REPORTABLE

IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10152/02

In the matter between:

BARIMWOTUBIRI RUYOBEZA	First Applicant
CAPE TOWN REFUGEE CENTRE	Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
MOLEBOGE MACHELE	Third Respondent
J E LESHABANE	Fourth Respondent
P LECHABA	Fifth Respondent
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Sixth Respondent

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JUDGMENT DELIVERED THIS 6th DAY OF MAY, 2003.

THRING, J.:-

The first applicant says that he is a national of Burundi, by which I assume that he means that he is a citizen of that country and is not, at the same time, a South African citizen. He thus falls within the definition of an "alien" for the purposes of the Aliens Control Act, No. 96 of 1991. He is an electrical engineer, having qualified as such in 2001 at the Cape Tecknikon. He is 30 years of age. In 1997 he fled from Burundi so as to escape from the escalating ethnic conflict there. His father was subsequently killed, and his mother is a refugee in Nairobi, Kenya. In August, 1997 he was recognized as a refugee by the South African authorities and granted asylum in the Republic of South Africa. He is in possession of a certificate dated the 13th February, 2001 affording him formal recognition of his refugee status and granting him asylum in this country. The certificate was issued to him by the second respondent in terms of sec. 24(3)(a) of the Refugees Act, No. 130 of 1998. The validity of this certificate, we are told, has been extended until October, 2003. Having been continuously resident in the Republic of South Africa for more than five years, he is now desirous of applying in terms of sec. 25 of the Aliens Control Act for an immigration permit, with a view to taking up permanent residence here.

Sec. 27 of the Refugees Act provides, in its relevant parts, as follows:

> "A refugee –
>
> (a) ......;
>
> (b) ....;
>
> (c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;"

The Standing Committee referred to is that established by sec. 9 of the Act. Its full nomenclature is the Standing Committee for Refugee Affairs. For the sake of brevity and convenience I shall refer to it herein as "the committee".

On the 20th September, 2002 the first applicant's attorneys wrote a letter to the committee requesting, on his behalf, that he be granted a certificate under sec. 27(c) of the Refugees Act to the effect that he will remain a refugee indefinitely. The request was motivated in the letter, and extracts of recent reports were

enclosed as substantiation of the high level of violence still prevalent in Burundi. There was no response whatsoever from the committee to this letter. Nor did a written reminder dated the 15th October, 2002 elicit any answer. As at the 23rd December, 2002, when the first applicant deposed to his founding affidavit in this matter, there had still been no response. In his opposing affidavit deposed to on the 13th February, 2003 on behalf of first respondent, the Minister of Home Affairs, one M.D. Tlhomelang, who is apparently a director of the Department of Home Affairs, complains that the first applicant is "expecting the impossible". Why it should have been impossible for the committee to respond in any way to the first applicant's request for more than three months, and why, instead, it ignored him completely, he does not satisfactorily explain. I would have thought that, if nothing else, a simple acknowledgment of receipt of the request coupled, perhaps, with an indication of the time which would probably be required to process the request would not have been beyond the call of common courtesy, and would certainly have been within the bounds of possibility for an organ of state. However, be that as it may: nothing turns on this discourtesy save that it reflects the attitude of the department and its servants

to the first applicant and his legal representative, which attitude will become relevant later in this judgment.

Having been unsuccessful in eliciting any response from the committee, the first applicant launched the present application as a matter of urgency on the 24th December, 2002. He says the urgency lies in two areas.

First, his personal and professional life is being compromised by the delay: thus, as a refugee, he is unable to obtain a loan from a bank so as to enable him to acquire a motor vehicle, which he needs for his work.

Secondly, the application attacks the legitimacy of members of the committee and seeks the setting aside of their appointment as such. This is a situation, the first applicant says, which must be remedied as soon as possible, because the respondents themselves require to know whether their acts are lawful for the proper administration of the Refugees Act. Thus the matter is probably more urgent for the respondents than it is for him, the first applicant says.

In their opposing affidavits it was contended on behalf of the respondents that the matter lacked urgency, and that the application should be dismissed on that ground alone. I disagree, for the reasons mentioned by the first applicant in his founding affidavit. Mr. Kekana, who appears for the respondents, did not persist with this contention in argument, and I think wisely. I find that the matter is sufficiently urgent to warrant its being dealt with without further delay.

