s 27*(a)* of the Refugees Act read with the provisions of reg 15 of the Refugee Regulations (Forms and Procedure), 2000, published in GN R366 in *GG* 21075 of 6 April 2000, as amended by GN R938 in *GG* 21573 of 15 September 2000, within fourteen days of the date of this order; and

(e) The respondents are directed to pay the applicant's costs, on an opposed basis, jointly and severally, the one paying, the other/s to be absolved.

HOLDERNESS, AJ

APPEARANCES

For the Applicant:	Adv Lee Anne de la Hunt
Instructed by:	UCT Refugee Rights Clinic, Cape Town
For the Respondent(s):	Adv Adiel Nacerodien
Instructed by:	State Attorney, Cape Town
Date of Hearing:	8 March 2017
Judgment delivered on:	16 May 2017