Reportable
11 SEPTEMBER 2007

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 13182/06

In the matter between:

IBRAHIM ALI ABUBAKER TANTOUSH	Applicant

and

THE REFUGEE APPEAL BOARD	First Respondent
TJERK DAMSTRA N.O.	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent
THE DIRECTOR-GENERAL: HOME AFFAIRS	Fourth Respondent
REFUGEE STATUS DETERMINATION OFFICER	Fifth Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Sixth Respondent

JUDGMENT

MURPHY J

1. The applicant has made application, in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") read with section 33 of the Constitution, to review and set aside two decisions relating to his quest for refugee status and asylum under the Refugees Act 130 of 1998 ("the Act").

2. The applicant's application for refugee status was first rejected on 11 March 2005 by the fifth respondent, the Refugee Status Determination Officer ("RDSO"). He appealed against this decision to the first respondent, the Refugee Appeal Board ("RAB"). On 12 December 2005 the RAB handed down a decision in which a majority of its members dismissed the appeal. The majority decision was handed down by the chairperson of the RAB, the second respondent. Advocate MM Hassim handed down a minority decision in which he held that he would have upheld the appeal.

3. The applicant now seeks to have both decisions set aside and requests this court in terms of section 8(1)(c)(ii)(aa) of PAJA, read with section 172(1)(b) of the Constitution, to correct the decisions of the RDSO and RAB by substituting them with a decision declaring that the applicant is entitled to refugee status and asylum in terms of sections 2 and 3 of the Act. Only the first and second respondents filed opposing affidavits. I will refer to them collectively as "the respondents". The Minister and the Director General of Home Affairs (the third and fourth respondents) and the RSDO have not filed opposing affidavits.

4. Section 8(1)(c)(ii)(aa) of PAJA is to the effect that a court in proceedings for judicial review under PAJA may grant any order that is just and equitable, including orders setting aside the administrative action and

substituting or varying it, instead of remitting the matter under section 8(1)(c)(i) for reconsideration by the original decision-maker, when exceptional circumstances justify substitution or variation. Section 172(1)(b) of the Constitution grants a court the power to make any order that is just and equitable when deciding a constitutional matter.

5. I will return to the specific grounds of review in due course. The crux of the applicant's case though is that the proceedings before both the RSDO and the RAB were attended by procedural unfairness, were further vitiated by material errors of both fact and law and that substitution is the only remedy in the light of the stance taken by both administrative bodies in the earlier proceedings and the RAB in this review application.

6. In the terms of section 3(a) of the Act a person qualifies for refugee status if that person 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 is unwilling to return to it. Section 4 excludes from refugee status those who commit certain criminal acts or enjoy the protection of other countries. Applications for asylum are processed first by a RSDO, an officer of the Department of Home Affairs located at a Refugee Reception Office, with appropriate training and experience. In terms of section 21 the application must be made in person to a Refugee Reception Officer. Pending the outcome of the application the applicant is issued with an asylum seeker's permit (section 22). The application is determined by the RSDO and where rejected it is appealable to either the Standing Committee for Refugee Affairs or the RAB, depending on the reason for refusal.

7. The respondents contend that the applicant does not qualify for refugee status for two reasons. Firstly because he has failed to satisfy the statutory criteria for eligibility. And secondly because he is excluded from refugee status in terms of section 4(1)(b) of the Refugees Act on account of there being reason to believe that he has committed a crime which is not of a political nature and which, if committed in South Africa, would be punishable by imprisonment. They also deny that the proceedings (or at least those before the RAB) were tainted by unfairness or were vitiated by material errors of law or fact.

The applicant's personal history and the background to his arrival in South Africa

8. The following facts regarding the applicant's life and the circumstances of his arrival in South Africa, taken from his un-contradicted averments in the founding papers and the transcript of his testimony before the RAB, can be regarded as common cause.

9. The applicant is a Libyan national who left Libya about 20 years ago in 1987. Since then he has spent most of his time in Pakistan. As a student he was opposed to the policies and practices of the government of Libya then (as now) under the control of Colonel Qadhafi. He became involved in political activity while a student at Bright Star University in Libya during 1983 to 1987. His activities at that time seem to have been fairly low key and of a limited nature. His political consciousness was sparked by Libya's war against Chad, which he described as "anti-humanity". He spoke out against the war in the mosque he attended and in meetings at the university. His activities extended to agitation for greater political

freedoms and fair elections. After graduating with a degree in mechanical engineering he returned to his home district near Tripoli. There, together with his best friend, Khalid Hingari, he secretly wrote political pamphlets agitating against the government which were distributed at night. Hingari was subsequently arrested in 1988 and imprisoned for political conduct. He died in 1996 in Abu Salim prison during an incident documented by Amnesty International as involving the mass killing of perhaps as many as 1200 political detainees. I will refer to this incident more fully later.

10. Before his involvement with Hingari, the applicant twice came to the attention of the revolutionary committee at Bright Star University, once in 1985 and once in 1987. During that time the Libyan government held "people's assemblies" convened by revolutionary committees aimed at achieving hegemony in respect of its socialist policies. The applicant regarded them as "propaganda meetings that were supposed to indicate that the government had a legitimate consensus on issues when in fact it was making authoritarian and dictatorial decisions". He claims that he was forced to attend these meetings and to keep quiet about his political opinions because people who did not attend were tortured and a "negative" political opinion was imputed to them.

11. Throughout the period of 1983 to 1987 the applicant nevertheless continued to attend student political meetings at night. His student group was a loose association, did not have a specific name, nor was it a political party.

12. The applicant's first brush with the revolutionary committee occurred in 1983, before he enrolled at Bright Star, after he had publicly declared his opposition to the war with Chad and the policy of compulsory military service for teenagers, during the *Jumaah* service (the weekly congregational gathering on Fridays at midday) at his local mosque. When questioned by the revolutionary committee he lied in order to protect himself, giving a false account of what he in fact had said by telling them that he had simply raised questions about the war and had merely

stated that the revolutionary committee should inform the people about the reasons for the war with Chad. His true opinion, then and now, was that the war was illegitimate because it was aimed exclusively at the annexation of Uzzo province in Chad, where large deposits of uranium had been discovered.

13. After this encounter the applicant became more circumspect in his political activities and public pronouncements. However, he remained politically motivated and along with his fellow students listened surreptitiously on the radio to *Al Jabba Al Watania Li Inqaad Libya*, an exiled political party that broadcast messages and propaganda opposed to the policies of Colonel Qadhafi. The applicant's attorney at the RAB hearing translated the Arabic name as: the National Foundation for the Salvation of Libya.

14. Despite his low profile, the revolutionary committee at Bright Star briefly detained him and some of his fellow students for the purposes of interrogation. He mentioned two of his fellow students by name: Abdul Qader Shar Maddu, currently in prison in Libya for his political activities, and Salah Khuwayldi who has been granted refugee status and asylum in Europe. During his interrogation he was warned not to hold political opinions opposing the government and was told that religious dissidence would not be tolerated. Once again, during his interrogation he lied to the revolutionary committee by professing to be a supporter of the Qadhafi government.

15. Although the evidence on the point was not elaborated upon in the founding papers, or in the testimony given before the RAB, there is more than a suggestion that the applicant belonged to a mosque that had attracted the attention of the Libyan authorities as one preaching religious

dissidence. It also emerged during the RAB hearing that the applicant's name had appeared on an internet website, referred to as "Libjust", established, maintained and controlled by the Libyan government for some time until it recently became defunct. The information contained on the website reflected the applicant as being a member of the Libyan Islamic Fighting Group ("LIFG"), who had received military training in Afghanistan. The applicant denied that he was a member of the LIFG, that he had ever received military training or that he had ever been associated with any terrorist group. In response to a question by one of the members of the RAB concerning how he became involved in politics, the applicant replied:

> "When you have people in the school, they are Egyptian teachers. They were involved in the Muslim Brotherhood groups. If the teachers saw that a student was clever, they took him aside" (sic)

When asked whether he had been persuaded to join the Muslim Brotherhood groups, he answered:

> "Yes, when I was sitting with these teachers, they opened my mind."

The second respondent took up this issue and the following exchange took place:

> ''**Second respondent:** When the teachers in your school were opening your mind, what did they tell you?
>
> **Applicant:** They told me that I must open my mind. About religion.
>
> **Second respondent:** How did politics come into this?

Applicant: You cannot separate politics and religion in Islam.

Second respondent: Gaddafi (sic) is called a prophet of God. But you say he did not show religion?

Applicant: He did not respect religion.

Second respondent: So he is a bad Muslim?

Applicant: Of course he is a bad Muslim."

16. The significance of this exchange is that it clearly positions the applicant in the Islamist tradition opposed to Colonel Qadhafi. The character of that enmity unfortunately was not fully explored. One assumes it was predicated upon a perceived intolerance by Qadhafi towards the teachings and doctrine of the Muslim Brotherhood and insofar as the applicant appears implicitly to reject Colonel Qadhafi's claim to prophethood, if indeed he has made such a claim, then also upon the foundational precept (*kalima*) of Islam that the Prophet Mohammed is the last prophet of God.

17. There is no evidence before me explaining or accounting for the stance taken by the Qadhafi government towards the Muslim Brotherhood. Suffice to say, it is common knowledge, of which judicial notice may legitimately be taken, that the Muslim Brotherhood (*Jamiat al-Ikhwan Muslimun*) originated in Egypt in 1928 and has spread throughout the Middle East. It propagates a traditionalist view of Islam that there can be no separation between secular, political, spiritual or religious life. It has global aims, and some have described it as having a jihadist agenda, whatever that may mean. Its influence is significant and its activities have

brought it into conflict with governments in the region.

18. Despite his denial of membership of the LIFG, the applicant, as mentioned, was identified by the Libyan government, on the Libjust website, as a member, associate or supporter of the LIFG. By his own admission, while still in Libya, he listened to, approved of and was influenced by the radio broadcasts of exiled political groupings. There is no direct evidence before me about the LIFG, its aims, methods and activities. Nevertheless, significant information about it has come to light in a matter recently adjudicated by the Special Immigration Appeals Commission ("the SIAC") in the United Kingdom, a body equivalent in status to the UK High Court. It will be convenient at this point to digress from the applicant's life story in order to consider some of its findings, specifically those a propos the LIFG, and to comment on the legitimacy of relying upon its findings for the purposes of determining this application.

19. Courts are generally reluctant to rely upon the opinion or findings of a court in a foreign jurisdiction about factual issues not ventilated, tried or tested before them. All the same, it is 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. In *Kaunda and others v President of the Republic of South Africa and others* 2005 (4) SA 235 (CC) (at para 123) Chaskalson CJ, commenting on reports by Amnesty International and the International Bar Association on the human rights situation in Equatorial Guinea, said as follows:

"Whilst this Court cannot and should not make a finding as to the present

> position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case."

These *dicta* have relevance beyond the narrow inquiry into whether it is permissible to rely on the findings of the SIAC in relation to the activities of the LIFG. They sanction reliance upon the decision of the SIAC, and the reports referred to in the decision, when assessing the general human rights situation in Libya, which I do later in this judgment.

20. The relevant decision of the SIAC is *DD and AS v The Secretary of State for the Home Department* (Appeal No: SC/42 and 50/2005 dated 27 April 2007). It concerned an appeal by two Libyan nationals against the refusal by the Secretary of State to grant them refugee status and asylum. Both appellants were alleged to be members of the LIFG, described by the SIAC as an organisation involved in providing extensive support to a wide range of Islamist extremists loosely affiliated to Al Qa'eda networks, who had been engaged in terrorist activity for a substantial period of time.

21. The evidence of the UK Secretary of State was that the LIFG is an Islamist extremist organisation which started in the Afghanistan/Pakistan border area in 1990 with strong Taleban connections and many members who had significant connections to Al Qa'eda operatives. Its aim was to overthrow the Qadhafi government and replace it with an Islamic state. It has carried out attacks against the Libyan state, but has been rebuffed with a fierce and severe military response. Many of its members have been killed, imprisoned or have fled Libya. The dispersal of its

membership has led to a broadening of its outlook, and an embracing of the pan-Islamic, global jihadist outlook of Al Qa'eda. Expert opinion before the SIAC suggests it has lost effectiveness since 9/11 with the recent arrest of some of its members in the UK described as "a symbolic defeat for the remnants of a fading organisation."

