THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 585/2020

In the matter between:

SOMALI ASSOCIATION OF SOUTH AFRICA	**FIRST APPELLANT**
HASSAN ABDINASIR OSMAN	**SECOND APPELLANT**
ALI JAMAC KHAYRE	**THIRD APPELLANT**
ABDULKADIR MOHAMED OMAR	**FOURTH APPELLANT**
ABDIRAHMAN ALI MAHAMED	**FIFTH APPELLANT**
MOHOMED AHMED	**SIXTH APPELLANT**
MOHAMED MAHMUD OSMAN	**SEVENTH APPELLANT**
MARYAMA MUHUMED KAHIN	**EIGHTH APPELLANT**
ABDULLAHI BASHIR HASSAN	**NINTH APPELLANT**

and

THE REFUGEE APPEAL BOARD	**FIRST RESPONDENT**
THE MINISTER FOR HOME AFFAIRS	**SECOND RESPONDENT**
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**THIRD RESPONDENT**
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	**FOURTH RESPONDENT**

THE TSHWANE INTERIM REFUGEE RECEPTION OFFICE **FIFTH RESPONDENT**

THE PRETORIA REFUGEE RECEPTION OFFICE **SIXTH RESPONDENT**

THE STANDING COMMITTEE FOR REFUGEE AFFAIRS **SEVENTH RESPONDENT**

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

Coram: NAVSA ADP, VAN DER MERWE, MOLEMELA, MBATHA AND HUGHES JJA

Heard: 19 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be handed down on 23 September 2021.

Summary: Applications for refugee status – duty on decision-maker to assist asylum seeker to obtain as full a picture as possible on which to predicate a decision – information and evidence to be gathered or acquired in terms of the provisions of the Refugees Act 130 of 1998, the regulations and in accordance with the UNHCR Handbook – regard to be had to the provisions of both s 3*(a)* and 3*(b)* of the Act – persecution too narrowly viewed – onus to show that statutory requirements met on applicant but has to be viewed with regard to a range of factors – applicant must be afforded an opportunity to confront and deal with adverse factors that might weigh against him or her – Refugee Appeal Board (RAB) and high court failed to consider that appeal was one in the wide sense – RAB failed to observe fundamental administrative law principles – decisions set aside – no basis for substitution order – structural interdict not warranted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mlambo JP sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and substituted as follows:

'1.1 The applicants' delay in bringing the review of the decisions by the Refugee Appeal Board outside the 180 day time limit prescribed in the Promotion of Administrative Justice Act 3 of 2000 is condoned.

1.2 The following decisions of the Refugee Appeal Board ("RAB") are reviewed and set aside:

(a) Appeal number 2923/14 of 14 October 2014, dismissing the appeal of Mr Hassan Abdinasir Osman.

(b) Appeal number 3459/14 of 1 December 2014, dismissing the appeal of Mr Ali Jamac Khayre.

(c) Appeal number 1212/14 of 21 November 2014, dismissing the appeal of Mr Abdulkadir Mohamed Omar.

(d) Appeal number 3848/14 of 2 March 2015, dismissing the appeal of Mr Abdirahman Ali Mahamed.

(e) Appeal number 2683/14 of 28 November 2014, dismissing the appeal of Mr Mohomed Ahmed.

(f) Appeal number 3455/14 of 14 October 2014, dismissing the appeal of Mr Mohamed Mahmud Osman.

(g) Appeal number 538/13 of 26 March 2014, dismissing the appeal of Mrs Maryama Muhumed Kahin.

(h) Appeal number 1790/13 of 22 May 2015, dismissing the appeal of Mr Abdullahi Bashir Hassan.

1.3 The 2nd to 9th applicants' appeals are remitted to the Refugee Appeals Authority for hearings afresh, with hearings to commence not later than Monday 4 October 2021 and decisions to be rendered no later than Friday 5 November 2021.

1.4 The respondents are ordered to pay the appellants' costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.'

3 The hearings and the adjudication of the appeals referred to in the substituted order are to be conducted in terms of the principles set out in paras 71 to 92 of this judgment under the various subheadings.

JUDGMENT

Navsa ADP (Van Der Merwe, Molemela, Mbatha and Hughes JJA concurring)

Introduction

[1] This case is about how applications for refugee status must be dealt with and adjudicated. Before dealing with how the appeal arose, it is necessary, at the outset, to accept that there is a legitimate State interest and concern to ensure that refugee status is granted only to those who qualify, to disqualify unfounded applications and to provide for the cessation of refugee status. In the case of persons who have come to our country to seek asylum and those who might ultimately qualify for refugee status, the following two quotes are apposite:

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

The renowned author, Khaled Hosseini, is reported to have said the following:

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

---

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

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

International television news channels and other media regularly feature images of refugee crises unfolding in many parts of the world with the attendant human cost. A relatively recent stark image of the body of a three year-old toddler on a Turkish beach, after fleeing from war in Syria, springs to mind.[3] The skepticism, to which State authorities and decision-makers are sometimes prone in relation to applications for refugee status, should be tempered by what is set out above and by the obligations of countries embodied in international instruments, which will be discussed in due course, and, of course by, the prescripts of domestic legislation. I deal with the background culminating in the present appeal in the paragraphs that follow.

[2] This is an appeal, with the leave of this Court, against a decision of the Gauteng Division of the High Court, Pretoria (the high court), per Mlambo JP, dismissing an application by the first to ninth appellants, for an order reviewing and setting aside decisions of the Refugee Appeal Board[4] (the RAB). That body had dismissed appeals by the second to ninth appellants against decisions of Refugee Status Determination Officers,[5] refusing them refugee status. Their applications for refugee status are at the centre of this appeal. More particularly, the legality and fairness of the process adopted by the RAB in arriving at the impugned decisions are brought into question, including whether it complied with its duty to assist an asylum seeker to procure evidence and information on which the decisions were to be predicated. The alleged misapplication by the RAB of the statutory requirements for refugee status is a further important issue in this appeal.

[3] The first appellant is the Somali Association of South Africa, a registered non-profit organisation, which has amongst its objects, the organisation of the Somali refugee community and generally defending the rights and advancing the welfare of the Somali community in South Africa. A person seeking recognition as a refugee in South Africa is,

---

[3] Alan Kurdi, the three year old-toddler who drowned in the Mediterranean in 2015, was part of a flow of refugees from the Middle East to Europe. The disturbing image which struck the conscience of the world was carried in major mainstream media outlets, including The New York Times, The Guardian UK and BBC news. See http://www.nytimes.com, https://www. theguardian.com, https://bbbc.co.uk.