The first applicant is joined in these proceedings by the Cape Town Refugee Centre as the second applicant. The latter has an interest in the decisions of the committee inasmuch as one of its objectives is to espouse the rights of refugees and asylum-seekers in this country.

The first and second respondents are, respectively, the Minister and the Director-General of the Department of Home Affairs. The first respondent is responsible for the administration of the Refugees Act. The third, fourth and fifth respondents are all members of the committee. The sixth respondent is its chairperson.

She is probably the same person as the fourth respondent. All the respondents oppose the application.

The principal relief sought by the applicants is formulated as follows in their notice of motion:

> "An order:-
>
> .....
>
> 2. Declaring the decision by the first respondent to appoint, in terms of sec. 10(2) of the Refugees Act, 130 of 1998 (the Refugees Act), the members of the Standing Committee for Refugee Affairs, established in terms of Section 9(1) of the Refugees Act, to be unlawful, as being ultra vires and inconsistent with the Constitution of the Republic of South Africa Act, 108 of 1996 and invalid ("the appointment");
>
> 3. Reviewing and setting aside the appointment;
>
> 4.1 Declaring that first applicant is entitled to apply for an immigration permit in terms of the Aliens Control Act, 96 of 1991 alternatively the Immigration Act, No. 13 of 2000 (sic: 2002).
>
> 4.2 Ordering second respondent to accept and process any application for permanent residence made by first applicant.
>
> 5. Directing that the costs of this application be borne by the first respondent and any other respondent who

opposes the relief sought in prayers 2, 3 and 4 above."

During the course of his argument Mr. Katz, who appears for the applicants, handed in a draft order in terms of which the relief prayed in paragraphs 2, 3 and 4.1 of the notice of motion was slightly amended. Prayer 4.2 is not being proceeded with.

The relief sought in prayers 2 and 3 above is based on secs. 9 and 10 of the Refugees Act. These sections read:

"9. Standing Committee for Refugee Affairs –

(1) There is hereby established a Standing Committee for Refugee Affairs.

(2) The Standing Committee must function without any bias and must be independent.

(3) The headquarters of the Standing Committee must be determined by the Minister.

10. Composition of Standing Committee –

(1) The Standing Committee must consist of –

(a) a chairperson; and

(b) such number of other members as the Minister may determine, having regard

to the likely volume of work to be performed by the Committee.

(2) The chairperson and other members of the Standing Committee must be appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of their office properly.

(3) A person may not be appointed as a member of the Standing Committee if he or she –

(a) is not a South African citizen;

(b) has been sentenced to imprisonment without the option of a fine during the preceding four years.

(4) At least one of the members of the Standing Committee must be legally qualified."

In section 11 the powers and duties of the committee are set out. Inter alia, it –

"(d) must advise the Minister or Director-General on any matter referred to it by the Minister or Director-General;

(e) must review decisions by Refugee Status Determination Officers in respect of manifestly unfounded applications;

(f) must decide any matter of law referred to it by a Refugee Status Determination Officer;

(g) must monitor the decisions of the Refugee Status Determination Officers;”

In terms of section 25(1) of the Refugees Act the committee is obliged to review any decision taken by a Refugee Status Determination Officer to reject an application for asylum as manifestly unfounded, abusive or fraudulent, and is also obliged to decide a question of law referred to it by such an officer. It is significant that, in terms of section 8(2)(a) of the Act, Refugee Status Determination Officers are required to be “officers”, and, presumably, consequently employees, of the Department of Home Affairs.

Now, it is alleged by the first applicant, and not denied by the respondents, that the third, fourth, fifth and sixth respondents are all employees of the Department of Home Affairs. Whether or not they are the sole members of the committee is not clear on the papers. For the purposes of this case, it does not matter. However, it would appear that the third respondent is the Deputy Director of Refugee Affairs in the department, and that she deposed to an affidavit on behalf of the Minister and of the Director-General of the department in the

matter of Watchenuka and Another v. Minister of Home Affairs and Others, 2003(1) SA 619(C), which was heard in this Court in August, 2002, and to which I shall presently refer in more detail.

It is contended by the applicants that the committee as presently constituted cannot function without bias and cannot be regarded as independent. The appointment of the third, fourth, fifth and sixth respondents to it by the first respondent was consequently ultra vires the Act, unlawful and inconsistent with the Constitution, and should be reviewed and set aside as invalid, they argue.