22. Nonetheless, Mr. Justice Ouseley, the Chairman of the SIAC, reached the following conclusion about the LIFG:

> "In general, it is our view that there are close links between Al Qa'eda and many senior LIFG members; the closest links were forged and exist outside the UK. Those who hold global jihadist views generally have the links to Al Qa'eda and still seek to oppose the Qadhafi regime by means which include violence. They co-operate with and support other groups in a broader anti-western agenda and in actions directed against what they all see as non-Islamic states notably in the Middle East and North Africa. There has been a clear shift in emphasis in recent years, caused in part by changes in leadership forced by arrests. Those with Al Qa'eda views are in the ascendancy and some of those of other views have left the LIFG or have become marginalized. The difficulties of operating within Libya, and the contacts among the Islamists of many nationalities dispersed throughout the west and elsewhere have encouraged a more global outlook. Those of that outlook represent a clear danger to the national security of the UK."

23. The SIAC went on to draw three other important conclusions about the LIFG. Firstly, the Libyan government has a clear interest in defeating the violent opposition of the LIFG to it. Secondly, despite its Al Qa'eda global outlook, the LIFG has not abandoned its aims in Libya. And finally, it was not possible to conclude from the evidence that the mere fact of LIFG membership shows that an individual is necessarily a global jihadist or Al

Qa'eda supporter. Some LIFG members support Al Qa'eda, others do not. The focus always has to be on what the individual has done and may do.

24. Returning now to the applicant's personal story. It will be recalled that he admitted to an association with the Muslim Brotherhood, to listening to the broadcasts of the exiled *Al Jabba Al Watania Li Inqaad Libya* in the mid-1980's and to being inspired and influenced by their message. Although he denied being a member of the LIFG, he was not asked if he was an *associate* or *supporter* of the LIFG. He could not have been a member of the LIFG while in Libya prior to leaving in 1988, because, according to the SIAC, the LIFG only came into existence in 1990 when it was founded in the tribal areas on the Pakistan/Afghanistan border. There is no evidence touching upon the relationship, if any, between *Al Jabba Al Watania Li Inqaad Libya* and the LIFG.

25. The applicant left Libya during the first half of 1988, shortly after his friend and mentor Khalid Hingari was arrested on being found in his car with pamphlets he was intending to distribute. When the applicant heard of his friend's fate he immediately went into hiding in Benghazi and learned later that members of the revolutionary committee had been to his family home looking for him. As already mentioned, Hingari remained in prison until his death in 1996 during the incident at the Abu Salim prison.

26. Shortly after Hingari's arrest, the applicant obtained a visa to leave Libya, exited Libya via Tripoli airport and proceeded on pilgrimage (*umra*) to Mecca in Saudi Arabia. The facility with which he obtained a visa and left is strangely inconsistent with his depiction of being sought by and on the run from the revolutionary committee. He claimed he was able to do this

because Libyan security officials “were not sophisticated or educated at that time” and he was “able to utilise this fact to avoid detection”.

27. He remained in Mecca for about four months, from Ramadan to Hajj. He had originally hoped to pursue Islamic studies in Saudi Arabia, but when this did not seem possible he considered other options. He met an Egyptian man at the Medina *masjid*, whom he did not identify by name, but who assisted him with finances and a visa to travel to Peshawar in Pakistan, where he was set up with a job as Director of the Islamic Heritage Foundation, a body based in Kuwait with offices in Pakistan. Thus the applicant happened to find himself in the very place that the LIFG was set up shortly before its establishment. Peshawar, it is well known, is the main city in the area of Pakistan bordering Afghanistan and Iran, the so-called Federally Administered Tribal Areas. Society in its immediate precincts is organised along tribal and traditionalist lines. One may safely take notice of the fact that it is an area in which the Taleban and Al Qa’eda enjoy support amongst the inhabitants, and the writ of the Pakistani government is of limited effectiveness.

28. The applicant remained in Peshawar for almost 13 years, from 1988 until 2001, working for the Foundation. The Libyans claim he spent some of that time actively engaged in the conflicts in Afghanistan. During that time he never sought Pakistani residence or citizenship. He operated totally illegally by obtaining fraudulent visa extensions from counterfeiters in Peshawar. When his passport expired he obtained a counterfeit one. The explanation was tendered on his behalf in argument that there was no compulsion upon him to regularise his status because he benefited from the protection of the tribal elders in the region. He acknowledged that he did not always act lawfully in securing visas and passports but submitted

that his conduct was no bar to his claim for asylum.

29. After the attacks in New York on 11 September 2001, the Pakistani government closed down the offices of the Foundation in Peshawar. The applicant offers no explanation for why it did so. One can only surmise that it was motivated most probably by its undertakings to the government of the USA to curtail the activities of persons associated with Al Qa'eda and the Taleban. The applicant avers though that the Foundation still exists and its bank accounts have not been frozen as a result of it being deemed a terrorist organisation. I assume that the Foundation continues to exist in Kuwait, but that its activities in the northwest of Pakistan, if not terminated, have been appreciably curtailed.

30. As a result of the Pakistani government's decision to close the Foundation, the applicant found himself without a job and somewhat discomforted because the Pakistani government, ostensibly in response to US pressure, began persecuting Arabs indiscriminately and irrespective of their affiliations. Being an Arab he fled to Iran by road. There he was picked up in Zaidan, a town just beyond the Pakistan border, and held in detention with 80 other Arab refugees for a period of 6 months.

31. In Iran he was able to negotiate his release on the condition that he left the country. In his testimony before the RAB he explained that a Libyan national, by the name of Mohammed El Saqui, came to Iran from the UK specifically to assist a group of Libyans held in detention after fleeing Pakistan. It is not clear whether El Saqui represented an exiled political movement or the Libyan government. The fact that the applicant referred to him as "a brother" indicates that he was most likely an exiled opponent of the Libyan government of similar Islamic persuasion as the applicant.

El Saqui's intervention seemingly led to the Iranian authorities posing the Libyans with a choice: either they could remain in relatively humane conditions of detention in Iran or they could leave the country. The applicant chose the latter option and left Iran with his family; his wife and children having flown to Iran immediately prior to his crossing to Zaidan by road. From there he went with his family to Malaysia. Fearful that the Malaysian authorities might repatriate him to Libya he fraudulently obtained a false South African passport. His plan at that stage, so he claims, was to seek asylum in Australia or New Zealand, where he believed it would be easier to enter with a South African passport. He was arrested in Jakarta, Indonesia, while on a visit there, and taken into custody. He remained in a deportation holding facility in Indonesia for over 2 months. During his interrogation he claimed to be a South African, of Moroccan origin, who had gained citizenship through marriage. In spite of the passport containing information to the contrary, reflecting the applicant as born in Cape Town, the Indonesian authorities deported him to South Africa.

32. On his arrival here, on 1 November 2003, he was immediately arrested for being in possession of a fraudulent passport. During his detention South African and foreign intelligence officials interrogated him. He was eventually released and applied for asylum. On 5 February 2004 Interpol again arrested him on an extradition request by the Libyan authorities relating to a charge of theft. The applicant is of the view that the extradition request came about as a direct result of his application for asylum and maintained that the charge was trumped-up in a transparent attempt to exclude him from refugee status in terms of the provisions of section 4(1)(b) of the Refugee Act. The offence was allegedly committed in 1985, three years before his departure from Libya, and there was no

reference to it on the Libjust website which stated merely that he was sought because of his association with the LIFG. I will discuss the evidence relating to this critical issue when considering the decision of the RAB. The applicant remained in prison until his release on 20 April 2004 and is currently on a temporary asylum seeker's permit. He says he has lived a law-abiding existence in Johannesburg since then.

33. The second respondent, in an opposing affidavit deposed to on behalf of the first respondent, the RAB, confirmed that the applicant's account of his life between 1988 and 2003 is in conformity with that placed before the RAB as evidence. However, he averred that he personally was unable to verify any of the allegations and stated that the RAB was "deeply concerned" about the applicant's "self-confessed ability to lie, deceive and to commit bribery, fraud and corruption". As will be seen presently, the RAB's concerns about the applicant's credibility played a central part in its decision. Be that as it may, there is no other evidence contradicting the applicant's story.

The proceedings before the RSDO

34. I turn now to the events and circumstances surrounding the decision of the RSDO. The applicant requested asylum immediately upon being arrested at OR Tambo International Airport on 1 November 2003. A formal application was made on 19 December 2003 and the applicant was issued with an asylum seeker's permit in terms of section 22 of the Act. For reasons not explained, the authorities continued unlawfully to detain the applicant. Only after he had threatened suicide and an urgent application for his release was mooted, did the authorities release him on 7 January 2004. He was arrested again on 5 February 2004 on the extradition

request. The extradition request from Libya most likely arose as a consequence of South African police causing an Interpol diffusion to be issued. Libya has no extradition agreement with South Africa. Accordingly, in terms of the Extradition Act 67 of 1967, an extradition to Libya may only proceed if the President consents to the extradition. Despite apparently being seized with the request for extradition, the President has elected not to consent to the extradition, and the respondents have provided no explanation or indication of any knowledge on their part as to why he has declined to do so.

35. During the time he was in custody on the extradition warrant, South African Interpol officials collected the applicant from prison on 26 March 2004 and without notice to his legal representatives took him to the office of the Department of Home Affairs in Marabastad, Pretoria where he appeared before the fifth respondent, Ms Magi Sawa, the relevant RSDO. Because of the intercession of someone at the prison where the applicant was held, the applicant's attorney was able to intervene timeously and challenge the conduct of the Interpol officials. Prior to the attorney's arrival the RSDO informed the applicant that she had a decision ready for him. She said that she was under a lot of pressure from Interpol to give a "negative" decision, stating that they called her every day twice a day to ask her to render a decision against him. Nevertheless, in response to the submissions of the attorneys, she agreed to delay the decision. A subsequent interview was held in April 2004. The RDSO informed the applicant's attorneys in August 2004 that she had taken a decision but that an official in the Home Affairs Department had requested the applicant's file. The applicant was informed of the RSDO's negative status determination only on 11 March 2005.

36. The fifth respondent did not deliver an opposing affidavit. Hence, the allegations that she admitted to being put under pressure by Interpol and senior officials in the Department have not been denied, nor the fact that Interpol officials sought to be present during the interview until the objection of the applicant's attorneys. The contention that she acted under dictation and without the requisite impartiality has also not been disavowed. In his answering affidavit, the chairperson of the RAB acknowledged that he had no knowledge of these allegations, but submitted that they are irrelevant for the purposes of the application, because, as he saw it, only the RAB decision ought to be in contention.

37. In the written reasons for her decision the RSDO made the following pertinent findings, pivotal to her ruling:

- Investigations conducted by Interpol and the Politburo in Libya pointed to the fact that the applicant fled Libya for fear of criminal prosecution after committing the crime of robbery.

- A simple engagement and involvement in student political activity "cannot be proportionate to the punishment of death". Consequently, the applicant's claim of fear of persecution was unfounded.

- The applicant could, and should, have been declared a refugee in Pakistan.

- There were no facts to back up his claim that Arabs were persecuted in Pakistan after 9/11.

- The applicant obtained a South African passport fraudulently and consequently his deportation to South Africa from Indonesia is illegal

(presumably under South African law).

- In terms of international law (the exact provision of which not being stated) the applicant automatically became a Pakistani citizen by getting married to a Pakistani woman. (The applicant is in fact married to an Algerian woman).

38. Relying on these facts and considerations, some of which, it can be seen straightaway, are wrong or of little or no relevance, the RSDO concluded that the applicant had not discharged the burden of proof resting on him, found that the applicant did not have a well-founded fear of persecution as contemplated in section 3 of the Act and further held that "the applicant's claim is unfounded as it relates to a criminal activity as opposed to a political activity".

The proceedings before the RAB

39. The applicant lodged an appeal some time in 2005 in terms of section 26(1) of the Act, which provides that any asylum seeker may lodge an appeal with the RAB in the manner and within the period provided for in the rules if the RSDO has rejected the application in terms of section 24(3)(c). It is common cause that the RSDO in this instance rejected the application for asylum in terms of that provision. At the conclusion of the hearing before the RSDO the latter is required to grant asylum (section 24(3)(a)); to reject the application as manifestly unfounded, abusive or fraudulent (section 24(3)(b)); to reject the application as unfounded (section 24(3)(c)); or to refer any question of law to the Standing Committee (section 24(3)(d)). The RAB is established in terms of section 12 of the Act and is required in terms of section 12(3) to function without any bias and to be independent. As will become evident later, the nature of the RAB's jurisdiction and the

manner of its functioning were contentious issues between the parties. Its powers in appeals though are clearly stipulated in section 26(2). The RAB may after hearing an appeal "confirm, set aside or substitute" any decision taken by a RSDO in terms of section 24(3).