[4] Established by s 12 of the Refugees Act 130 of 1998.

[5] They are appointed and operate in terms of s 8 and 24 of the Refugees Act 130 of 1998.

in terms of the Refugees Act 130 of 1998 (the Act), an 'asylum seeker'.[6] The second to ninth appellants are the eight asylum seekers who were refused refugee status. I shall, for convenience, where the context requires, refer to the second to ninth appellants collectively, as the eight asylum seekers or, where they are referred to separately, I shall refer to them as an asylum seeker in the sequence in which they appear as appellants. For example, the second appellant would be the first asylum seeker, the third appellant, would be the second asylum seeker and so on. It is in that order that the high court referred to them.

[4] The respondents are as they were in the high court. The RAB is the first respondent. The Chairperson of the RAB was cited in his official capacity as the second respondent. The third respondent is the Minister of Home Affairs (the Minister), the responsible Minister in terms of the Act. The Director-General of the Department of Home Affairs (the DG) was cited as the fourth respondent. The Tshwane Interim Refugee Reception Office was cited as the fifth respondent in the high court. The Pretoria Refugee Reception Office and the Standing Committee for Refugee Affairs were cited as the sixth and seventh respondents, respectively. Only the RAB, its chairperson, the Minister and the DG filed opposing affidavits in the high court. They made common cause and were represented by the same counsel, both in the high court and before us.

[5] Over and above seeking a review and the setting aside of each of the eight decisions by the RAB, referred to in paragraph 1 above, the appellants had, in the high court, sought, in addition, the following extensive substantive relief, which included substitution orders and a structural interdict:

'2 Each of the decisions of the RAB in paragraph 1 above are substituted with the following decision:

2.1 The appellant's appeal against the decision of the Refugee Status Determination Officer is upheld

[6] Section 1 of the Act defines an 'asylum seeker' as 'a person who is seeking recognition as a refugee in the Republic'. This definition is in line with an international understanding of the concept.

2.2 In terms of section 24(3)(a) of the Refugees Act 130 of 1998, the appellant is granted asylum.

3 The 5th and 6th respondents are directed to issue the second to ninth applicants with formal written recognition of refugee status as provided in section 27(a) of the Refugees Act read with the provisions of regulation 15 of the Refugee Regulations (Forms and Procedure), 2000 published in GN R366 in GG 21075, of 6 April 2000, as amended by GN R938 in GG 21573 of 15 September 2000, within 10 days of service of this order.

. . .

5 It is declared that the approach of the RAB to the decisions referred to in paragraph 1 above was unlawful and invalid in, *inter alia*, the following respects ("the repeated errors"):

5.1 The RAB treats political persecution as a necessary condition for refugee status in terms of section 3 of the Refugees Act 130 of 1998 ("Refugees Act"), and accordingly:

5.1.1 fails to consider and apply section 3(b) of the Refugees Act in appropriate cases; and

5.2.2 fails to recognise that other forms of persecution qualify applicants for refugee status in terms of section 3(a) of the Refugees Act.

5.2 The RAB fails to comply with the "shared burden of proof", as set out in paragraph 196 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status.

5.3 The RAB refuses to consider the merits of an application for asylum unless it is convinced as a matter of certainty that the applicant for asylum is credible in all respects.

5.4 The RAB assesses the credibility of asylum seekers by having regard primarily to alleged inconsistencies in their evidence, and makes adverse credibility findings wherever it finds previous inconsistent statements in that evidence.

5.5 The RAB fails to put prejudicial country of origin information to applicants for asylum and fails to afford them a reasonable opportunity of responding to such information.

5.6 The RAB requires applicants for asylum to supply their own interpreters at their own expense, irrespective of whether it is practicable and necessary for the Department of Home Affairs to provide interpretation services.

6 The second and third respondents are directed:

6.1 Within **6 months** of the date of this order, to investigate and identify the causes of the repeated errors in the RAB's decision-making.

6.2 Within **12 months** of the date of this order, to develop a plan or plans – in consultation with the first applicant, the applicants' attorneys and other interested parties – to address the causes of these repeated errors in the RAB's decision-making.

6.3 Within **one week of the expiry of the deadline in paragraph 6.2** above, to file an affidavit with this Court and the applicant's attorneys setting out:

6.3.1 the findings of the investigation conducted in accordance with paragraph 6.1 above; and

6.3.2 the plan or plans developed in accordance with paragraph 6.2 above.

7 The second and third respondents are directed to file reports, on affidavit, with this Court and the applicant's attorneys, **at least every 2 months** from the date of this order, setting out the steps taken to comply with paragraph 6 of this order.'

[6] It is necessary to record that the Act was amended quite substantially, approximately one year after the high court's judgment was delivered, with the amendments coming into effect during January 2020. New regulations were concomitantly promulgated. The material changes are those provisions that:

(a) replaced the RAB with the Refugee Appeals Authority (the RAA), the chairperson and some members of which are now required to have a legal qualification;

(b) deal with the ability of one member of the RAA being able to hear and determine an appeal;

(c) allow for the appointment of more persons to the RAA to deal with increased volumes of work,

(d) extend the bases for exclusion from refugee status;

(e) set out that a Refugee Status Determination Officer (RSDO) in adjudicating applications for refugee status must do so having regard to the provisions of the Promotion of Administrative Justice Act 3 of 2000 (previously there was reference to the just administrative provisions of the Constitution) and must, in particular, ensure that an applicant fully understands the procedures, his or her rights and responsibilities, and the evidence presented.

[7] The attendant regulations also provide greater clarity on how the RSDO must conduct hearings in relation to applications for refugee status and how further information, evidence and clarification might be sought and obtained. They also provide that an interview must be recorded. The definition section, under 'hearing before Refugee Status Determination Officer', envisages interviews being recorded, 'either digitally or otherwise'. This ought to lead to greater transparency and accountability. Digital recordings, to a large extent, ought to exclude disputes concerning the nature and tenor of the interviews. But more about the amendments later. The eight asylum seekers were at the relevant times dealt with in terms of the Act and the regulations as they then stood.