On behalf of the respondents, on the other hand, it is submitted that the present members of the committee are not disqualified from being such by reason of their being servants of the Department of Home Affairs, simply because the Act does not provide in express terms that they are so disqualified. It is also contended by Mr. Kekana that members of the committee can, indeed, function on it without bias, and be independent, notwithstanding the fact that they are, at the same time, servants of the department.

In my view the respondents' contentions cannot prevail.

In the Watchenuka case, supra, H.J. Erasmus, J. made the following remarks at 626F-627G:

> "The second ground on which the applicants attack the validity of the condition is that the members of the Standing Committee were appointed unlawfully and accordingly any determination made by it is unlawful and unconstitutional. In this regard the applicants rely on the proposition that any act by an improperly constituted tribunal is ultra vires the tribunal so constituted and is invalid. The provisions of a statute as to the constitution of a board or similar body must be strictly complied with (see L A Rose-Innes "Judicial Review of Administrative Tribunals in South Africa" (1963) at 120).
>
> The exercise of a power or duty of the Standing Committee granted to it by the provisions of the Act is, therefore, valid and lawful only if the establishment of the Standing Committee satisfies the requirements of ss 9 and 10.

Section 9(2) of the Act requires the Standing Committee to be independent and to perform its functions without any bias. Section 10(2) of the Act provides that the Minister must appoint the chairperson and members of the Standing Committee with 'due regard' to their ability to perform their functions properly.

According to the minutes of the meeting of the Standing Committee held on 18 September 2000, the chairperson of the Standing Committee was Adv. J E Leshabane, and the members were Dr. Machele and Mr. Lechaba. Dr. Machele is the Deputy Director of Refugee Affairs based in the Department of Home Affairs and the deponent, on behalf of all three respondents, to the opposing affidavit in these proceedings. In her replying affidavit the first applicant alleges that the other members of the Standing Committee are also employees of the first and second respondents.

Baxter, "Administrative Law" (1984) points out that while there is –

> 'no clear single principle which seems to have governed the legislative choice of tribunals rather than ministers or departmental officials for certain decisional functions',

an important consideration in this regard is

> 'the desirability of an impartial decision free from the considerations of policy

> which departmental officials and ministers are (rightly) interested in propagating but which engender so-called "departmental bias". This is particularly important where rights are at stake or where a decision could have drastic consequences for individuals.'

In New National Party of South Africa v. Government of the Republic of South Africa, 1999(3) SA 191 (CC) (1999(5) BCLR 489) at para [162] O'Regan J emphasised the importance of independent institutions as a structural component of our constitutional democracy, and stressed that other organs of State are obliged to assist and protect these institutions to protect their independence, impartiality, dignity and effectiveness.

The applicants say that government employees, and especially functionaries employed by the Department of Home Affairs, cannot perform their functions independently and without bias. It is, therefore, inappropriate for a Deputy Director of Refugee Affairs, or any other employee in the first respondent's department, to be a member of the Standing Committee. In the circumstances, the Standing Committee cannot be regarded as independent, and any decision taken by such Standing Committee is unlawful and should be set aside.

Moreover, in terms of s 11 of the Act, included in the powers and duties of the

> Standing Committee is the obligation to advise the Minister or Director-General on any matter referred to it by the Minister or Director-General, and the power to review certain decisions of Refugee Status Determination Officers. The object of the Legislature seems to have been to provide the Minister and the Director-General with a source of independent advice, and to have decisions of Refugee Status Determination Officers reviewed by an independent tribunal. A committee consisting of employees of the Department of Home Affairs can hardly be a source of independent advice, nor constitute an independent review tribunal."

I respectfully and entirely agree with these remarks, and I will presently say why. Before doing so, however, I should point out that what was said by the learned Judge in this passage was obiter, since he decided that case on other grounds. Nevertheless, the strong expression of his clearly-held views in this regard must carry considerable persuasive force. I am also aware that leave was granted by the learned Judge to the respondents in that case to appeal to the Supreme Court of Appeal, and I presume that such an appeal is presently pending. However, in view of the urgency of the present matter, of the probability that it will not be necessary for the Supreme Court of Appeal

to consider the correctness or otherwise of the learned Judge's obiter remarks which I have quoted, and also because of the clarity of the view which I have formed, I do not think that delaying this judgment until the Supreme Court of Appeal shall have pronounced on the Watchenuka case would be necessary or justified.