40. The RAB met twice to hear evidence and deliberate the applicant's appeal. The first meeting took place on 6 July 2005 and the second on 2 November 2005. The transcription of the first meeting reveals that it commenced with the second respondent making certain opening remarks read from a prepared document devised with the laudable objective of informing an appellant of the legal issues at stake and the method and approach of the RAB. The following remarks have assumed particular relevance in this case:

> "We know that one of the officials at the Department of Home Affairs has declined your application for refugee status. We have looked at the reasons for this. But the Board as such makes its own independent assessment of the facts and we do not look at the reasons that the Board (sic: he meant the RSDO) rejected your application. Thus, you do not need to prove that the prior ruling was wrong. This is a fresh, or a *de novo* hearing. Today, we will listen to you as if this was your first hearing."

41. After the opening remarks, the applicant was led by his attorney and set out the story of his life between 1983 and 2003 in broad detail. The three members of the RAB intervened where they felt it necessary or desirable with probing questions or inquiries aimed at elucidation or elaboration. I have already referred to the most relevant aspects of the applicant's testimony before the RAB, so it is unnecessary to repeat it.

42. Besides providing oral evidence, the applicant furnished the RAB with a

large bundle of documentary evidence that included various affidavits and letters of support from Libyan refugees throughout the world, including a letter from His Royal Highness Mohammed El-Hassan El-Sinoussi, the Crown Prince of Libya, supporting the applicant's claim to a well-founded fear of persecution. In addition, he handed in letters from exiled Libyan pressure groups, such as Libya Watch and Human Rights Solidarity.

43. One document of notable relevance was the print out of the write-up on the applicant on the Libjust.com website: http: // libjust.com/details9.htm, now non-operational. The print out is in Arabic and depicts a photograph of the applicant. It is accompanied by a translation set out in an email from AAS Media addressed to the applicant's attorney dated 16 February 2004 . The name of the author of the email and the translation is not stated. The authenticity and reliability of the translation have not been challenged and hence should be accepted as accurate. The relevant portions of it read as follows:

> "On 10.01.2001 the US Treasury Secretary, Paul O'Neil, announced a freeze on accounts of "Abdul-Muhsin Al-Libi", director of the Islamic Heritage Revival Office in Peshawar. The US Treasury Department said that the Libyan national "Abdul-Muhsin" was "inflating the numbers of orphans in his lists in order to obtain more funds from the Kuwaiti association, to transfer to the Al Qaeda organisation, and that he is sending funds and message to Bin Laden."
>
> The information on him includes the following:
>
> - Name: Ibrahim Ali AbuBaker Tantoush
> - Nickname: Abdul-Muhsin
> - Born: 1964 at al-Aziziya (translator: 40km south of Tripoli)
> - Mother's Name: al Magtoufah Ali Ziyadah
> - Qualifications: B Sc Petroleum Engineering
> - Wife's name: Mannouba Boughouffah / Algerian, and they have 5 children

- Address in Libya: Sayyad District - Libya

*NOTES:

In 1988 He left al-Jamahiriyyah (Libya) for Saudi Arabia and then to Pakistan and Afghanistan where he received several military course at military training camps belonging to al-Qaeda, and participated in the Afghan war.

During 1990-1998 he worked for the Kuwaiti Islamic Heritage Revival Association, as a Director of the Association's bureau in Peshawar.

Pakistani authorities raided his home but he managed to escape inside Afghanistan.

The person concerned belongs to the so-called the Islamic Fighting Group, banned internationally under Security Council Resolution on Afghanistan (AF 169 A) SC 7222 dated 26.11.2001.

He was head of the Group's members in Pakistan and Afghanistan, and during his period in the service of the Kuwaiti Islamic Heritage Association, he offered financial assistance to the Group he is affiliated to.

Participated in al-Qaeda meetings held in Kabul following the 11 September incidents and he was at that time living in Jalal Abad.

He divorced his wife and asked her to return to Algeria with her five children.

During July 2002 the person concerned was seen at domestic flights at Karachi airport arriving on an internal flight inside Pakistan."

44. The website, it has not been denied, was an officially sponsored website of the Libyan government.

45. Another document submitted to the RAB was taken from the website of "Libya Watch for Human Rights": *www.libya-watch.org*. It is headed: "Urgent Appeal for Action Re: Mr. Ibrahim Ali Tantoush - Libyan National". This organisation portrays itself as "an independent human rights organisation concerned with monitoring and reporting human rights

abuses in Libya …. concerned with upholding and defending the human rights of the Libyan people." It goes on to offer the following endorsement:

> "We can confirm that Mr. Ibrahim Ali Tantoush …. a Libyan citizen and currently an asylum seeker in South Africa, is a *well-known Libyan dissident*."

After setting out his personal history, which accords with the applicant's account to the RAB, it concludes:

> "Mr. Tantoush's return to Libya would no doubt result in his arrest and subsequent interrogation by the Libyan authorities leaving him in very grave danger and physical harm, especially, when considering the track record of the Libyan regime's treatment of political opponent's".

46. In addition to the letters and affidavits of support, the RAB was furnished with Amnesty International's Country Condition Reports in respect of Libya for each year between 2000 and 2005, as well as the US State Department's Country Reports for Libya 2003 and 2004.

47. In paragraph 8.1 of the index of the bundle of documents handed in at the first hearing there is a reference to the Amnesty International Country Condition Report of Pakistan 2003 with the annotation that it supports the applicant's claim that Arab men were arbitrarily detained in and deported from Pakistan after 9/11. It is evident from the transcript of the hearing of 6 July 2005 that reference was made to this document and the attention of the members of the RAB was drawn to it by the applicant's attorney in support of the proposition that the applicant was a victim of this discrimination and anti-Arab sentiment at the hands of the Pakistani government. Unfortunately, the report is not included in the record filed in terms of rule 53(3) with the result that I have had no insight into its

contents.

48. At the end of the hearing on 6 July 2005, the second respondent stated that he preferred to adjourn the hearing because he wanted to conduct further investigations with regard to the extradition warrant and hear the evidence of Inspector Mendes of Interpol. It is common cause that in the period between the two hearings the second respondent had discussions with Mendes without the applicant or his representatives being present. The applicant's attorney, when this came to her knowledge, objected. She informed the second respondent that she regarded it as unfair and prejudicial that he was having discussions with Interpol of which she was not kept informed. The second respondent's rejoinder to this criticism in the answering affidavit is somewhat contradictory and confusing. In the first instance he admitted to having spoken to Mendes several times but claimed he was entitled to do so in terms of the legislation. Section 26(3)(a) of the Act provides that before reaching a decision the RAB may of its own accord make further inquiry or investigation. However, later he qualified this by stating that his discussions with Mendes were at all material times restricted to the question of his availability to present himself before the RAB and that he had never discussed with Mendes the merits of the applicant's claim or any evidence to be presented by Mendes. Notably there is no confirmatory affidavit from Mendes.

49. The assertion of perceived bias acquired an added dimension on the morning of the second hearing of the RAB on 2 November 2005. In his founding affidavit the applicant described how on arrival at the RAB he and his representatives waited for 20 minutes before the hearing commenced while the second respondent was in discussion with Interpol officials in his office. He became apprehensive that the second respondent

was being unduly influenced by Interpol and is of the view that this break away meeting was prejudicial to his application. The second respondent in the answering affidavit replied that there was no basis upon which the applicant could impugn the conduct of the RAB as having been influenced by pressure exerted by officials of Interpol and that the allegations of bias or acting under dictation were sweeping and lacking in particularity. He denied being unduly influenced by Interpol. Nevertheless, he did admit to having separate discussions with the Interpol officials, but said they were confined to introductions and an exchange of courtesies. He explained that the Interpol officials arrived prior to the hearing and proceeded to introduce themselves to members of the RAB before the applicant and his legal representatives arrived.

50. The applicant in reply took up the challenge and responded to the allegation that his criticisms were sweeping, lacking in particularity and unfounded. He explained that he had arrived with his legal representatives at about the same time as the Interpol officials and reiterated that the meeting between the members of the RAB and Interpol had lasted for 20 minutes, stating that he found it hard to understand how it could have taken that long for the Interpol officials merely to introduce themselves to the members of the RAB. In support of his version he filed a confirmatory affidavit of Ms Rubena Peer, a candidate attorney, who in November 2005 had been employed by the applicant's attorneys doing research work on a voluntary basis. She arrived at the offices of the RAB on that morning together with counsel and two attorneys from the Wits Law Clinic. On their arrival they met Mendes who they know and briefly exchanged greetings. The applicant and his representatives sat in the reception area of the RAB on couches situated on the right hand side of the room, while the Interpol officials sat on the couches located on the left hand side of the

room. The second respondent then entered the reception area, invited the Interpol officials into his office and proceeded to consult with them for approximately 20 minutes. One of the attorneys, Ms Bhamjee, noted aloud that the consultation was irregular and a point could be taken to that effect on review. They were shortly afterwards led by the receptionist into the hearing room. On their way there Ms Peer noticed that the consultation was still underway. Ms Peer stated in the affidavit that she was deposing to it in response to the second respondent's assertion in the answering affidavit that the allegations regarding this incident were sweeping and lacking in particularity.

51. As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations by Ms Peer were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them - see *Sigaba v Minister of Defence and Police and another* 1980(3) SA 535 (TkSc) at 550F. The respondents did not request to be given an opportunity to deal with these averments. Their failure to do so tilts the probabilities towards the applicant's version that the consultation occurred, that it lasted 20 minutes and that Ms Bhamjee objected. Whether the inference of actual bias may be drawn in the light of the second respondent's denial thereof is a matter to which I will return later.

52. At the commencement of the second hearing, the second respondent placed on record that the purpose of the hearing was to record the evidence from Superintendent Mendes regarding the criminal matter. By that he meant the request for extradition of the applicant by Libya based

on the allegation that the applicant had committed either theft or robbery in Libya in 1985. Mendes testified that after the arrest of the applicant at the airport, an international diffusion together with the applicant's fingerprints, photograph and personal information were sent to Interpol in Paris and disseminated worldwide. His office received in reply a lot of feedback from a lot of countries. Most of the responses were negative, in the sense that the applicant was unknown to them. He however received a confirmation from Libya that the applicant was wanted for the *theft* of gold. Interpol South Africa also obtained his correct name, details and passport number from Kuwait, who also confirmed that he was an engineer. The theft charge related to the theft of gold from a factory some 800 kilometres from the applicant's normal place of residence in 1985. Mendes sought clarification and established that the death penalty would not apply to such a crime in Libya and that the applicant faced a sentence of no more than 7 years imprisonment. Mendes confirmed that his office was awaiting the President's decision on extradition and that it was not his duty to go behind the warrant or to consider its veracity. His responsibility was confined to ensuring the warrant complied with formal procedures and therefore he had not fully investigated the allegations in the warrant.

53. Mendes was questioned by counsel about the issue of a so-called "red notice". The line of questioning started with counsel inquiring whether a red notice had in fact been issued. From Mendes' answers it is clear that a distinction is drawn between a diffusion and a red notice. The purpose of a diffusion is to identify a fugitive. When the second respondent requested Mendes to clarify the notion of a red notice, he responded as follows:

"A red notice is issued by a country where a person is wanted for a crime committed,

> not by us. Libya in this matter had to issue the Red Notice. The fact that he was not circulated does not mean that he was not wanted. Some are not circulated, and some are - for me, if it is not a serious crime, I will not send a diffusion if I know around which the area the person may be (sic). The red notice would in this matter be issued by Libya to head office in France. And France would permit the notice to be sent around to all countries."

54. There are two facets to this evidence. In the first place it clarifies the distinction between a diffusion and a red notice. The former is issued by the intelligence or law enforcement authorities of the jurisdiction where a fugitive or asylum seeker is held in order to garner information about him. A red notice is issued by the country seeking a fugitive from justice, either by the local intelligence or law enforcement agency, and is then sent to Interpol in Paris who authorizes its circulation throughout the world. The second facet is that Mendes was clearly under the impression that Libya had not in fact circulated a red notice in respect of the applicant, as appears from his assertion that the fact that one had not been circulated did not mean the applicant was not wanted. As he indicated, he would normally not send one, or a diffusion for that matter, in cases where the crime was not serious.

55. Averments made in the answering affidavit by the second respondent reveal that he misunderstood the evidence of Mendes on this aspect. His understanding was that Libya had in fact issued a red notice and sent it to Interpol in Paris and that it (rather than just a diffusion) had been sent around the world. Although there is no explicit reference to a red notice in the written decision of the second respondent, his averment in the affidavit, the general tenor of the reasoning in his judgment and his ultimate conclusion strongly suggest that his mistaken assumption was a consideration or factor influencing his decision that the applicant was

excluded from refugee status on account of criminal conduct. The applicant's interpretation of the evidence (with which I agree) is that Libya had not in fact issued a red notice. He relies on this, and such was put to Mendes, to contend that the failure of Libya to have issued a red notice between 1985 and 2003 is indicative of the fact that the charges were trumped up in response to the diffusion and a deliberate attempt to thwart the asylum proceedings.