[8] The Act, in its pre-amended and post amendment forms, deals with what was referred to earlier, namely the State's interests to ensure that refugee status is granted to only those who qualify. It provides for the disqualification of unfounded applications and the cessation of refugee status.[7] The Act prescribes how applications for refugee status must be dealt with and provides for appeals. In dealing with such applications, it must be emphasised, once again, that State authorities are required to ensure that constitutional values, including those that embrace international human rights standards set by international conventions and instruments in relation to those seeking asylum, adopted by South Africa,[8] are maintained and promoted. Section 2 of the Act, in recognition of the aforesaid values, entrenches the international principle of *non-refoulement,*[9] an aspect noted by the high court and discussed later in this judgment.

---

[7] See ss 3, 4 and of the Act and s 5 in its pre, and post amendment state.

[8] See *Somali Association v Limpopo Department of Economic Development, Environment and Tourism and Others* 2015 (1) SA 151 (SCA) at para 44 and *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at paras 2-7, and the provisions of s 6 of the Refugees Act 130 of 1998 in relation to the applicable international instruments- now s 8A. See also *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at paras 23-34 and in relation to how asylum seekers should be treated at paras 27 to 29.

[9] Section 2 reads as follows:

'Notwithstanding any provision of this Act or of 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

[9] It is now necessary to set out what the appellants contended are the facts against which their appeals before the RAB should have been adjudicated. It is important, for reasons that will become apparent later, to stress that much of what appears immediately hereafter, concerning the circumstances under which the eight asylum seekers left their country of origin, is drawn from the founding affidavit in support of the application in the high court, rather than from the information supplied by the eight asylum seekers in their applications for asylum or from the information they supplied to the RAB.

The founding affidavits

Conditions in Somalia and the flight by the eight asylum seekers from their country of origin

[10] The eight asylum seekers described how they were compelled to flee the civil war and resultant humanitarian crisis that endured in Somalia between 2007 and 2012. They explained that Somalia has been in a state of civil war since 1990 and that it has not had a stable government since the fall of the Barre regime in 1991. They stated that estimates of the deaths caused by the conflict vary between 500 000 and 1 million and pointed to a report by the United Nations High Commission for Refugees (UNHCR), indicating that there are over 975 000 registered Somali refugees living in countries comprising the horn of Africa. The appellants ventured that the global figure must, therefore, be much higher.

[11] According to the appellants, the period between 2006 and 2012 was the most significant, as that was the time when they had fled the conflict in Somalia. They stressed that this was when the conflict was at its most intense with Al-Shabaab, a militant group that threatened the government, at the height of its power and influence, and that troops from African countries had been deployed to Somalia to counter that threat. There was extensive fighting involving warlords and clan-based militias. The conflict in Somalia had been concentrated in Central and Southern Somalia. The appellants detailed the various

---

(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 whole of the country.'

See also *Gavric v Refugee Status Determination Officer* [2018] ZACC 38; 2019 (1) BCLR 1 (CC); 2019 (1) SA 21 (CC) para 26.

phases of the conflict and the role therein of Al-Shabaab, which according to them is the foremost militant group, with links to Al-Qaeda. In support of their own assertions the eight asylum seekers relied, additionally, on reports by the UNHCR.

[12] The Transitional Federal Government (the TFG) supported by Ethiopian troops retook the capital, Mogadishu, in the south of the country, in December 2006. In 2007, Al- Shabaab and its allies launched waves of attacks on the TFG and Ethiopian forces in Mogadishu. By March 2007, the African Union forces landed in Mogadishu in support of the TFG. Between 2007 and 2009 Al-Shabaab had gained control of most of Mogadishu and seized towns and villages in South and Central Somalia. By January 2009, Ethiopian forces withdrew from Somalia, and Al-Shabaab continued to extend its geographical control.

[13] Between 2011 and 2012, the conflict between African Union forces, in support of the TFG, and Al-Shabaab continued. By August 2011, Al-Shabaab had withdrawn from Mogadishu and had resorted to guerilla tactics in that city. In October 2011, Kenyan forces, at the invitation of the TFG, entered the fray. January 2012 saw Ethiopian forces capture towns in Central Somalia. In September 2012, the Somalia Federal Government (the SFG) was inaugurated.

[14] Between 2013 and 2015, the SFG and African Union forces waged campaigns against Al-Shabaab and other insurgent groups, recapturing towns, and villages. Effectively, so the appellants alleged, Al-Shabaab still retains control of much of South and Central Somalia.

[15] The United Nations sanctioned a further African Union troop surge in Somalia between July 2015 and May 2016. The appellants contended, with reference to a Danish Immigration Services report, dated May 2015, that Mogadishu is presently only nominally under government control and is struggling to provide basic security to its population. The appellants pointed out that notwithstanding that assessment, Kenya and some European countries started deporting refugees back to Somalia from 2013 already. They noted that the UNHCR and prominent human rights groups have condemned the forced return of

refugees to Somalia. So, for example, Amnesty International, in a statement during October 2014, condemned such actions. The relevant part of the report quoted by the appellants reads as follows:

'Countries should under no circumstances attempt to return individuals to south and central Somalia as the fragile security conditions have not led to a fundamental, durable and stable change.'

The UNHCR guidelines published in 2014 were in similar vein.

[16] The appellants asserted, emphatically, that South and Central Somalia remained in a state of civil war and that the need to protect Somalian refugees remains. Moving from the generalised statements concerning conditions in Somalia, the appellants proceeded to deal with the individual circumstances of the eight asylum seekers. Seven of them hail from Mogadishu. The first alleged that he had lost his mother and sister due to rocket fire during 2007. Two years later, whilst employed by an NGO, he received an anonymous telephone call threatening his life. This, it was alleged, was in line with the *modus operandi* of Al-Shabaab. He went on to describe how this caused him to terminate his services with the NGO. In 2009, his brother-in-law, who worked for a German NGO and who supported him financially, was murdered. This forced him to return to work with the NGO, his erstwhile employer. He claimed that late in 2009 he and a friend were kidnapped and blindfolded and taken to an Al-Shabaab prison, south of Mogadishu, where they received daily beatings and were warned not to work for the government. After two weeks, he escaped and fled to a government-controlled district of Mogadishu. He was later arrested on suspicion of being a member of Al-Shabaab and was held in detention for three days where he was beaten by government officials. His sister managed to negotiate his release during 2010. Thereafter he started saving money to fund his escape from Somalia. He left Somalia in 2011 and arrived in South Africa on 13 March 2011.