The third, fourth, fifth and sixth respondents are all salaried full-time servants of the state, employed in its Department of Home Affairs. They take orders from their superiors in the department, including, of course, the first and second respondents, who are the Minister and the Director-General of Home Affairs. Subject to the provisions of the Public Service Act (Proclamation No. 103 of 1994) and any other applicable statutory provisions including, probably, regulations and the Civil Service Code, matters of how, when and where they are to perform their functions can and will usually be dictated by their superiors in the department, including the first and second respondents. They can be transferred, demoted or dismissed from office by departmental action. Conversely, they depend for promotion on departmental action and, in particular, on the views of their superiors in the department as to their eligibility and suitability for

such promotion. More examples of their dependence could be given, but it is not necessary to labour the point: by its very nature, the relationship of servant to master has inherent in it the subservience, in matters of the work to be done, of the servant to the wishes and directions of the master. Moreover, as Baxter, "Administrative Law" says in the passage quoted by Erasmus, J. in the Watchenuka case, supra, there will almost always be –

> "(C)onsiderations of policy which departmental officials and ministers are (rightly) interested in propagating but which engender so-called 'departmental bias'."

Section 9(2) of the Refugees Act requires that the committee "must function without any bias and must be independent". Obviously it cannot comply with this requirement if it manifests, in its workings or its decisions, a "departmental bias" of the kind referred to by Baxter. Thus, for example, there might exist a departmental bias or policy in terms of which would-be immigrants from a particular part of the world, or holding particular political or religious views, might be favoured and encouraged, whilst those from other parts of the world or holding different views might not. Clearly it could not

have been intended by the legislature that when the committee gives advice to the first or second respondent in a matter referred to it by one or the other of them, or reviews or monitors the decisions of a Refugee Status Determination Officer, such a bias should be permitted to play a role; on the contrary, section 9(2) evinces the contrary intention: the committee is enjoined to function without any bias. As for the additional requirement that the committee must be independent, the word is defined in the Shorter Oxford Dictionary (3rd Edition) inter alia as:

> "Not depending upon the authority of another;
> not in position of subordination;
> not subject to external control or rule;
> self-governing, free."

To suggest that employees of the Department of Home Affairs who have been appointed to the committee could, with the best will in the world, ever be expected to perform their functions under the Act without any bias or to be independent would, in my judgment, be little short of fanciful, especially when regard is had to some of those functions, viz. to provide the first or second respondents with independent advice on matters referred to it by them and to review and monitor certain decisions by

other employees of the Department who are not required to function without bias or to be independent. Significant in this regard, I think, is the fact that no attempt has been made in the affidavits delivered by or on behalf of the respondents to aver that, notwithstanding the status of the third, fourth, fifth and sixth respondents as civil servants in the employ of the department, they or any of them are, as a matter of fact, independent within the meaning of sec. 9(2) of the Refugees Act or that they or any of them are able to function as members of the committee without any bias, as required by the sub-section.

The creation of statutory tribunals to take administrative decisions is discussed by Baxter, op. cit., at 240-241 (part of this passage was cited in the Watchenuka case, supra, loc.cit., but it bears repeating):

> "There is no clear single principle which seems to have governed the legislative choice of tribunals rather than ministers or departmental officials for certain decisional functions. Instead, a number of factors are relevant.
>
> The allocation of certain administrative decisions to a tribunal has the effect of

isolating those decisions from the general administrative process. This has various advantages. First, where the interests of those immediately affected by the decision in question are very great, while the general public interest is correspondingly less important, a tribunal is able to focus its attention on the issues presented by the parties without being distracted by the broader concerns of the relevant department. Special attention may be given to local requirements: thus a rent board may be in a better position to determine the value of controlled accommodation than the national Rent Control Board, and a local road transportation board would enjoy a similar advantage over the National Transport Commission.

Secondly, individual rights and interests may be so important as to merit the special attention which only a body undistracted by general administrative concerns can give them. Thus business licence applications are often dealt with by special tribunals or boards.