56. There are contradictory statements on record about whether the criminal charge related to theft or robbery, the latter being more serious on account of the element of violence. The seriousness of an offence is a criterion applicable to the exclusion from refugee status. The request for extradition, in a *Note Verbale* issued by the People's Bureau of The Great Socialist People's Libyan Arab Jamahiriya to the South African Department of Foreign Affairs, states that the applicant is:

> "a Libyan national who is wanted by the judicial authorities in Libya in terms of case (sic) pending against him before the Libyan courts pursuant to Article 2 and 3 of the Libyan Criminal Code No 446-444 for theft of a quantity of gold."

The *Note Verbale* is dated 11 February 2004. The warrant of arrest issued by the senior magistrate in terms of section 5(1)(b) of the Extradition Act 67 of 1962 on 3 February 2004, presumably on the basis of an informal request, states that the magistrate was in receipt of information that the applicant was wanted for the offence of theft of gold. Mendes throughout his testimony also referred only to a charge of theft. And the second respondent in his decision held there was reason to believe the applicant was guilty of theft. Accordingly, the reference to the crime of robbery in the decision of the RSDO, and in other documents alluded to in argument before me, are insufficient to conclude that the

Libyan authorities are pursuing the applicant on a charge of robbery.

57. After hearing argument on 2 November 2005 the proceedings of the RAB were adjourned. The RAB handed down its decision on 12 December 2005. As mentioned, the majority (Mr. Damstra, Mr. Mohale and Ms Morobe) concurred in the decision of Mr. Damstra, the second respondent, with Adv Hassim dissenting in a separate written decision.

58. The majority confirmed the decision of the RSDO rejecting the application for asylum on the grounds that the applicant did not qualify for refugee status in terms of section 4(1)(b) of the Act. It found also, in the alternative, that the applicant was not a credible witness and that his evidence ought not to be accepted. The implications of this latter finding were not enlarged upon by the majority, but reading the decision as a whole it seems they were of the opinion that his lack of credibility meant he had failed to establish on a balance of probabilities that he had a well-founded fear of being persecuted by reason of his religion, political opinion or membership of a particular social group should he be compelled to return to Libya.

59. The dissenting minority opinion took a different tack. Adv Hassim disagreed with the majority's finding on credibility. While he was constrained to accept that the applicant had lied, committed fraud and used deception to acquire visas, passports and the like, over a period of almost 20 years (the main basis for the majority impugning the applicant's credibility) he was not inclined to reject the applicant's version on that account alone. Firstly, he felt the evidence relating to the applicant's travel documents was not a material aspect of his claim and thus an insufficient basis to reject his version of his life and his fear of persecution. Nor, he felt, was the applicant given a proper opportunity by the majority of the RAB to deal with any adverse inferences they sought to draw from his past deceptions. As he saw it, the applicant's lying, bribery and fraud were done for political reasons and were the means of his survival. He accordingly found that the applicant was "credible in relation to all core issues relating to his claim". With that, he reviewed the evidence of the applicant's life, his activities

before and after leaving Libya, and concluded that there was a reasonable likelihood that the applicant had fled Libya in an attempt to avoid being persecuted for his political opinion. He also found, for reasons upon which I will expand later, that the charge of theft was trumped-up, and taken together with the information on the Libjust website such indicated, in his estimation, that the Libyan authorities would act against the applicant were he forced to return to Libya. The reports of Amnesty International, he felt, provided overwhelming evidence that political dissidents face persecution in Libya and in view of that there was a real risk of the appellant facing the same if he were to be returned to Libya.

60. I will come back to other relevant aspects of the two opinions when I discuss the specific review grounds. Before doing that, it is necessary first to set out more fully the relevant legal provisions governing the status and rights of refugees in our law, which I paraphrased earlier in this judgment. They were of obvious importance to the decisions of the RSDO and the RAB, and in the final analysis will be dispositive of this application.

The legal position in relation to refugees

61. On 6 September 1993 the South African government and the United Nations High Commissioner for Refugees ("UNHCR") concluded an agreement in relation to the policy regarding asylum seekers and refugees in South Africa. After that, in 1996, South Africa acceded to the United Nations Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol. In the same year, South Africa became party to the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Protection of 1969. In order to give effect to these newly acquired international obligations, Parliament enacted the Refugees Act 130 of 1998. The Act provides a new regime and seeks to reflect the principles contained in the various international instruments. The treaties have thus been incorporated into domestic law.

62. The key provisions of the Act for the purpose of the present matter are sections 2, 3 and 4, to which I have already referred. They read as follows:

> ‘‘**2. General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances.** -Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where -
>
> (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group: or
>
> (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.
>
> **3. Refugee status.** - Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-
>
> (a) owing to a well-founded fear of being persecuted by reason of his or her race, 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, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
>
> (c) is a dependant of a person contemplated in paragraph (a) or (b).
>
> **4. Exclusion from refugee status.**-(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she -
>
> (a) has committed a crime against peace, a war crime or a crime

against humanity, as defined in any international legal instrument dealing with any such crimes; or

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence."

63. Section 3 is the operative provision in determining refugee status. It must be read together with section 2 which entrenches the international law obligation of non-refoulement. Section 6 provides that the Act must be interpreted and applied with due regard to the two Conventions, the Protocol, the Universal Declaration of Human Rights and "any other relevant convention or international agreement to which the Republic is or becomes a party".

64. In our constitutional dispensation the Bill of Rights is applicable equally to foreigners (and hence asylum seekers) as it is to citizens. In *Minister of Home Affairs and others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at para [25], the Supreme Court of Appeal held:

> "Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. And while that person happens to be in this country - for whatever reason - it must be respected, and is protected, by section 10 of the Bill of Rights."

65. In terms of section 8(1) of the Constitution the duties imposed by the Bill of Rights are binding on the RSDO and the RAB, both being organs of state exercising public power and performing a public function. By the same token, their decisions are administrative action as defined in section 1(i) of

PAJA. Likewise, to the extent that they are obliged to interpret legislation and the Bill of Rights they must promote the spirit, purport and objects of the Bill of Rights and consider international law, in terms of section 39 of the Constitution.

The grounds of review

66. The applicant grounds his various causes of action on the relevant provisions of section 6 of PAJA, which for all intents and purposes concretely embodies the constitutional right to just administrative action, and codifies and supplants the common law grounds for judicial review - *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para [25].

67. In paragraph 19 of his founding affidavit the applicant submitted that the decision of the RAB to reject his appeal should be set aside because:

> "19.1.1 I was not afforded a fair hearing on the matter;
>
> 19.1.2 the Appeal Board was not properly constituted and it was not authorized to hear my appeal;
>
> 19.1.3 the decision was materially influenced by errors of law;
>
> 19.1.4 the decision was not rationally connected to the information before the decision-maker;
>
> 19.1.5 the decision was taken because irrelevant considerations were taken into account and relevant factors were not considered;
>
> 19.1.6 the decision was so unreasonable that no reasonable decision-maker could have come to the same decision; and

19.1.7 the decision was unconstitutional and unlawful.

19.1.8 the decision maker showed bias and prejudice towards me."

68. He made similar general submissions with regard to the decision of the RSDO, except there is no allegation that the RSDO was not properly constituted.

69. Mr. *Arendse*, who appeared for the respondents, seized upon the generality of the grounds and submitted that insufficient factual and legal basis for the attack had been made out in the papers. Relief can only be granted in an application where the order sought is clearly indicated in the founding and other affidavits and is established by satisfactory evidence in the papers. The basis for relief must be fully canvassed and the party against whom such relief is to be granted must be fully apprised that relief in a particular form is being sought and be given the fullest opportunity of dealing with the claim - *Luwalala and others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112D-F. Similarly, it is well established that applicants are obliged to make out their case in the founding affidavit and the prevailing practice is to strike out matters in replying affidavits which should have appeared in founding affidavits - *Titty's Bar and Bottle Store v A.B.C. Garage and others* 1974 (4) SA 362 (T) at 368H.

70. At first glance there is some merit in Mr. *Arendse's* submission, especially insofar as it concerns the attack upon the decision of the RSDO. Beyond the allegation that the RSDO acted under the dictation of Interpol officials, few other facts are alleged or averments made in the supporting affidavit regarding the other review grounds of alleged unfairness, irrationality and unreasonableness. The point loses some of its force, however, when

regard is had to the supplementary affidavit filed in terms of rule 53(4), which added to the supporting affidavit once the rule 53 record had been filed. There the applicant made much of the fact that the record delivered was inadequate for the reason that it comprised one set of documents, and not two. The applicant accordingly maintained that the failure or inability of the first and fifth respondents to file separate and distinct records was clear evidence of their failure to apply their minds properly. If the decision makers were not able to identify what documentation served before them and which documents (such as the Amnesty International reports) were taken into account when making the decision impugned, that in and of itself, he argued, would be a reason to set aside the decisions. The allegation is made that the RSDO failed to take into account the documentation and thus failed to apply her mind to the application and ignored relevant information. Because the fifth respondent did not file an answering affidavit she has not denied these allegations. The unanswered allegations of acting under dictation and a failure to properly consider the application therefore do indeed establish sufficient basis for the relief sought on the grounds that the RSDO violated the applicant's constitutional and statutory rights to reasonable, rational and procedurally fair administrative action. (It was intimated in argument that the denials of the second respondent might be extended to the fifth respondent. That cannot be so. One person cannot make an affidavit on behalf of another. The second respondent can only depose to matters in his own knowledge - *Gerhardt v State President and others* 1989 (2) SA 499 (T) at 504G).

71. I am similarly, if not more, persuaded that a proper factual basis was laid in the supporting affidavit and the supplementary affidavit for the relief sought in relation to the RAB decision. Beyond the general grounds, the applicant averred that the two bases of the impugned decision were

vitiated either by procedural unfairness, material errors of law and fact and a failure of the RAB to apply its mind to the relevant considerations in the documentation provided to it, particularly that relating to the human rights situation in Libya. In paragraphs 172 and 173 of the supporting affidavit the applicant complained firstly that his credibility was rejected in circumstances where he was not cross-examined and no evidence, which he was apprised of, was led suggesting that his version of events was false, and secondly that the finding by the majority that he did not qualify for refugee status because of section 4(1)(b) of the Act was wrong in law and fact. His expressed approval of the minority decision amounts to an alignment with the factual findings of Adv Hassim that the charges were trumped-up and were not enough to exclude him from refugee status. Added to that there are several other statements interspersed throughout both affidavits alleging variously bias, irrationality and a failure of discretion. There can be little question that the first and second respondents were fully apprised that relief in a particular form was being sought and that they had the fullest opportunity to deal with it in their answering affidavit. Moreover, as I have already intimated, where new material was introduced in reply, the respondents could have relied upon the principle enunciated in *Sigaba v Minister of Defence and Police and another* (*supra*) to seek leave to file additional affidavits in the sure likelihood that such leave would have been granted.

The human rights situation in Libya

72. In the supplementary affidavit the applicant placed much emphasis on the fact that he furnished the RAB, among other documentation, with the Amnesty International Country Condition Reports in support of his belief that he will suffer persecution on account of his political opinion if forced to

return to Libya. Referring to the absence of any noteworthy discussion of this material in the majority decision, and its exclusion from the rule 53 record, he underlined that this relevant information was for the most part ignored by the first and fifth respondents. His assertion is not denied by either the RAB or the RSDO. It must therefore be held that such information was in fact ignored. The fuller implications of that for the reviewability of the decision, if not immediately self-evident, will become clear later. I turn now though to consider the content of that information.

73. Serendipitously, the same evidence was placed before the SIAC earlier this year in *DD and AS v The Secretary of State for the Home Department (supra).* As in the present case the commission had to decide whether the two appellants, both Libyans, could lawfully be returned to Libya. The appellants argued that, due to their political views, they held a well-founded fear of being persecuted if they were returned. Despite finding that both appellants were extremists with links to Al Qa'eda, supportive of terrorist violence and a threat to UK national security, and thus not protected by the refugee conventions, the SIAC refused to sanction their return to Libya on the grounds that to do so would involve a breach of the UK's obligations under the European Convention for Human Rights, in particular the provisions prescribing detention, torture and unfair trials. The judgment includes a detailed, analytical and objective synthesis of the general human rights situation prevailing in Libya at the present time. It is drawn from and paraphrases a variety of authoritative and reputable sources, including the Country Condition Reports of Amnesty International and the US State Department which were furnished to the RAB in this matter.