[17] The second asylum seeker alleged that he had also been victimised by Al- Shabaab. He owned a small stall in Bakaara market, which is Mogadishu's largest marketplace. During 2006, a rocket landed in the market leaving him with shrapnel wounds. A year later, a bomb landed approximately 20 metres away from his stall,

resulting in casualties. He was traumatised by this. In 2009, Al-Shabaab raided his home, killing his friend and abducting a neighbor. He too received an anonymous threatening telephone call. This was because it was claimed that he worked for the government. He went into hiding and used money from the sale of his business to escape from Somalia. He left Somalia in October 2009 and arrived in South Africa on 7 February 2010.

[18] The third asylum seeker stated that he had left Somalia to escape the combined threats of Al-Shabaab and government forces. In May 2009, during the time that Al-Shabaab controlled many districts in Mogadishu, he was arrested and blindfolded by government soldiers. Thereafter, he was interrogated about whether he was a member of Al-Shabaab. During that time, he was subjected to beatings. He was subsequently released when family members paid a bribe. In August 2009, after he had returned to his employment at the Bakaara market, he was approached by Al-Shabaab, seeking to recruit him. He refused their offer. Sometime thereafter, he was arrested by members of Al-Shabaab, who took him to their training camp. This time he was coerced into joining them. He used a visit to his family to plot an escape to Kenya, from where he travelled to South Africa. He left Somalia in October 2009 and arrived here during 21 January 2010.

[19] The fourth asylum seeker fled Somalia, allegedly, to escape forced recruitment by Al-Shabaab. He too lived in Mogadishu during a period of great political instability and experienced the conflict between warring factions. He claimed that in May 2010 Al-Shabaab called at his home and demanded he join them. He told them he would seek his parents' approval. During June 2010, they returned but he hid from them. He subsequently fled Somalia arrived in South Africa on 28 June 2010.

[20] The fifth asylum seeker, like the fourth, claimed that he had been subjected to Al-Shabaab's forced recruitment drive in Mogadishu. He left Somalia during August 2007 and arrived in this country during December 2007.

[21] The sixth asylum seeker stated that his brother was killed by Al-Shabaab during March 2007. The sixth asylum seeker claimed that he had witnessed many battles and had lived in Somalia in constant fear of his life. In October 2008, he was shot in the upper

thigh, after being caught in crossfire. He was admitted to hospital where he remained until he was discharged in June 2009. He left Somalia in October 2009 and arrived here in December 2009.

[22] The seventh asylum seeker and the only woman in the group had her home hit by a grenade during 2006, killing two of her eight children and leaving her with severe injuries. After she was discharged from hospital, she decided to leave Mogadishu and moved south, near the town of Dhobley, where there were also ongoing battles. She was subsequently injured in an explosion in Dhobley. In 2008, she moved once again to a camp of internally displaced persons. The combination of civil war, the constant danger of injury and death and severe deprivation, so she claimed, compelled her and her two daughters to leave Somalia. They arrived in South Africa in May 2010.

[23] The eighth asylum seeker, unlike the others, was born in a rural area outside the port city of Kismayo in Southern Somalia. He belonged to a nomadic family that kept livestock. In 2006, his family was displaced by fighting between insurgents and government forces, causing them to relocate to a town near the Kenyan border, outside the town of Dhobley. In 2008, his mother was killed in crossfire. In 2011, his uncle was caught up in a battle and was killed. Soon thereafter his cousin was killed in Dhobley by Al-Shabaab. He fled Somalia in 2012 and arrived in South Africa in June that year.

The refugee status determination process

[24] In their affidavits the eight asylum seekers described the refugee status determination process that each had been subjected to and set out the attendant circumstances. Each had completed the standard application form for refugee status at a Refugee Reception Office. These were required to be completed in English. None of them, at the time, was fluent in that language. Even though almost all of them were provided with an interpreter, the quality of the interpretation, so they alleged, was wanting. One of them was not provided with any interpreter at all.

[25] They claimed that their applications were then considered by Refugee Status Determination Officers (RSDOs). It is not clear whether all of them were afforded an

interview, and those who could recall an interview stated that the interviews were cursory and suffered from a lack of proper communication. Their applications were subsequently all rejected by the RSDOs. Consequently, the eight asylum seekers noted appeals to the RAB. They submitted that an appeal before the RAB is a wide appeal, in that it is not confined to the record of the decision of the RSDO. Put differently, it amounts to a hearing afresh. Thus, so they contended, it was obligatory for the RAB to be proactive. It was submitted that the RAB had a duty to adequately question asylum seekers and to conduct further research so as to have as full a picture as possible to reach a decision on each of their applications.

[26] The appellants noted that their appeals conducted before the RAB were brief, averaging between 20 to 30 minutes and that questioning was limited. They were all required to provide their own interpreters. Many brought acquaintances to assist them. Two of them recruited other asylum seekers to assist. Communication was thus poor. In the result, all their appeals were dismissed. The RAB's 'judgments' were, according to the appellants 'startlingly similar, with large portions of the reasoning repeated verbatim, down to the same spelling and grammatical errors'. The RAB was accused of using a pro forma 'judgment' with limited consideration of the individual circumstances of each of the eight asylum seekers.[10]

The grounds of review and the extensive relief sought

[27] The dismissal of the appeals by the RAB is what led to the application for review in the high court. The grounds of review were stated as follows:

'141 As indicated above, the RAB's decisions share at least four common errors of law, fact and procedure:

141.1 First, the RAB applied the wrong test, in that the members misinterpreted and misapplied section 3 of the Refugees Act;

141.2 Second, the RAB applied the wrong burden of proof, in that the members ignored the duty to adopt a shared burden;

[10] Appeals are adjudicated and 'decisions' are made by the RAB in terms of s 26 of the Act. The RAB's duties and powers are set out in s 14 of the Act.

141.3 Third, the RAB adopted the wrong approach to credibility findings, in that the members misunderstood the purpose of credibility findings and adopted an overly narrow understanding of credibility;

141.4 Fourth, the RAB decisions were all procedurally unfair, as they breached the principle of *audi alteram partem*.'

[28] The grounds were expanded on as follows. First, in respect of the wrong test allegedly being applied by both the RSDOs and the RAB, it was contended that s 3*(a)* of the Act mirrors the standard definition of refugee status under the United Nations Convention Relating to the Status of Refugees (the 1951 Convention) and, secondly, that s 3*(b)* reflected an expanded definition of refugee status, which neither the RSDOs nor the RAB appreciated. The appellants also pointed out that s 3*(b)* was in line with Article 1(2) of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Protection (the OAU Convention). At this point, it is necessary to have regard to the provisions of s 3, which reads as follows:

'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)*.' (My emphasis).