Usually related to these considerations is a third important factor, namely, the desirability of an impartial decision free from the considerations of policy which departmental officials and ministers are (rightly) interested in propagating but which engender so-called

> ‘departmental bias’. This is particularly important where rights are at stake or where a decision could have drastic consequences for individuals. The importance of impartiality is the main theme underlying criticisms of the system of ministerial restriction and detention orders. Impartiality is also essential if there is to be a review of the quality of discretionary decisions: hence a number of tribunals exist as appellate bodies against original administrative decisions.
>
> There is a fourth related consideration: the desirability or otherwise of an absence of political accountability on the part of the decision-maker. Ministers are politically responsible to Parliament (and to the caucus of the governing political party). It is often desirable to insulate the decision concerned from the viscissitudes of parliament and party politics, especially where important legal rights and interests are at stake. Tribunals help to provide this insulation.”

It is true that there are degrees of independence, that not every tribunal can be as completely independent as a court of law is expected to be, and that the independence of courts of law and of administrative tribunals cannot be measured by the same standard: see

Financial Services Board and Another v. Pepkor Pension Fund and Another, 1999(1) SA 167 (C) at 174 F-g. However, independence and impartiality (or the absence of bias), whilst being distinct concepts, are closely connected: see the Financial Services Board case, supra, at 167 J and the following passage quoted at 168 A-B from the Canadian case of R. v. Valente, (1986) 19 CRR 354 (SCC) (1986) 24 DLR (4^{th}) 161 at 361:

> "Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial", as Howland CJC noted, connotes absence of bias, actual or perceived. The word 'independent' in s 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of Government, that rests on objective conditions or guarantees."

The case of van Rooyen v. S., 2001(4) SA 396(T) is, I think, instructive in this regard. It was held by the Transvaal Provincial Division in that case that magistrates lacked the independence from state control which was required of judicial officers: this notwithstanding the numerous checks and balances which exist in their case, such as the interposition between magistrates and the state of the Magistrates' Commission. On appeal, the Constitutional Court held otherwise at 2002(5) SA 246 (CC) but only, it would seem, with some hesitation. At 336 CD Chaskalson, C.J. said:

> "In the result there are provisions of the Magistrates Act, the Magistrates' Courts Act and the Regulations for Judicial Officers in the Lower Courts as presently formulated that fall short of what is required to ensure the institutional independence of magistrates' courts. However, in the context of the protection given to magistrates' courts and magistrates at an institutional level by the Constitution itself and by the other safeguards referred to in this judgment, the legislation viewed as a whole is consistent with the core values of judicial independence."

None of the constitutional and other legislative machinery which has so painstakingly been put in place to preserve the independence of magistrates applies, of course, to the committee or its members. Even allowing for the fact that the standard of independence required by sec. 9(2) of the Refugees Act is probably not as high as that called for in a judicial officer such as a magistrate, it seems to me that it could not be as low as the respondents appear to contend that it should be, viz. that it can be satisfactorily maintained in matters relating to his employment by a servant vis-à-vis his master, notwithstanding the fact that he is, by reason of their relationship, subservient to and dependent on his master in all things relating to the work to be done. To revert for a moment to the dictionary definition of "independent" which I have quoted above, the servant in that position seems to me to have not a single one of the qualities essential to independence in this context: for he is dependent upon the authority of another (his master); he is in a position of subordination (to his master); he is subject to external control or rule (by his master); and he is neither self-governing nor free as regards work: he is obliged to work, and to do the work in the manner and at the time and place directed by his master. Wade,

"Administrative Law" (7th Edition) says of statutory tribunals at 912:

> ".... tribunals are completely free from political control, since Parliament has put the power of decision into the hands of the tribunal and of no one else. A decision taken under any sort of external influence would be invalid.
>
> In order to make this independence a reality, it is fundamental that members of tribunals shall be independent persons, not civil servants."

The argument of the respondents that employees of the Department of Home Affairs are eligible to be appointed to the committee simply because they are not expressly disqualified from such appointment by the Refugees Act is spurious. Sec. 10(3) of the Act does not contain, or purport to contain, a numerus clausus of disqualified persons. If it did, it would be open to the first respondent to appoint, for example, mentally defective persons to the committee. In any event, in terms of sec. 9(2) all persons who are biased or not independent are, by clear implication, disqualified from serving on the committee: they will not, to use the words of sec.