74. It is unnecessary to regurgitate the full analysis and conclusions of the

SIAC. The judgment is of public record. It is permissible to refer to it and take cognizance of its findings in accordance with the principle stated in *Kaunda and others v President of the Republic of South Africa and others (supra)*. Reference will be made to the pertinent conclusions of relevance to this case. That most of the background material on Libya is not controversial is reflected in an Operational Guidance Note issued by the UK Home Office in October 2006 for use by its decision makers. It is cited in paragraph 137 of the judgment and states:

> "The following human rights problems were reported in 2005: inability of citizens to change the government; torture, poor prison conditions; impunity; arbitrary arrest and incommunicado detention; lengthy political detention; denial of fair public trial; infringement of privacy rights, severe restriction of civil liberties- freedom of speech, press, assembly and association; restriction of freedom of religion; corruption and lack of government transparency; societal discrimination against women, ethnic minorities, and foreign workers; trafficking in persons and restriction of labour rights."

The Guidance Note concludes:

> "The Libyan government continues to be repressive of any dissent and opposition. Islamic activities are generally not allowed to operate on any substantial scale within the country. If it is accepted that the claimant has in the past been involved in opposition political activity or is a radical Islamic activist for one of the opposition political or Islamic groups mentioned above then there is a real risk they will encounter state-sponsored ill-treatment amounting to persecution within the terms of the 1951 Convention. The grant of asylum in such cases is therefore likely to be appropriate."

75. The SIAC held that these statements can safely be assumed to reflect the UK Government's views of the state of affairs in Libya.

76. The US State Department Report for 2005 records that although Libyan

law prohibits torture, security personnel routinely tortured prisoners during interrogations or as punishment. The reported methods of torture include chaining to a wall for hours, clubbing, electric shock, breaking fingers and allowing the joints to heal without medical care, suffocating with plastic bags, deprivation of food and water, hanging by the wrists, suspension from a pole, cigarette burns, threats of dog attacks, and beatings on the soles of the feet.

77. With regard to the rights to fair trial and detention, the SIAC referred to a text of Professor Mansour El-Kikhia describing the People's Court as a distinctively unjust feature of the criminal justice system. Introduced in 1988, (the year the applicant fled Libya), it was separate from the mainstream judiciary. It was totally unaccountable, hearings were held in private, often in the absence of defendants, with no right to a lawyer or notification of the charge. It is notorious for its politically motivated judgments and biased trials. Notwithstanding its formal abolition in 2005, Human Rights Watch has reported that an ad hoc revolutionary court was used recently in the retrial of 85 Muslim Brotherhood members.

78. One feature of trial-related practice is incommunicado detention. Many political detainees, including Islamists, were so held for unlimited periods and often in unknown places, mainly in Abu Salim prison - (SIAC judgment para 152). It will be recalled that the applicant's undisputed testimony is that his friend and mentor, Khalid Hingari, was killed in Abu Salim prison. According to the SIAC, Abu Salim is located in a compound of the Military Police in a suburb of Tripoli and has an unusual status among Libyan prisons: it is run by the Internal Security Organisation and not the Ministry of Justice. In practice it operates independently and reports to Colonel Qadhafi. In April 2004, Colonel Qadhafi acknowledged that killings had

taken place at Abu Salim. The applicant claims 800 were killed. Others have put the figure at 1200. There is evidence that riots broke out at the prison in October 2006 as well. In that instance the authorities were more restrained with only one prisoner being killed, but with many others being injured mostly from bullet wounds.

79. The following conclusions of the SIAC (paras 301-305) are relevant to assessing the current human rights situation in Libya:

- Torture is extensively used against political opponents among whom Islamist extremists and LIFG members are the most hated by the Libyan Government, the Security Organisations and above all by Colonel Qadhafi. It is practiced for the purposes of obtaining confessions for use in trials against the confessor or other defendants; it is used in intelligence gathering. There is also evidence that it is used for punishment.

- The judicial system is clearly marked by a lack of judicial independence stemming both from the practice and acceptance of political interference and hostile attitudes towards the government's political opponents.

- The system of government is designed to procure the survival of the current government, and it does so by repressing the expression and organisation of dissent in a variety of ways, whether that dissent is that of a secular non-violent opponent or that of the violent Islamist.

The reviewability of the RSDO decision

80. I turn now to consider the reviewability of the decision of the RSDO. In the answering affidavit the RAB contended that it is only the decision of the RAB which falls to be reviewed. The RAB holds the standpoint that the appeal to the RAB in terms of section 26 of the Act constitutes a hearing *de novo* and on that account the applicant should be precluded from reviewing the decision of the RSDO. The view is not entirely accurate. It is obvious that the appeal to the RAB is an appeal in the wide sense, seeing as the provisions of section 26(3) permit the RAB before reaching its decision to invite representations from the UNHCR and to call for additional evidence from other sources. That the RAB is an appellate body, as opposed to a body of original jurisdiction, is also beyond doubt, if only by virtue of its designation and its powers in section 26(2) "to confirm, set aside or substitute" - such customarily being appeal powers. But these characteristics alone should not operate to justify a denial of natural justice by the "trial" body. As Megarry J put it in *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713 (Ch) at 720:

> "If a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had? I very much doubt the existence of any such doctrine."

The principle in *Leary* was considered to have been stated too categorically by Nicholas AJA (as he then was) in *Slagment v Building, Construction and Allied Workers Union* 1995 (1) SA 742 (A) at 756 I-J where he held in essence that no general rule can be laid down in this regard. Much depends on the context: the nature of the adjudicative process and the extent of irregularity. As Botha J put it in *van Garderen N.O v The Refugee Appeal Board* (unreported decision 30720/2006 of 19 June 2007).

> "Irregularities committed by the RSDO are relevant to the extent that they have not been overtaken by or cured in the proceedings before the RAB."

81. The undisputed evidence is that Interpol brought pressure to bear on the RSDO to render a negative decision in respect of the applicant's application for asylum. On 26 March 2004 the applicant was taken by two officers from Interpol to the RSDO who told him on arrival that she had a decision ready for him and that Interpol had insisted that she prepare a negative decision. None of this has been denied by the respondents. Section 6(2)(a)(iii) of PAJA provides that a court has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias. The evidence indicates that the applicant was justified in reasonably apprehending that the negative decision rendered by the RSDO was the result of external influence, that she took the decision acting under dictation and thereby wholly compromised her impartiality and independence, even though she afforded the applicant a further opportunity to make representations. A defect of this kind wholly vitiates the decision and is not a procedural irregularity of the kind that can be cured on appeal. It is a total failure of the proper exercise of an independent and impartial discretion. On that ground alone the decision of the RSDO must be set aside. Not only is the decision tainted by bias it is also reviewable under section 6(2)(e)(iv) of PAJA on account of the decision having been taken because of the unauthorised or unwarranted dictates of another person.

82. Although the applicant in his founding papers challenged the decision of the RSDO on the grounds that irrelevant considerations were taken into account and relevant considerations not considered, the point was not

pressed in argument. The fact that he might or should have sought or obtained refugee status in Pakistan is not relevant to the inquiry mandated by section 3 of the Act. On receipt of the application for asylum the RSDO was obliged to conduct an investigation into whether the applicant had a well-founded fear of persecution in Libya and because of that fear is outside of Libya and is unable or unwilling to avail himself of the protection of Libya, the country of his nationality. Similarly that she regarded his involvement to be limited to "a simple engagement and involvement in student political activity" for which the death penalty did not apply, means that she gave not much consideration to his association with the Muslim Brotherhood while he was in Libya or to his activities and associations in Pakistan, Afghanistan and Iran between 1988 and 2001, and particularly his flight from Pakistan after 9/11.

83. By focusing her attention in a limited way upon the credibility of the applicant's reasons for leaving Pakistan, the RSDO appears not to have given consideration to any risk of torture, detention or an unfair trial that the applicant might face in Libya. The applicant's submission in the supplementary affidavit that she ignored the documentation handed to her in support of that contention has not been denied. The absence of any specific reference to the Country Condition Reports in her written decision lends credence to the inference that she paid them little heed. Finally, her questionable declaration that the applicant's deportation from Indonesia was illegal would seem also to be an irrelevant consideration, albeit that the extent of its influence upon her is uncertain. All these factors taken together leave little doubt that her decision was fatally vitiated by irregularity and must be set aside.

The reviewability of the decision of the RAB

84. The applicant contends that the decision of the RAB was similarly flawed by bias and procedural irregularity. The allegation of bias has two legs. It is not in dispute that on the morning of the second hearing the second respondent met separately with Interpol officials. The second respondent is correct that, in terms of section 26(3)(c) and (d), the RAB has the right to request the attendance of any person able to provide it with relevant information and of its own accord may make further inquiry or investigation. As I have said, the failure by the second respondent to seek leave to file additional affidavits in response to the version put up by the applicant's attorneys leave me persuaded that the meeting with Interpol endured for about 20 minutes and went beyond introductions and an exchange of courtesies. Still, there is no conclusive evidence that the second respondent acted under dictation. Nor that he was put on guard by any complaint that the RSDO had acted under dictation. Where the second respondent erred, however, is that when he convened the hearing he failed to place on record the content of his prior discussions with Interpol and did not afford the applicant's legal representatives an opportunity to raise any issues in that regard. His conduct and omissions do not justify a finding that he was actually biased in the sense that he approached the issues with a mind which was in fact prejudiced or not open to conviction. Regretfully though, the shortcomings in his conduct gave rise to a reasonable perception of bias that might have been overcome had he explained to the applicant the powers of the RAB under section 26(3) and disclosed the content of the separate discussions and his purpose in holding them. The events of the morning of the second hearing gave rise to a reasonable apprehension that some of the members of the RAB might not bring an impartial mind to bear on the adjudication of the case, especially when the applicant and his legal

representatives were further aware that the second respondent had been engaged in telephonic discussions with Mendes prior to the hearing, the content of which had not been disclosed to them.

85. The perception of bias is strengthened to some degree by the strenuous opposition put up by the first and second respondents to this application. The RAB is an adjudicative tribunal. All its members are members of the International Association of Refugee Law Judges. They are administrators tasked with quasi-judicial functions.

86. Rule 7 of the Rules of the Refugee Appeal Board (enacted in terms of section 14(2) of the Act and promulgated in GG25470 of 26 September 2003) provides that in any appeal before it the appellant and the Department of Home Affairs are the parties to the appeal. The Minister and Director-General of Home Affairs were cited and served as the third and fourth respondents in this review application, but from the record I am unable to ascertain any involvement of the Department of Home Affairs in the appeal before the RAB. The state attorney delivered a notice of intention to oppose on behalf of all the respondents, including the Minister and the Director General. However, only the second respondent deposed to an answering affidavit and did so explicitly on behalf of the RAB and himself. In paragraph 3 of the affidavit he makes the following rather curious statement:

> "I depose hereto only on behalf of the First and Second Respondent. I am advised that the Third and Fourth Respondents oppose this application on the basis that they are jointly responsible for institutions and processes established under the Act. I am advised that the Third and Fourth Respondents are duty bound to protect the integrity of the First Respondent."

Whatever the beneficial aspects of the structural relationship between the RAB and the Department of Home Affairs, there is more than one problem with this approach. Firstly, section 12(3) of the Act provides that the Appeal Board must function without bias and must be independent. Not only must it be impartial in its decision-making, it must also be structurally

independent. Secondly, once again, the second respondent cannot make an affidavit on behalf of the Minister or the Director-General. They, not he, are required to set forth the basis of their opposition to the application - *Gerhardt v State President and others* (supra). Thirdly, and most importantly for the purposes of the present discussion, the strenuous opposition conducted by the RAB, the adjudicative functionary, on behalf of one of the parties to the appeal before it, the Department of Home Affairs, the successful party, compromises its independence and adds force to the applicant's legitimate or reasonable apprehension of bias.

87. In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (CKH) at 353F - 353I Pickard JP made the following comments, with which I respectfully agree, in relation to opposition put up by a tender board:

> "The perception of bias may quite possibly be enhanced by another factor which appeared to the Court to be somewhat unusual. Unlike what normally occurs in review matters of this nature, the tribunal (the Board) has in this case offered extremely strenuous opposition to the review proceedings. I have great difficulty in understanding why.
>
> It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of Rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. More often than not independent tribunals, having done their duty in terms of the provisions of Rule 53, take the attitude that they abide the decision of the Court and leave the other matters to the interested parties to dispute

> before the Court …… Regrettably this attitude of the Board in this case may well be to some extent support for a suggestion that they are not entirely independent and disinterested."