[29] Developing the thesis that the wrong test was applied, the appellants contended that s 3*(b)* of the Act made it clear that persecution under s 3*(a)* was not the sole criterion for refugee status. Even if there had been no persecution, the appellants submitted that s 3*(b)* required a decision-maker to determine if an asylum seeker was compelled to leave their country of origin due to 'external aggression, occupation, foreign domination or

events seriously disturbing or disrupting public order' either in part or the whole of the person's country of origin. The appellants contended that this fundamental misconception is demonstrated when one examines the 'judgments' of the RAB'. They refer to the following identical statements in 'six' of the eight judgments of the RAB:

'149.1 Six of the eight judgments contain the identical statement, making persecution a necessary condition for refugee status:

> "*The appellant in casu needs to show that he/she left his/her country for specifically politically motivated reasons, should appellant fail to show this, appellant's refugee claim will be rejected . . . [R]efugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution on political grounds or opinion exists.*"'

A reading of the record shows that this appears in five, not six of the RAB decisions.

[30] Similarly, in respect of the remaining judgments, the following appears:

'149.2 The remaining three judgments also made persecution the focus, describing the test in virtually identical terms:

> "*The appellant claims that he left his country of origin because of civil war. He failed to demonstrate that he was harmed or persecuted in any way. He merely relied on the fact that he feared to be killed. There was nothing which shows a sustained and systemic violation of his human rights.*"

And:

> "*The appellant claims that she was persecuted because of the civil war that occurred in the year 2006. She claimed that her life was in danger . . . [S]he failed to demonstrate that she was harmed or persecuted in any way. She has merely relied on the general instability in her home country but there is nothing which shows a sustained and systematic violation of her rights.*"'

[31] The appellants contended that the repeated references by the RAB to 'sustained and systemic' violations, in any event, indicate a misunderstanding of the meaning of 'persecution'. According to the appellants, the RAB failed to properly apply s 3*(b)* of the Act, ignored it, and treated s 3*(a)* as the sole criterion for asylum. It was submitted that had the RAB properly applied s 3*(b)*, it would have recognised that the conditions in Somalia compelled the eight asylum seekers to leave Somalia and that they qualified for

asylum status in South Africa. They took the view that the ongoing civil war in Somalia, the threat of Al-Shabaab, and the weak state of the government 'undoubtedly constituted "events seriously disturbing or disrupting public order".'

[32] In support of its proposition that the RAB took an unjustifiably restricted view of persecution, the appellants pointed to the death threats and attempts at forcible recruitment by Al-Shabaab and the detention by government forces of at least five of the eight asylum seekers, which they contended qualified as persecution. They submitted that the RAB unjustifiably limited itself to considering whether there was persecution on grounds of political opinion.

[33] The next ground of review raised by the appellants was that the RAB erred in applying the wrong burden of proof. The RAB was accused of wrongly placing the burden of proof, in relation to satisfying the requirements for refugee status, exclusively and unfairly on the shoulders of the eight asylum seekers. In this regard, it was contended that our courts have endorsed the concept of a 'shared burden, which places a duty on the decision-maker to adopt an inquisitorial and proactive approach in evidence gathering'. This they said was consistent with the UNCHR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee status. The position adopted by the appellants was that the shared burden principle ties in with a wide appeal before the RAB.

[34] Additionally, the appellants pointed to the provisions of s 26 of the Act in terms of which the RAB had powers; to invite the UNHCR to make oral and written representations; to refer a matter to the Standing Committee for further investigation; request the attendance of any person who, in its opinion, is in a position to provide further information; and to request an applicant to appear before it to provide such further information that it may deem necessary. The appellants alleged that there was no indication that the RAB was alive to the shared-burden principle.

[35] A third and further ground of review was that the RAB had adopted the wrong approach in assessing the credibility of the eight asylum seekers and over-emphasised its importance. The contentions in this regard were as follows. First, that the RAB,

impermissibly, made credibility the sole prerequisite for upholding a claim to refugee status. Second, that it adopted an overly restrictive approach to credibility, 'focusing solely on alleged inconsistencies between statements' provided to the RSDOs and the RAB. In relation to this ground of review, the appellants referred to the following part of the RAB judgments in all eight matters:

'*In Principles of International Refugee Law the learned author, Guy S Goodwin-Gill states the following: "One of the hardest tasks in refugee determination, and one that is central to the process, is assessing the credibility of the applicant . . . The decision-maker must assess not only credibility of the applicant, but also the credibility of the story in itself . . ." This means that the Board must be convinced that the appellant is telling the truth before it can consider the principal issues.*'

The appellants were adamant that this statement has no basis in the works of the cited author or in any other work on refugee law. This, they submitted, constituted a fundamental error of law on at least two levels.

[36] The first was that the RAB suggested that credibility was a prerequisite for refugee status, whereas our courts have held that it is but one of a range of factors to be considered. The UNCHR Handbook also advocates such a holistic approach, indicating that credibility should assume prominence only when there is no external evidence to support an applicant's claim.

[37] Second, the appellants took issue with the statement by the RAB that it 'must be convinced that the appellant is telling the truth'. They submitted that the burden of proof in refugee claims is less than a balance of probabilities and certainly less than the certainty that the RAB demanded.

[38] The appellants went further and criticised the RAB for elevating coherence of testimony as the sole requirement for a positive finding on credibility. In this regard, it referred to the discrepancies, held against the eight asylum seekers, between their oral testimony and that which appeared in the application form and with what was communicated during the RSDO hearing.

[39] A fourth ground of review was that of procedural unfairness. Principally, the complaint was that the *audi alteram partem* rule (the *audi* rule) was not observed. It was contended that there was no indication that prejudicial country of origin information was placed before the eight asylum seekers to enable them to contest it. That the *audi* rule was flouted, so said the appellants, was evident from all eight judgments. The eight judgments recorded that the RAB had consulted objective country of origin information before making their decisions but does not indicate that this was placed before the eight asylum seekers to refute.

[40] The appellants contended that in so far as adverse credibility findings were made based on inconsistencies, those should have been put to the eight asylum seekers for a response.