10(2), have the "ability to perform the functions of their office properly", and they are consequently not eligible for appointment. A minister who appoints such a person to the committee acts ultra vires, for he is required by sec. 10(2) to have "due regard" to, inter alia, the ability of the person concerned to perform the functions of his office properly. To "have due regard" to something means "to take it into proper account, to give appropriate consideration to it" (Holomisa v. Argus Newspapers Ltd., 1996(2) SA 588 (W) at 603 G-H).

I conclude that, simply by reason of their being employees of the Department of Home Affairs, the third, fourth, fifth and sixth respondents are unable to function without bias and cannot be independent within the meaning of that term as it is used in sec. 9(2) of the Refugees Act. In the circumstances I find it unnecessary to consider the further question, viz. whether a reasonable person could think that the risk of bias in its functioning or of lack of independence on the part of the committee was unacceptably high (see Mönnig and Others v. Council of Review and Others, 1989(4) SA 866 (C) at 881 I); on my findings, that question does not arise. As I have said, sec. 10(2) of the Refugees Act enjoins the

first respondent to appoint the chairperson and other members of the committee -

> ".... with due regard to .... their ability to perform the functions of their office properly."

If, as I find, the third, fourth, fifth and sixth respondents are unable to function without bias, and are not independent, it follows that they will be unable to perform the functions of their office properly, and they are therefore simply not eligible for appointment in terms of the Act. The provisions of the Act regarding the constitution of the committee must be strictly complied with: see Transvaal Coal Owners' Association and Others v. Board of Control, 1921 TPD 447 at 453.

At common law the decision of the first respondent to appoint the third, fourth, fifth and sixth respondents to the committee is ultra vires the Refugees Act, and is consequently unlawful and invalid. However, there is also a constitutional aspect. In Pharmaceutical Manufacturers' Association of South Africa and Another: in re ex parte President of the Republic of South Africa and

Others, 2000 (2) SA 674 (CC) Chaskalson, P., as he then was, said at 692 E-G:

> "The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

The applicants are therefore correct, it seems to me, when they claim, in prayer 2 of their notice of motion, an order, inter alia, that the decision is inconsistent with the Constitution.

Consequently the appointment of the third, fourth, fifth and sixth respondents to the committee by the first respondent is ultra vires, unlawful and invalid on the above basis, and must be set aside as being inconsistent with the Constitution.

I come now to the relief prayed by the applicants in paragraph 4 of their notice of motion. In paragraph 4.1 they seek, in effect, an order declaring that the first applicant is entitled to apply in terms of the Aliens Control Act, alternatively the Immigration Act No. 13 of 2000, for an immigration permit notwithstanding the absence of a certificate in terms of sec. 27(c) of the Refugees Act that he will remain a refugee indefinitely. Now, it would seem from the allegations and supporting material put up by the first applicant that it is very likely, by reason of the continuing internecine conflict in Burundi, that he will, indeed, remain a refugee indefinitely. These allegations have not been denied by the respondents on the papers: they have seen fit to decline to deal with them, their attitude being that they are irrelevant, the committee not yet having considered the first applicant’s request.

Normally, where the legislature has entrusted a particular function to a statutory body a court will not, in the exercise of its review powers, usurp that function unless there are exceptional circumstances justifying such action. This is the more so where, as here, the statutory body concerned has taken no decision and has not even purported to perform its function by considering the first applicant's request for a certificate under sec. 27(c) of the Refugees Act. Thus, in Masamba v. Chairperson, Western Cape Regional Committee, Immigrants' Selection Board and Others, 2001(12) BCLR 1239 (C) this Court said at 1259 D-G:

> "The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give courts the power to perform the relevant administrative functions themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested

> in the Legislature, the executive authority in the Executive, and the judicial authority in the courts. The Constitutional Court has held that both the interim and the final Constitutions provide for such a separation of powers and that this separation must be vigilantly upheld, 'otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of the legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined' (per Chaskalson, P. in South African Association of Personal Injury Lawyers v. Heath and Others, 2001(1) SA 883 (CC) at para. 26.....)"

However, Mr. Katz relies on two statutory provisions. The first is sec. 172(1) of the Constitution, Act No. 108 of 1996, which reads:

> "When deciding a constitutional matter within its power, a Court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make an order that is just and equitable ....."