88. Taking these facts and circumstances together I am persuaded that the applicant has made out more than a *prima facie* case that the RAB was reasonably suspected of bias within the meaning of section 6(2)(a)(iii) of PAJA. The RAB's assertions of fairness and the absence of actual bias fail to address satisfactorily the reasonable apprehension of bias on the part of the applicant. On that ground alone its decision falls to be set aside under section 8 of PAJA.

89. The applicant has challenged the decision of the RAB on other procedural grounds, most important among them being one relating to the finding regarding the applicant's credibility, the procedural dimension of the issue being the failure by the RAB to raise its concerns or assumptions in respect of credibility during the hearing in order to give the applicant an opportunity to deal with it. I will discuss this aspect together with the substantive issue later. At this stage it may be said that any procedural defect of this kind invariably will colour the quality of the substantive decision.

90. The applicant has trenchantly criticised the RAB's misinterpretation of the nature of its functions as an appellate body. As already explained, because of the RAB's powers to gather additional evidence, the intention of the legislature was to confer upon the RAB an appellate jurisdiction in the wide sense, meaning that it is not bound to pronounce upon the merits within the four corners of the record of the RSDO. An ordinary appeal is one where the appellate body is confined to the record of the body appealed against. A wide appeal is one in which the appellate body may

make its own enquiries and even gather its own evidence if necessary - *Tikly v Johannes NO* 1963 (2) SA 588 (T) at 592 A - E. In both kinds of appeal the primary function is one of reconsideration of the merits of the decision in order to determine whether it was right or wrong, or perhaps vitiated by an irregularity to the extent that there has been a failure of justice. Where the appellate body is placed in exactly the same position as the original decision-maker it will be able to correct lesser irregularities and will enjoy a power of rehearing *de novo*:

91. In paragraph 12.3 of his answering affidavit, the second respondent stated:

> "The hearing of an appeal by the Board is in the nature of a *de novo* hearing. In other words, the decision of the RSDO is not the subject of the hearing at all. For all intents and purposes, whatever happened before the RSDO is ignored. None of the evidence and/or information placed before the RSDO is placed before the Board, unless there is agreement with appellant's legal representative that in order to save time or narrow the issues, the new information/evidence before the RSDO should also serve before the Board. The latter was not the case here."

He made like comments in his opening remarks at the commencement of both hearings.

92. I agree with Mr. *Katz*, counsel for the applicant, that the second respondent has misconstrued and misstated the function of the RAB. The scheme of the application process is clearly formulated in the Act. Where the RSDO rejects an application for asylum in terms of section 24(3)(c), the asylum seeker may lodge an appeal against that decision to the RAB in terms of section 26(1). Section 26(2) provides that the RAB, after hearing the appeal, may confirm, set aside or substitute the decision of the

RSDO. The interplay between the wording of section 24(3)(c) and section 26 makes it clear that a reconsideration of the RSDO decision is required. The RAB must determine the asylum seeker's appeal by re-considering the RSDO decision, which decision it may confirm, set aside, or substitute. Notwithstanding the fact that the Act envisages an appeal in the wide sense, the RAB is still required to have regard to the proceedings and the evidence adduced before the RSDO. Any failure to do that opens it to the charge that it ignored relevant considerations.

93. Mr. *Katz* goes further than that. He submitted that the RAB's failure to consider the correctness of the RSDO decision meant it had committed a material error of law and had acted beyond the powers conferred by the Act with the result that its decision falls to be set aside on those grounds under section 6(2)(a) and 6(2)(f)(i) of PAJA. I accept without hesitation that the second respondent has made an error of law causing him not to appreciate the true nature of the discretion or power conferred upon him. But I do not accept that as a result of his misconception he failed to exercise the discretion or power conferred upon him. Because of that, his error was not material or reviewable. The record shows that despite his statements and mistaken assumption he reviewed relevant evidence, entertained the submissions of the applicant and confirmed the RSDO's decision to reject the application. As I have said, the RAB seems not to have had the benefit of any evidence or submissions from the Department of Home Affairs. It did though elicit the evidence of Interpol, something it was entirely within its rights to do in terms of section 26(3). Accordingly, I am not of the view that the error *materially* influenced the decision as to make it reviewable, nor do I accept that the decision was as a result of the misconception one not authorised by the empowering provision. The decision to confirm the RSDO decision, though perhaps not adequately

informed by the earlier proceedings, was authorised. That said, there may be value in adding a note of caution: had the misconception not occurred the RAB might have looked at the RSDO decision more carefully and by being alerted to its deficiencies would have structured its own decision with fuller cognisance of relevant considerations that ultimately it appears to have ignored.

94. The second error of law alleged by the applicant has different consequences. It relates to the appropriate standard of proof applicable in the determination of whether an applicant has a "well-founded fear" of persecution in order to qualify for refugee status under section 3(a) of the Act. Whether or not the applicant had a well-founded fear was the primary question for determination before the RSDO. Although she mentioned "the objective background information" on Libya, she did not analyse or discuss it, and concluded that the applicant had no well-founded fear of persecution because his political life was restricted to; "a simple engagement and involvement in student political activity." It was this finding that the RAB was called upon in the first instance to reconsider. However, the tenor and line of reasoning pursued in the second respondent's written decision indicates that he was primarily concerned to determine whether the exclusion clause in section 4(1)(b) of the Act applied to disqualify the applicant from refugee status. Though it might have been better to have determined the threshold question first, there is nothing inherently wrong with such an approach. It does, however, offer an explanation for and insight into the line the second respondent followed in determining whether the applicant had a well-founded fear of persecution.

95. After setting out the background information, the applicant's account of his

life story and the law, the second respondent commenced his analysis and his reasons for his findings with the following remark:

> "The Board will confine its findings in this matter to whether the exclusion clause is applicable and the appellant's credibility in order to determine if the appellant qualifies for refugee status."

Nowhere in his decision did he explicitly pose the question whether the applicant had a well-founded fear of persecution in Libya, nor did he indicate an intention to re-consider the finding of the RSDO that the applicant had failed to discharge the onus upon him to prove a well-founded fear of persecution.

96. The closest the second respondent came to the question is in paragraph 50 when, after finding that the exclusion clause did indeed apply, he stated:

:

> "Counsel for the appellant has submitted, and this is the crux of the appellant's case, that his reason for fleeing Libya is based on political opinion. Should this be decided on in the alternative the Board, before it can determine the principal issues in this matter, must first make an assessment of the appellant's credibility."

He went on to say that the credibility of an appellant is usually the main factor in establishing whether there exists a well-founded fear of persecution. In paragraph 52 he then found:

> "The standard of proof for assessing evidence is on a balance of probabilities. In the matter *Orelien v Canada (Member of Employment and Immigration)* [1992] I.F.C. 592 (CA) at 605 it was stated: "One cannot be satisfied that the evidence is credible or trustworthy unless satisfied that it is probably so, not just possibly so."

Earlier in his judgment, after referring to the *UNCHR Handbook on Procedures and Criteria for Determining Refugee Status* and the fact that the burden of proof lies on the asylum seeker, he said:

> "The standard of proof is *real risk* and must be considered in light of all the circumstances i.e. past persecution and a forward-looking appraisal of risk."

97. The RAB's finding that the applicant was required to prove a real risk on a balance of probabilities is not correct. The appropriate standard is one of "a reasonable possibility of persecution" - see *Immigration and Naturalization Service v Cardoza-Tonseca* 480 US421 (1987) at 440. Two decisions of this division have concluded similarly, namely *Fang v Refugee Appeal Board and others* 2007(2) SA 447(T) and *Van Garderen N.O v Refugee Appeal Board* (*supra*). In the latter, Botha J stated:

> "In my view by simply referring to the normal civil standard, the RAB imposed too onerous a burden of proof. It is clear … that allowance must be made for the difficulties that an expatriate applicant may have to produce proof. It is also clear that there is a duty on the examiner himself to gather evidence."

Later in the judgment the learned judge added:

> "All this confirmed my view that the normal onus in civil proceedings is inappropriate in refugee cases. The inquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle."

98. These *dicta*, with which I respectfully agree, are premised upon the provisions of para 196 and 197 of the UNHCR Handbook which read:

> "196. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between

> the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should be given the benefit of the doubt.
>
> 197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant."

99. The application by the RAB of the normal civil standard was thus an error of law and one which caused it not to exercise its discretion properly. The materiality of the error is interwoven with the approach the RAB took to the evidence, and particularly the credibility of the applicant.

100. In paragraph 33 of his decision the second respondent mentioned that he had due regard to the objective background information on Libya as well as the documentary evidence tendered by the appellant and Mendes on behalf of Interpol. There is no discussion of "the objective background information" in the judgment, nor any reference to the specific findings in the Country Condition Reports, by way of a "forward looking appraisal of risk" of the prospects of torture, detention and unfair trials. The second respondent focused rather on four affidavits of support, to none of which he attached much weight or significance. One of the affidavits makes mention of the Libjust website and included the profile of the applicant on it. Given the damning content of the write up, the second respondent's assessment of it is puzzling. He dismissed its relevance by simply stating:

> "Presently the current Libjust.com website is a British commercial website and bears no relevancy to the appellant."

101. Having effectively discounted the evidence of the applicant's associates in

exile in Europe, the second respondent turned to examine the credibility of the applicant. His reasoning is set out in paragraphs 53-59 of his decision as follows:

"[53] The Board is not impressed with the appellant's testimony. By his own admissions he is a liar and a person who does not hesitate to commit fraud and bribery to suit his own needs and purposes. It is one thing to lie or to commit fraud in order to flee from a country where one is facing persecution but it is quite another to continue with lies, bribery and fraud when this is not required in order to protect yourself for a period of approximately fifteen years.

[54] When the appellant traveled from Saudi Arabia to Pakistan he obtained a visa from the Pakistani authorities to enter Pakistan. He could very easily have obtained an extension of this permit or visa to remain in Pakistan but instead the appellant chose to have fraudulent entries made in his passport. When his passport's validity expired the appellant had it extended by way of a fraudulent entry in his passport and when his passport could not be extended any longer he acquired a false Libyan passport.

[55] Although the Canadian Federal Court of Appeal in **Marcel Simon Chang Tak v Minister of Employment and Immigration** A-196-87, March8, 1988 recognised that failure to make a claim for refugee status does not raise an issue of credibility if it can be explained, such failure can show the implausibility of an appellant's evidence. *In casu* when asked why he did not apply for refugee status in Pakistan the appellant replied that he did not think it was necessary. Wherever the appellant went after leaving Pakistan he failed to apply for asylum despite the position he found himself in according to his evidence. The Board does not accept this as being reasonable and finds this implausible.

[56] Before leaving Pakistan the appellant obtained false Moroccan passports for himself and his family. His wife was not a wanted person and

presumably possessed a valid Algerian passport. The appellant was not asked why his wife needed a false Moroccan passport seeing that she did not travel with him to Iran and the question goes begging unfortunately.

[57] To enter Iran the appellant bribed his way in. Instead of applying for asylum the appellant was prepared to be incarcerated for six months by the Iran authorities. After being released and flying to Malaysia and Indonesia the appellant acquired a false South African passport to allegedly enable him to travel to Australia or New Zealand.

[58] It is evident from the appellant's testimony that he is not a person who is used to the truth. For a period of approximately fifteen years the appellant elected to lie, bribe and commit fraud to further his life-style when he had ample opportunity to legalise his position by applying for asylum in a number of countries before being deported to South Africa. The appellant's evidence is implausible. The Board does not accept that the appellant is telling the truth now and consequently finds that he is not a credible witness. In the light thereof the Board does not need to analyse the evidence further in order to reach its decision.

[59] The Board finds that the appellant has not discharged the burden of proof which rested on him."

102. The applicant cannot deny, nor has he attempted to, that he survived the past 20 years through lying, bribery and deception. The exclusive source of the testimony establishing his web of lies and deceit is the applicant himself. He truthfully told the RAB about the nature and extent of his dishonesty. His evidence on that score was candid, consistent and coherent. Two preliminary observations can be made here: firstly the fact that the applicant has in the past lied to the authorities in Pakistan, Iran, Malaysia, Indonesia, South Africa and Libya does not *per se* exclude him from refugee status in terms of section 4 of the Act or any other provision

or principle of law. Secondly, the fact that a witness has been untruthful on one or other aspect on another occasion does not mean that he was untruthful in relation to the enquiry at hand, or that his entire testimony should be rejected on account of any admitted untruth. The credibility and reliability of his testimony for the purpose of establishing whether he has a well-founded fear of persecution must be weighed looking at the inherent probabilities, the presence or absence of external or internal contradictions, its consistency or otherwise with the other evidence, his candour and overall performance in testifying, and so on. The objective facts must be examined to decide if a well-founded fear exists. And for that purpose it will usually not be enough to rely almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence.