[41] With reference to the grounds of review the appellants submitted that a case had been made out for special circumstances, which warranted the court hearing the review to substitute the decision of the RAB without referring the matter back and that further delay would cause the eight asylum seekers unjustifiable prejudice, particularly if regard is had to the considerable time delay from the time that they first made application for asylum status.

[42] As indicated in para 5 above, the appellants also sought a structural interdict, based on what they considered to be sufficient proof of systemic deficiencies in the decision-making processes of the RAB. On this aspect it contended that it would be just and equitable for the court to direct the Minister and the Director-General to conduct an investigation into the causes and extent of the problem, and to prepare a plan to address these problems and to report back to the court. The systemic deficiencies they submitted were those of a repeated pattern of errors in decision-making of the RAB, which they said went beyond a coincidence. On this issue they cited criticisms by academics and practitioners and provided supporting affidavits by refugee law practitioners. The errors relate to the misapplication of all the issues of law on which the appellants relied for the review in the high court. The appellants sought to show that the RAB repeatedly failed to have regard to the provisions of s 3*(b)* of the Act in deciding applications for refugee

status. The appellants also referred to decisions of our courts showing how the RAB had misunderstood crucial concepts of refugee law and to repeated findings by courts that procedural rights were flouted.

[43] The principal deponent on behalf of the appellants recorded how he had attempted to engage with the RAB on the high number of rejections of appeals by asylum seekers from Somalia. The stance adopted by the RAB was that the political situation in Somalia had stabilised, which, according to the appellants, does not accord with the factual situation on the ground. In relation to the conditions in Somalia, the appellants provided a British Broadcasting Corporation timeline, stretching from the thirteenth century to May 2015, which indicated continued strife, presently mainly due to acts of aggression by Al-Shabaab. The application in the high court was launched in December 2015. The conditions described are thus those that prevailed more than five years ago.

[44] In seeking the extensive relief referred to in paragraph 4 above, the appellants explained that setting the RAB decisions aside and referring them back for reconsideration would cause unjustifiable prejudice to the asylum seekers. They pointed out that this Court would, in the prevailing circumstances, be justified in substituting the RAB's decision, especially since it had all the relevant information at hand. The appellants contended that referring the matter back would, considering that there was a backlog in RAB appeals in 2015, of some 100 000 cases, result in further delays and cause the asylum seekers undue hardship. The asylum seekers had applied for refugee status between three and six years before the review application was launched.

[45] In relation to the structural interdict sought, the appellants contended that the RAB was obdurate and persisted in misapplying the law and failing to follow fair procedure. This, despite repeated attempts by relevant role-players to persuade them otherwise. They contended that the extensive relief sought was justified. That, in sum, was the case for the appellants.

[46] The appellants provided all eight of the RAB 'judgments'. They provided some of the completed application forms and decisions of the RSDO. Some of the written appeals

lodged by the eight asylum seekers were provided. Very few of the interview notes by either the RSDOs or the RAB were provided. We were informed by counsel on behalf of the appellants that this was due to a 'patchy' Rule 53 record having been provided.

An Illustration of how the applications for refugee status were dealt with

[47] The application form and the other documentation related to the eighth asylum seeker are illustrative of how the applications were dealt with. The relevant details are as follows. The reason for applying for asylum set out in his application form was curt:'Because of the civil war in Somalia'. The RSDO interview notes record the following:

'The applicant stated that he left his country because the Al-Shabaab and the interim Government are fighting and people are being killed. He stated that the Al-Shabaab bomb his house while his parents and brother were in the house and they died at the same time in 2008. He stated that he was at a location visiting a friend when the Al-Shabaab bomb his house and when he came back, he found that they were dead and the neighbours told him that that the Al-Shabaab bomb the house. He stated that from 2008 until 2012, the time he left he was in Somalia living in fear as the fight is still going on and he could not live in fear for the rest of his life.'

In response to the question why he was applying for asylum, he replied that it was for 'protection'. Asked about the measures he took to solve the problems he faced he replied that he left the country. As to why he did not want to return to Somalia, he replied that he might be killed.

[48] In the reason for its decision the RSDO stated the following:

'According to the country of information of Somalia published by the New York Times on the 04 April 2012, the famine eased, the violence ebbed and, in 2012, Somalia began showing signs of hope. Mogadishu, the capital, which had been reduced to rubble during years of civil war, started to make a remarkable comeback. With the Shabab having withdrawn from the City in August. In early April 2012, the city was enjoying its longest epoch of relative peace since 1991: eight months and counting and on August 2012, Somalia has elected a new Government which has replaced the Transitional Government. I found that there is no reasonable ground to believe that you will be forced to join the Alshabab when you are returned to your country.'

[49] In his affidavit in support of his appeal to the RAB, the eighth asylum seeker stated only the following:

'There is no stability and no peace in Somalia. Young men are forced to join Al-Shabaab and when you refuse you might be killed.'

[50] The relevant part of the RAB decision is set out hereafter:

'Appellant was personally affected by the political instability in Somalia when the said Al Shabaab & government soldiers fought in the very same bush (just outside Kismayo) where appellant were looking after his camels; not the appellant nor any of his camels were injured in the process. This is in essence what compelled the appellant to leave his country of origin.'

[51] Under the heading 'Credibility' the following appears:

'The Appeal Board accordingly assessed the credibility of the appellant's story and makes the following remarks in passing.

[a] Appellant's appeal hearing differed materially from his earlier information captured in his DHA-1590 & RSDO decision. There was a bare denial on the appellant's side when discrepancies were put to him; appellant at times conveniently blamed the interpreter.

[b] An internationally acclaimed refugee law expert: **James Hathaway (The Law of Refugee Status p 101)** describes persecution as the sustained and systemic violation of basic human rights resulting from failure of state protection.

[c] **The Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status p30 para 203 & 204** states the following on the issue of **benefit of doubt**.

"After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. It is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statement's must be coherent and plausible, and must not run counter to generally known facts''.'

[52] Under the heading 'Ruling' the following appears:

'[a] The appellant never made out a case to justify persecution on the grounds envisaged in S3 of Act, 130 of 1996. The appellant throughout his case was silent on the issue of his fear of being persecuted, be it the past, present and or the future. There was no link between the appellant's mother's death & appellant's relocation to SA more than four years later.