The second is the Promotion of Administrative Justice Act, No. 3 of 2000. Sec. 6(2) of that Act provides that –

> "A court or tribunal has the power to judicially review an administrative action if -
>
> .....
>
> (g) the action concerned consists of a failure to take a decision; ....."

Sec. 6(3) goes on to say that:

> "If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where –
>
> (a) (i) an administrator has a duty to take a decision;
>
> (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
>
> (iii) the administrator has failed to take that decision,
>
> institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; ....."

Sec. 8(2) of the Act then provides:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders –
>
> .....
>
> (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties;....."

Mr. Katz also referred to the following passage in Masamba's case, supra, at 1259 H – 1260 E:

> "In determining whether there are exceptional circumstances justifying the review court in substituting its own decision for that of the relevant administrative organ, the overriding principle is that of fairness to both sides.
>
> .....
>
> Although it would appear that there is no numerus clausus of situations in which a court may substitute its own decision for that of the administrative organ concerned, a number of guidelines have crystallised from the South African case law in this regard, which

guidelines were usefully summarised by Hlophe, J. (as he then was) in University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others, 1998(3) SA 124 (C) as follows (at 131D-J):

> 'Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary .... The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant .... Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again .... It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself. Of course the mere fact that a Court considers itself as qualified to take the decision as the administrator does not per se justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant may demand that the Court should take such a view .... the categories where the Court would be prepared to substitute its own decision for that of an administrative body are not closed. Depending on the circumstances of each particular case, it may be fair for the Court to take the decision itself rather than refer it back to the appropriate functionary.'"

Mr. Katz submitted that exceptional circumstances existed in this case which justified a substitution by this Court of a decision by the committee. The circumstances consisted, in essence, of the delay which has so far occurred and the further delay which would occur if the matter were to be referred back to the authorities and the first applicant had to wait for a freshly-appointed committee to consider his request.

I agree with these submissions. The existing committee totally ignored the first applicant's request for a certificate for three whole months. A reminder did not help. Even after the first applicant had launched these proceedings there was no satisfactory explanation. Three months is an unreasonably long time, in the absence of any acceptable explanation. That delay alone must have caused the first applicant considerable prejudice. Then, through no fault of the first applicant the first respondent had already constituted the committee unlawfully, rendering it necessary for the Court to set aside the appointments of the third, fourth, fifth and sixth respondents to it. We were told by Mr. Kekana from

the Bar that it would take at least two months for the first respondent to appoint a fresh committee: the positions must apparently be advertised and applications for them must be invited. That delay would undoubtedly cause further prejudice to the first applicant. It seems to me that in these circumstances it would be only "just and equitable" (sec. 172(1) of the Constitution) to come to the assistance of the first applicant; that the order which I propose would be "just and equitable" and "necessary to do justice between the parties" (sec. 8(2) of the Promotion of Administrative Justice Act); that the order will do justice to the principle of "fairness to both sides" (Masamba's case, supra, at 1259 H); and that further delay would cause "unjustifiable prejudice" to the first applicant, so that "fairness to the applicant" demands that this Court should itself take a decision (the University of the Western Cape case, supra, at 131 D-J).

An order is therefore made in the following terms:

1. The decision of the first respondent to appoint the third, fourth, fifth and sixth respondents to the Standing Committee for Refugee Affairs in terms of sec. 10(2) of the Refugees Act, No. 130

of 1998 is declared to be ultra vires, unlawful, inconsistent with the Constitution of the Republic of South Africa, Act No. 108 of 1996 and invalid, and is set aside.

2. The second respondent is directed to receive an application for an immigration permit from the first applicant in terms of sec. 25 of the Aliens Control Act, No. 96 of 1991, alternatively to receive an application for a permanent residence permit for the first applicant in terms of sec. 27(d) of the Immigration Act, No. 13 of 2002, and to deal with such application in accordance with whichever of the said Acts may be applicable notwithstanding the absence of a certificate that he will remain a refugee indefinitely referred to in sec. 27(c) of the Refugees Act, No. 130 of 1998.

3. The respondents are ordered to bear the costs of this application jointly and severally, the one paying, the others to be absolved.

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THRING, J.

I agree.

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DESAI, J.