103. Within the context of a review of the RAB decision, as opposed to an appeal, there are a number of difficulties, amounting to irregularities, with the RAB's assessment of the applicant's credibility and the consequences of it.

104. Firstly, when viewed against the objective facts available about the applicant's life, his associations after leaving Libya and the human rights situation currently prevailing in Libya, it seems that an over reliance on the applicant's life of deception operated to exclude consideration of other more relevant factors. Secondly, the applicant was never apprised during the hearing that his past dishonesty would be used to make an adverse finding to discount the credibility and reliability of the account he gave of his life, activities and associations that underpinned his apprehension of persecution. Thirdly, the failure to have previously sought refugee status

does not raise a credibility issue, and in fact amounts to an irrelevant consideration, if it can be explained, as it was, by the absence of any need of protection against refoulement. The need for refugee status became most compelling for the applicant on fleeing from Pakistan after 9/11. Before that he received informal protection from the tribal chiefs that exert considerable influence and control in the Peshawar area. Fourthly, the assessment of credibility was predicated exclusively on the historical account provided by the applicant. The applicant was not cross-examined on his credibility so as to expose any inconsistency, contradiction or incoherence in that historical account. The RAB accepted the applicant's version about his lies and fraud, but did not explain why it rejected other aspects such as his association with the Muslim Brotherhood, *Al Jabba Al Watania Li Inqaad Libya* and Khalid Hingari, and the damning account of his activities described on the internet.

105. In the supporting and supplementary affidavits the applicant challenged the credibility finding stating that it was inexplicable bearing in mind that he was not cross-examined, that no countervailing evidence of any kind was presented to the RAB and that his version stood un-contradicted. The only response to this in the answering affidavit is the statement that the negative credibility finding was based on the applicant's own testimony. In his replying affidavit the applicant admitted to lying in order to avoid being sent back to Libya where he faced persecution, but stated that the second respondent was not in a position to deny his version. He invited the members of the RAB to explain to the court, prior to the hearing of the application, exactly what allegations they disbelieved. The second respondent did not take up the invitation and accordingly one is compelled to accept that the applicant was in fact associated with the Muslim Brotherhood, *Al Jabba Al Watania Li Inqaad Libya* and Khalid Hingari

while in Libya and that he did what he said he did in Pakistan and while on the move thereafter.

106. Had the RAB given careful consideration to this evidence, as well as the fact that the applicant arrived in Peshawar at exactly the time the LIFG was established there, shortly after the intensification of political repression in Libya, in 1988, as evidenced by the establishment of the People's Court in that year, that the Pakistanis had shut down the Foundation of which he was the Director and that he had been on the run ever since, it might reasonably have concluded, having regard to the past patterns of persecution, and taking a forward-looking appraisal of risk, that the applicant faced a reasonable possibility of persecution. In the final analysis, the impression is inescapable, the misplaced over-reliance on its questionable and procedurally flawed credibility finding and the application of the incorrect standard of proof caused the RAB to ignore the more relevant considerations of the human rights situation, the objective evidence of the applicant's association with the Libyan Islamist opposition and the obvious risk such entailed for him if returned to Libya.

107. The finding of Adv Hassim that the applicant's deception was probably done for political reasons and could not reasonably be used to make an adverse credibility finding for the purpose of assessing whether he had a well-founded fear of persecution accords with the applicant's own explanation. The fact that he has so lied, and his reasons for doing so, ironically perhaps, are relevant considerations to be kept in account in assessing his apprehension. He lied, bribed and deceived precisely because he had an apprehension that he would be persecuted if returned. The majority of the RAB ignored this.

108. Mr. *Arendse* has pressed upon me the admonition not to blur the lines between appeal and review by indulging in a review of substantive reasonableness. The applicant, he argued, was, in effect, seeking an appeal on the merits. In review proceedings, he submitted correctly, deference towards the RAB decision, and its institutional specialist nature, is essential. Such deference is certainly salutary when reviewing the

exercise of power or functions under section 6(2)(h) of PAJA on the grounds of reasonableness, when the courts should take care not to usurp the functions of administrative agencies - *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (*supra*) at para 45. However, the grounds of review raised by the applicant in this matter do not target the substantive reasonableness or the rational relationship between the purpose, evidence and reasons for the decision. They are directed more at the dialectical aspects of the decision-making process, the issues of natural justice and the failure to consider relevant considerations. The applicant's case is that the decision-making process was flawed. The fact that an irregular process most likely produced an irrational or unreasonable decision cannot be avoided. But that is not the challenge posed by the applicant and hence there is no need to examine whether the decision cleared the minimum threshold requirement of rationality or reasonableness, and, if so, to defer to it. The decision is dialectically flawed and that is sufficient to set it aside.

The criminal charge of theft and exclusion from refugee status under section 4(1)(b) of the Act

109. The applicant has challenged the RAB's finding that he is excluded from refugee status in terms of section 4(1)(b) of the Act on two fronts: firstly that it made an error in law in finding that the alleged crime fell into the disqualifying category; and secondly it was factually mistaken in finding that there was reason to believe that the applicant had committed the crime when it was in fact trumped up in response to the application for asylum.

110. Section 4(1)(b) provides that a person does not qualify for refugee status

for the purposes of the Act if *there is reason to believe* that he or she has committed a crime which is not of a political nature and which if committed in South Africa would be punishable by imprisonment. The crime allegedly committed by the applicant in 1985 was designated in the supporting documentation, particularly the *Note Verbale*, to be the crime of "theft". The RSDO without much elaboration stated in her reasons:

> "The Applicant's claim is unfounded as it relates to a criminal activity as opposed to a political activity."

The RAB provided a clearer and fuller consideration of the question and its conclusions on the matter form the principal reason for its decision to reject the applicant's claim. For understandable reasons it relied largely, if not exclusively, on the evidence of Mendes. It held that the request made by Libya to Interpol to apprehend the appellant for the crime of "theft of gold" was "irrefutable evidence" and that:

> "Accordingly the Board has no other option but to find that there is reason to believe that the appellant committed a non-political crime of such a serious nature that if it had been committed in the Republic it would be punishable by imprisonment. Section 4(1)(b) of the Act is thus applicable and the Board finds that the appellant does not qualify for refugee status."

111. There is ample precedent on the approach a court or tribunal should follow when deciding whether "there is reason to believe" that an objective state of affairs exists. The phrase places a much lighter burden of proof on a party than, for instance, "a court is satisfied" - *Trust Bank van Afrika Bpk v Lief and Another* 1963 (4) SA 752 (T). The reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man

ought or could not give credence to, does not suffice - *Native Commissioner and Union Government v Nthako* 1931 TPD 234 at 242. There must be facts before the court or tribunal on which it can conclude that the applicant for asylum committed a non-political crime punishable by imprisonment in South Africa. One must ask therefore whether the facts put up by Mendes, and regarded as irrefutable evidence by the RAB, were sufficient to constitute a reasonable belief that the crime had been committed? Put in another way, for there to be a reason to believe a crime was committed there must be a belief based upon reason and an objective factual basis for the reason. It will not be enough that the second respondent thought he had reason to believe - *Hurley and Another v Minister of Law and Order* 1985 (4) 709 (D&CLD) at 717A. The phrase thus imposes a jurisdictional pre-condition that there must exist a reasonable basis for the factual conclusion that the applicant committed a crime before the discretion to exclude can be exercised. Absent a reasonable basis, the exercise of power must be set aside.

112. The first point taken by the applicant is that the alleged crime does not fall into the category of *serious* crimes contemplated by section 4(1)(b). The provisions of section 4(1)(b) do not explicitly introduce a requirement of *seriousness* beyond the condition that the crime must warrant a sentence of imprisonment. Though counsel did not make the argument, the point could be taken that the specific inclusion of the pre-requisite of a sanction of imprisonment excluded *ex contrariis* any other requirement or dimension of seriousness, such as the nature of the crime or an element of violence - *inclusio unius est alterius exclusio*. Counsel for the applicant, however, has urged for a more contextual approach by having regard to the provisions and intention of the treaty, that is, the UN Convention Relating to the Status of Refugees. The approach is expressly mandated

by section 6(1) of the Act providing that the Act must be interpreted and applied with due regard to the Convention and section 39(1)(b) of the Constitution obliging courts when interpreting the Bill of Rights to consider international law. Article 1F of the Convention deals with exclusion on the grounds of criminality. The relevant provisions read:

> "The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering* that:
>
> (a) ….. ;
>
> (b) he has committed a *serious* non-political crime outside the country of refuge prior to his admission to that country as a refugee;"

113. In passing, it is noteworthy that the condition precedent of "serious grounds for considering" sets the bar somewhat higher than the standard of "reason to believe" in the Act. The evidence supporting the belief should be compelling, and hence courts and tribunals in South Africa should consider giving meaning to the latter with reference to and reliance upon the former.

114. Returning to the issue at hand, the expressed intention in the *ipssima verba* is that only serious crimes justify exclusion or disqualification. In Hathaway: *The Rights of Refugees Under International Law* (2005) at 349 the learned author, an acknowledged expert in the field, in relation to article 1F(b), comments as follows:

> "Serious criminality in this context is normally understood to mean acts that involve violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery."

115. The theft of gold would not fall into the category justifying exclusion; but theft in which violence or the threat of violence is used to induce the possessor of the gold to submit to its taking and where that is achieved through the aggravating circumstance of a firearm (armed robbery) would. Documents accompanying the warrant and the *Note Verbale* introduced by Mendes during his testimony, forming part of the Rule 53 record, reveal that Libyan law draws a distinction between theft and aggravated theft. The latter is committed, *inter alia*, by using violence against things and contemplates the use of weapons. The *Note Verbale* does not refer to aggravated theft, only theft.

116. It follows accordingly that both the RSDO and RAB applied the incorrect test of "seriousness" to exclude the applicant from refugee status, meaning that the rejection of the applicant's application for refugee status was materially influenced by an error of law resulting in the power of exclusion being improperly exercised, for, among other reasons, there was no reason to believe that a serious crime had been committed. Since the Libyan government has not alleged the commission of violence, and Mendes did not testify to the use of any violence, there is no reason to believe that a serious crime was committed. The decisions of both the RSDO and the RAB consequently fall to be set aside under section 6(2)(a) of PAJA as well.

117. Mr. *Katz* also advanced the argument that because the alleged theft was committed during May 1985 it may not be prosecuted in South Africa because of the 20 year prescription period laid down in section 18 of the Criminal Procedure Act of 1977. It followed, in his view, that the offence was not punishable in South African law and that the relevant pre-condition in section 4(1)(b) was thus absent. Section 18 of the Criminal

Procedure Act provides that "the right to institute a prosecution for any offence" (other than specified serious offences) lapses after the expiration of a period of 20 years from the time when the offence was committed. In view of the decision to which I have come, it is unnecessary to pronounce definitively on whether the right to prosecute had lapsed under our law. The evidence on the steps taken by the Libyan authorities is in any event not full or clear. For what it is worth, I tend to agree with Mr. *Arendse*, given the date of the *Note Verbale* issued in 2003, that the Libyans must have taken at least some steps at that time to constitute prosecution. A decision on the part of the prosecuting authorities, conveyed to the accused in a formal manner that he is to be prosecuted, would to my mind amount to the institution of a prosecution - *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 51E-G. That means the prosecution by the Libyan authorities was most likely instituted within the 20 year period.

118. Finally, I think there is much to support the applicant's contention that the charge against him was trumped-up by the Libyan authorities so that the applicant would be refused asylum and returned to Libya. The majority decision of the RAB failed entirely to deal with the evidence and allegations in that regard. Under cross-examination Mendes conceded that he was not in a position to critically analyse the documentation received from Libya and that he was not in a position to gainsay the applicant's evidence about his fear of persecution. Nor could he explain why the South African authorities had not consented to Libya's request for the applicant's extradition.

119. The RAB's almost exclusive reliance on the evidence of Mendes as irrefutable amounted to it failing to give consideration to two pertinent facts that raise a doubt about whether the crime was committed, and coincidentally add to the reasonable possibility that the applicant risks persecution. The first is that if Libya was indeed serious about the allegations concerning the gold theft it would have issued a red notice to Interpol. The second is that there is no reference on the Libjust website to

the fact that the applicant was sought for that particular crime. Much of the information in the write-up on the applicant is accurate. If the applicant was a genuine theft suspect, one would have expected to see a reference to that effect.