[b] Appellant entered SA to benefit from the rights afforded to refugees under the Refugees Act, 130/1998. Appellant fabricated his claim to fall within the parameters of refugee law.
[c] In the circumstances the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him. The appellant's unwillingness to return to the Somalia, based on this factual enquiry, is not based on a well-founded fear of persecute. Appeal Board accordingly finds that the appellant does not have a reasonable fear of persecution should he return to the Somalia.
[d] The appellant when asked what would happen to him should he returned to Somalia replied that the fighting problem still exists even now in Somalia. The appellant failed to make out an individual case that it is unsafe for him to return to Somalia. The Appeal Board finds that the appellant's case is not coherent and plausible & appellant accordingly does not deserve to be given the benefit of the doubt.'

The basis for opposition by the first four respondents

[53] The respondents were adamant that the application for review was an appeal, disguised as a review. They accepted that s 3 of the Act provides the criteria for refugee status. They also referred to s 4 of the Act, which deals with exclusion from refugee status. They contended that this demonstrated, starkly, that the recognition of refugee status was subject to qualifications and limitations.

[54] In dealing with s 26 of the Act and the then applicable regulation 14 of the Regulations[11] under the Act, the respondents took the view that the power to decide appeals from decisions of RSDO vested in the RAB and what the appellants sought in the high court had the effect of divesting it of that power, which it was best suited to exercise. It was submitted that by itself, assuming the power to decide the appeal, the court would impermissibly be breaching the principle of the separation of powers.

[55] The respondents did not engage with any of the appellants' factual assertions concerning the irregularities and deficiencies complained of, choosing instead to insist

[11] Regulation 14 sets out the time limit within which an appeal in terms of s 26 must be lodged and states that it must be lodged in person at a designated Refugee Reception Office.

that what the appellants sought was an appeal on the merits of the decisions of the RAB, which they were not entitled to bring.

[56] In the concluding paragraph of their affidavit opposing the relief sought, the respondents stated the following:

'The Applicants in truth have brought an appeal cloaked as a review. The issue however is not whether first respondent is thought to be wrong. It is whether it has acted unlawfully, firstly because it has not complied with the Refugees Act to the level required and secondly as first respondent's decisions are polycentric and the Court should not interfere with them more so as they have been made lawfully.'

The respondents took the view that they had acted strictly in terms of the provisions of the Act and that the decisions by the RAB were not susceptible to challenge.

The judgment of the high court

[57] It is against the background set out above that Mlambo JP adjudicated the matter. First, he acknowledged the world-wide displacement of people due to armed conflict, and the hardships that ensued. He had regard to the *United Nations Convention Relating to the Status of Refugees of 1951* (the UN Convention) and *the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Protection of 10 September 1969* (the OAU Convention). He also took into account that South Africa had ratified both the UN Convention and the 1967 Protocol, as well as the OAU Convention.

[58] The high court recognised that the purpose of the Conventions was to provide protection to refugees and to regulate how they are treated, and more particularly, in relation to their applications for refugee status. Furthermore, Mlambo JP stated the following:

'An important principle common to the Conventions is the incorporation of the *non-refoulement* principle which effectively means that no person may be refused asylum in another country where that person faces real threats to his or her life especially life threatening persecution in such person's country of origin should he be refused asylum.'

He appreciated that the *non- refoulement* principle has been entrenched by the legislature in s 2 of the Act. In this regard he took into account the decision of the Constitutional Court in *Ruta v Minister of Home Affairs,*[12] where the following was said:

'[24] This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of *non refoulement*, the concept that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.

[25] It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees "the right to seek and to enjoy in other countries asylum from persecution".'

[59] The high court went on to deal with the merits of the review application. It took into account that in terms of s 14 of the Act, the RAB performs an adjudicatory function. That section of the Act reads as follows:

'14. (1) The Appeal Board must –

(a) hear and determine any question of law referred to it in terms of this Act;

(b) hear and determine any appeal lodged in terms of this Act;

(c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Appeal Board.

(2) The Appeal Board may determine its own practice and make its own rules.

(3) Rules made under subsection (2) must be published in the *Gazette*.'

[60] In considering the bases for the review, the high court thought it important to keep in mind that the RAB was 'constrained to the materials before it when considering the appeals'. In this regard the high court noted that most of what was referred to and relied on by the appellants in their affidavits filed in support of the review application was not before the RAB or indeed the RSDOs. It proceeded to consider the treatment of each appeal by the RAB against the factual material before both. It is necessary to repeat the

[12] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC).

entirety of the recital by the high court of the information on which the RAB decided each appeal as well as the bases of their decisions. That recital is set out hereafter.

[61] Mlambo JP commenced with the first asylum seeker:

'[18] The second applicant informed the RAB that he left Somalia in January and arrived in South Africa in March 2011 and applied for asylum. This applicant stated in his DHA Form that he left Somalia due to the civil war there. He also mentioned this when he applied for asylum, and this much is evident in the hearing notes of the RSDO who dealt with his asylum application. The RAB also recorded that it appeared from the RSDO hearing notes that the second applicant was never persecuted by Al-Shabaab or by Government forces, that he left Somalia because *"there is a lack of peace and stability. He fled his country of origin and came to SA lo seek protection*. During the RAB hearing, the record shows that the second applicant also asserted the civil war as the reason why he left Somalia. He is recorded as having stated that his life was in danger and that he was invited by his brother to come to South Africa. It is also recorded that he was never recruited by either Al-Shabaab or by the Somali Government forces.

[19] The RAB then, in assessing the second applicant's appeal stated –

> *"The applicant claims that he left his country of origin because of civil war. He failed to demonstrate that he was harmed or persecuted in any way. He merely relied on the fact that he feared to be killed. There was nothing which shows a sustained and systemic violation of his human rights. The appellant managed to stay in country for eight months nothing happened to him.*"

The RAB then went on to find, that the appellant had suffered no *"persecution or harm in terms of section 3 ".*

The RAB concluded with the following statement –

> *"The Board finds that he does not have a well-founded fear of persecution. The appellant was not compelled to leave his country of origin, he managed to stay in the same region after his brother's death, 2007 nothing happened to him. There is nothing from his evidence which indicated that he was persecuted in his country of origin. The board finds that he came to South Africa seeking a better life.*"'

[62] The high court then went on to deal with each of the remaining asylum seekers in turn:

‘[20] In respect of the third applicant, the RAB recorded that he was a resident of Mogadishu. According to this recordal, this applicant told the RAB that he left Somalia in 2010 as a result of the war and to feeling insecure. It is also recorded that he mentioned that one of his acquaintances in Mogadishu was allegedly killed by AI-Shabaab after having received a phone call two weeks prior to being killed. The third applicant also allegedly received a phone call subsequent to his acquaintance's demise and assumed that whoever was phoning him intended to kill him as well. This applicant then, fearing for his life decided to leave Mogadishu for South Africa.