120. Moreover, the pronouncements on the general human rights situation by the SIAC, Amnesty International and Human Rights Watch add credence to the trumping up of charges by the Libyan authorities as a distinct possibility. The SIAC drew attention to the spurious case against the Bulgarian nurses (that lasted for 8 years and which has attracted international condemnation), known as "the Benghazi trial". These accused were charged with deliberately infecting children with the HIV virus. During the trial Luc Mentagnier, the co-discoverer of the HIV virus, testified that the children were probably infected as a result of poor hygiene and many had been infected before the arrival of the foreign medics. Despite that, the accused were convicted and sentenced to death on charges quite evidently trumped up. Even though he was in possession of all this information the second respondent did not discuss it or appear to take it into consideration in any meaningful way. In the result, his belief that the crime was committed was not based on reason or an objective factual basis. There is no reasonable basis for his factual conclusion.

121. In his dissenting decision Adv Hassim went to considerable length to explain why he believed the charge against the applicant was trumped up and why his colleagues had erred in their finding that the crime had been committed. Paragraphs 49-51 of his decision are illuminating. They read:

"[49] The bundle of documents submitted by the Libyan authorities

includes a detailed investigation diary relating to case 134/1985 opened in 1985. It also includes a diary of investigation opened by the Libya authorities on the **17th December 2003** outlining how a certain Mr. Abdelbari Abdallah Husien Al Failung returned from exile and gave details relating to the his contact with the appellant while together in overseas. Mr. Abdelbari clearly states that the Appellant mentioned that he [the appellant] was involved in the gold theft in 1985. This investigation continued until the 20th December 2003. Thereafter the matter was referred to the office of the Attorney General on the 29th December 2003. A warrant of arrest dated 28 December 2003 was issued for the immediate arrest of the appellant. What is interesting to note that it was only after this investigation which commenced on the **17th December 2003** did the Libyans authorities allege that they came to know that the appellant was the person involved in the criminal offence of gold theft that allegedly took place in 1985. Strangely a letter from the Libyan Embassy in Pretoria, South Africa **DATED 11 December 2003** [a copy of the letter was submitted to the Board by Interpol, Wits Law clinic as well as the Department of Home Affairs] clearly states that the appellant is a Libyan national and is wanted in Libya for a criminal charge of robbery to finance terrorist activities.

[50] Therefore, to summarise, the Libyan government according to its own evidence in the warrant of extradition documents clearly states that the first occasion it had any knowledge whatsoever of the Appellant Mr. Tantoush having committed the crime of gold theft was on the **17th December 2003** when Mr. Abdelbari was questioned yet strangely its offices in Pretoria issued a letter on the **11th December 2003** stating he is wanted for the offence of gold theft to fund terrorist activities. It is a manifest contradiction in their testimony. It is critical to peruse the aforementioned documents submitted in this matter by the Libyan authorities in order to deduce that the charges against the appellant were

indeed fabricated.

[51] This evidence clearly shows that there was an apparent engineering of documents in a desperate attempt to have the appellant extradited to Libya on the basis of a trumped up charge."

122. The logic and rationality of this reasoning is persuasive. What is surprising is that the majority decision made no effort to give a different gloss to the contradictory evidence referred to or the inference drawn, leading me to deduce that the majority for reasons unknown preferred to ignore it.

123. In a note filed subsequent to the hearing Mr. *Arendse* made two points about this issue. Firstly he pointed out that counsel had not cross-examined Mendes on the documentation and secondly the diary referred to had in fact been opened on 16 May 1985. I am not sure that the second point disposes of the finding that the Libyans stated they first knew that the appellant committed the crime on 17 December 2003 but that the Pretoria embassy had earlier issued a letter on 11 December 2003 saying that he was wanted. As for the first point, Mendes admitted knowing nothing about the merits and Adv Hassim in any event reached his conclusion on his own analysis of the documentary evidence. The only relevant facet of all of this, in the context of the present review, is that the failure by the majority to deal with the contradictory evidence raises a further question as to the reasonableness of its belief that a crime had been committed.

124. For all the foregoing reasons the decisions of the RAB and the RSDO on the operation of the exclusion clause must be set aside.

Substitution

125. In addition to setting aside the decisions, the applicant seeks to have this court substitute them and grant the applicant refugee status. As mentioned at the beginning, section 8(1)(c)(ii)(aa) of PAJA empowers a court in exceptional circumstances to substitute its own decision for that of the administrative body instead of remitting it for reconsideration.

126. In deciding whether to substitute a court normally considers whether further delay will cause an applicant unjustifiable prejudice, whether the original decision-maker has exhibited bias and incompetence, and whether remitting the matter will result in a foregone conclusion. Furthermore, the court should practically be in a position to take the decision. Considerations of fairness may in a given case also require the court to make the decision itself provided it is able to do so - *Commissioner, Competition Commission v General Council of the Bar of South Africa and others* 2002 (6) SA 606 (SCA) at paras 14-15; *Gauteng Gambling Board v Silver Star Development Ltd and Others* 2005 (4) SA 67 (SCA) at para 28; and *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72(T) at 75H-77C.

127. Exceptional circumstances justifying substitution exist in this instance. Both the decision-makers *a quo* exhibited bias and the uncertainty surrounding the appellant's fate should not be allowed to continue indefinitely. In *Ruyobiza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C) at 65C-H the prejudice caused by delay was considered to be an exceptional circumstance sufficient to justify substitution.

128. Most importantly, from the evidence before me I am able to determine whether the applicant has a well-founded fear of persecution, and in view of what has gone before fairness dictates that I do so.

129. The un-contradicted evidence is that the applicant was influenced in Libya by the teachings of the Muslim Brotherhood, aligned with *Al Jabba Al Watania Li Inqaad Libya* and participated in the dissemination of anti-Qadhafi propaganda. He left Libya in 1988. Libya witnessed an intensification of political repression in 1988 with the introduction of the People's Court by the security apparatus. Although the court was abolished in 2005, there is evidence that quite recently 85 members of the Muslim Brotherhood are on trial before an ad hoc revolutionary court (see para 148 of the SIAC judgment).

130. While the applicant disavows any connection to the LIFG, frankly I doubt he has furnished the complete picture. He arrived in Pakistan at the very place the LIFG was established at the very time it was established. He worked for an organisation that the Pakistani government closed down immediately after 9/11. He was forced to flee Pakistan in the face of a crackdown by Pakistani authorities aimed primarily at Al Qa'eda elements and their associates, which according to Amnesty International was extended indiscriminately to persons of Arab origin on the north-western frontier. Before arriving in Pakistan and after leaving it, the applicant was financially assisted by Libyan and Egyptian exiles. There may be truth in his statement that he benefited from Muslim charity (*zakat*); more likely he was assisted by compatriots who shared his political and religious convictions. In 1989 he was helped with his move from Saudi Arabia to Pakistan and given a job in an Islamist foundation. After fleeing with

others to Iran in 2001, Libyans negotiated his release and facilitated his move to Malaysia and Indonesia, where Islamist opposition has given rise to security concerns, such perhaps being a factor in his arrest there. From these facts a legitimate and plausible inference might be drawn that if not actually a member or associate of the LIFG or it affiliates, the applicant is perceived to be so aligned, and as the page from the Libjust website and the trumped up charges reveal, that perception persists in Libya.

131. However, in fairness, it must be kept in mind that the applicant's denial of membership of the LIFG or that he has engaged in terrorist activities stands un-contradicted. Mendes confirmed that he was not aware of any allegations of terrorism against the applicant. During his initial interrogation in South Africa, both US and British intelligence officers were in attendance. Had there been any evidence of terrorist activity, no doubt the Department would have put that information before the RAB in order to exclude the applicant from refugee status under section 4(1)(a) or (c) because there was reason to believe he had committed a crime against peace or was guilty of acts contrary to the objects and principles of the UNO or the OAU. The fact that there may be reasonable grounds to suspect that he might have associated with elements of the LIFG is not sufficient to show that he is an Al Qa'eda supporter or a threat to national security here or elsewhere. The observations of Mr. Justice Ouseley in *DD and AS v The Secretary of State for the Home Department* at para 33 on this point are worth repeating. He said:

> "We accept that it is not possible to conclude from the evidence that the mere fact of LIFG membership shows that an individual is necessarily a global jihadist or Al Qa'eda supporter. The real focus of the analysis of that aspect of the national security risk is not therefore simply on whether the individual is an LIFG member, but is on what an individual LIFG member has done and may do in the future, taking

account of what is known of his outlook and with whom he associates."

132. In the face of the applicant's uncontested denial of membership or association, there is therefore at most in the light of his history a reasonable suspicion that he might have been associated, and as such not even a *prima facie* case. In support of that suspicion is the strong possibility that facing an uncertain future and the prospect of returning to Libya he thought best to put some distance between himself and the LIFG by admitting only to a less dangerous involvement. Whatever the case, one fact is certain: his recent travails through Iran, Malaysia and Indonesia on fleeing Pakistan suggest he has not escaped the taint or stigma arising from a perceived association with the LIFG and Al Qa'eda. One imagines he knows that all too well and that is why he is afraid to be sent back to Libya. He has a well-founded fear of being persecuted for his political and religious affiliations.

133. The fact that the applicant is a member of a loose grouping of political and religious dissidents whose members are regularly detained, tortured and unfairly prosecuted in Libya and that he faces trumped up charges renders it axiomatic that on his return to Libya he will be detained in an institution like Abu Salim, where there is a real risk, more than a reasonable possibility, that he will be subjected to cruel and inhumane treatment.

134. Section 6(1)(d) of the Act requires the Act to be interpreted and applied with due regard to any other relevant conventions or international agreements to which the Republic is or becomes a party. By "due regard" is meant the giving of serious consideration. Article 3 of the Convention Against Torture, to which South Africa became a party on 10 December 1998, provides:

"1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in

danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

135. The non-refoulement obligation under both the Torture Convention and section 2 of the Act are central to the question of substitution, if only on account of the RAB not having given due regard to it. Objectively there is a consistent pattern of gross, flagrant and perhaps mass violation of human rights in Libya; and subjectively the evidence establishes conclusively that the applicant has engaged in activity within and outside of Libya over the past 20 years, including his application for asylum, which makes him vulnerable to the risk of being placed in danger of torture were he to be returned to Libya. The primacy of the non-refoulement obligation was underscored by the ultimate conclusion of the SIAC in *DD and AS v The Secretary of State for the Home Department*. It held that DD was not entitled to refugee status under the Refugee Convention because of his terrorist activities, but despite the risk he posed to UK national security he could not be returned because of the non-refoulement obligation. It closed at paragraph 430 of the judgment with the following salutary declaration:

"We have given this decision anxious consideration in view of the risks which the Appellants could face were they returned (to Libya), and those which the UK, and individuals who can legitimately look to it for protection of their human rights, would face if they were not. We must judge the matter ….. by considering only the risks which the Appellants could face on return, no matter how grave and violent the risks which, having chosen to come here, they pose to the UK, its interests abroad, and its wider interest. Those interests at risk include fundamental human rights."

136. There is no evidence that the applicant poses any grave or violent risk to South Africa, but like the SIAC, the courts and relevant authorities here are equally if not more constrained by the wider interest of our treaty and constitutional obligations to avoid refoulement in the face of the risk of torture.

137. For all those reasons, the applicant should be granted refugee status and there is no basis for excluding him under section 4 of the Act on account of there being no reason to believe he is guilty of any of the proscribed conduct.

138. Before finalising this matter, I would like to express my appreciation to counsel, Mr. *Katz* and Mr. *du Plessis* for the applicant, and Mr. *Arendse* SC with Mr. *Matjila* for the respondents, who produced most comprehensive and well-documented argument supported cogently with the relevant authorities. Their combined efforts have been of great service to the court.

139. In the result, the following order is made:

1. The decision of the Refugee Appeal Board taken on or about 12 December 2005, rejecting the Applicant's appeal in terms on section 26 of the Refugees Act 130 of 1998 against the decision of the Refugee Status Determination Officer in a letter made known to the Applicant on 15 March 2006, in which his application for refugee status and asylum was denied, is declared to be inconsistent with the Constitution of 1996, unlawful and invalid; and is hereby reviewed and set aside.

2. The decision of the Refugee Status Determination Officer taken in

March 2005, rejecting the Applicant's application for refugee status and asylum, is declared to be inconsistent with the Constitution of 1996, unlawful and invalid; and is hereby reviewed and set aside.

3. The Applicant is declared a refugee who is entitled to asylum in South Africa as contemplated by section 2 and 3 of the Refugees Act.

4. The Respondents shall bear the costs of this application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard:14 August 2007

For the Applicant: Adv A Katz, Cape Town and Adv M du Plessis, Durban
Instructed By: Wits Law Clinic c/o Lawyers for Human Rights

For the Respondent: Adv N Arendse SC, Cape Town and Adv O Matjila, Pretoria

Instructed By: State Attorney, Pretoria