[21] The RAB summed up the matter by first finding that the factual background sketched in the paragraph above, is what compelled the applicant to flee Somalia. To the RAB the killing of the applicant's acquaintance could not have compelled him to leave Mogadishu. The RAB –

> *"The irony of the appellant's claim is that his entire family currently resides peacefully in Mogadishu; the Board therefore infers that it is safe for appellant to return to Mogadishu. The appellant is however not prepared to go back to Somalia as he fears that whoever phoned him will kill him, fears nursed by the appellant in this regard Is not reasonable and or "well-founded".*

According to the RAB this applicant never made out a case to justify persecution on the grounds envisaged in section 3 of Act. The RAB then concluded that the applicant had not mentioned that he feared being persecuted, *"be it the past, present and or the future".* The RAB also concluded that nothing happened to this applicant which compelled him to flee Somalia for South Africa and dismissed his appeal.

[22] In the case of the fourth applicant the RAB recorded that he did not belong to a political party nor was he ever arrested, that at all material times he resided in Mogadishu. He testified that Al-Shabaab recruited young men to join the organisation and that they killed those who refused to join the organisation. The RAB recorded that he decided to leave Somalia before being so approached by AI-Shabaab, in search of a safe and or better life. He was assisted by his uncle, financially to leave Somalia. The RAB further recorded that his uncle was subsequently allegedly killed by AI-Shabaab during December 2013, apparently after he admitted to Al-Shabaab operatives during interrogations that he had assisted the fourth applicant to go to South Africa. The RAB recorded the following -

> *"It was put to the appellant that the death of his uncle was irrelevant to his asylum claim* due to the long lapse between events. The irony of the appellant’s claim is that his entire family currently resides peacefully in Mogadishu, the Board therefore infers that it i[s] safe for appellant to return to Mogadishu. Appellant raised new evidence that he was arrested

and or abducted by Al-Shabaab (between Jan – April 2009) for a period of two weeks where after he managed to escape. Appellant blamed the new evidence firstly on the interpreter & secondly admitted that he forgot to mention it at an earlier stage. During the course of the proceedings it also transpired that in addition to Al-Shabaab the Government also wanted appellant to join them; in fact, the Government offered appellant a job if appellant joined them & fought against A1-Shabaab in turn".

[23] In its conclusion the RAB stated that –

"The appellant never made out a case to justify persecution on the grounds envisaged in section 3 of the act... [t]he appellant failed to make out an individual claim of what compelled him to leave Mogadishu ...In the circumstances the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him. The appellant is unwilling to return to Mogadishu as he claims that the presence of Al-Shabaab is everywhere in Somalia and that they are still killing people, conceding at the same time that his entire family is still residing peacefully in Mogadishu. It was the appellant's testimony that he left before anything could happen to him. The Appeal Board finds that the appellant's case is not coherent and plausible and appellant does not deserve to be given the benefit of the doubt."

[24] Regarding the fifth applicant, the RAB recorded that he also did not belong to a political party and that he was at no stage arrested. The RAB recorded that he testified that there was a civil war in Somalia; that there were a lot of political parties in Somalia; that the political parties were fighting with the Government; that Al-Shabaab came to appellant's house during the beginning of 2010 and ordered him to join the organisation and he refused. The RAB further recorded that he left for Kenya where he remained for ten days. Furthermore, the following was recorded by the RAB –

"Appellant in his DHA-1590& RSDO hearing stated that he left Somalia as a result of lack of peace and stability; that he came to SA to get peace and an education; that he cannot stay in SA without proper documentation."

The RAB referred to this applicant's evidence as:

"[N]ot entirely consistent with appellant's oral evidence. Appellant in his notice of appeal amongst other things averred that when the situation in Somalia became unbearable for him, he decided to leave looking for a place of safety and security away from persecution. Appellant was silent on what happened to him in Somalia that compelled him to leave. "

[25] The RAB concluded its' assessment of this applicant's appeal with the following findings

"The Board is satisfied that appellant does not face a reasonable possibility of persecution should be return to Mogadishu. It was not appellant's testimony that he left Mogadishu as a result of events seriously disrupting and or disturbing the public order in Mogadishu. The once-off attempt by Al-Shabaab did not compel appellant to leave Mogadishu. The Board cannot exclude the possibility that appellant is an economic migrant in that he voluntarily left Somalia to take up residence and employment elsewhere. The Board finds corroboration of this fact when appellant in his DHA-1590 and RSDO hearing makes mention of the fact that he came to SA to get an education and that he is applying for asylum as he cannot stay without proper documents in SA. In the circumstance the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him."

[26] It appears from the record that the sixth applicant informed the RAB that he left Somalia during 2007, then aged 26, claiming that the Government in Somalia was defeated in 1991, that Somalia has been uncontrollable ever since and that different tribes were fighting with each other in the whole of Somalia and Mogadishu. The applicant told the RAB that he was personally affected by the fighting in that different tribes wanted him to join them but he refused. The RAB then states –

> *"Appellant embarked on his journey to SA 16 years post 1991 as he was too young to leave earlier. This is background information of what made appellant leave Somalia during 2007. The standard of proof is that of a "reasonable risk" and must be considered in the light of all the relevant circumstances i.e. past persecution and a forward-looking appraisal of risk. The appellant in casu needs to show that he left his country for specifically politically motivated reasons, should appellant fail to show this, appellant's refugee claim will be rejected. Taking into account that refugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution on political grounds or opinion exists. Appellant failed to highlight an incident in Mogadishu that compelled him to leave for SA. Appellant made an informed decision to move to SA as an adult. Appellant's family is currently residing in Mogadishu. The Board finds that nothing happened to the appellant that compelled appellant to leave Mogadishu. Appellant did not explain when, how & under circumstances the different tribes wanted appellant to join them. Appellant was only threatened to be beaten when he refused to join the respective tribes. The appellant never made out a case to justify persecution on the grounds envisaged in S3 of Act, 130 of 1998. Appellant throughout his case was silent on the issue of his fear of being persecuted, be it the past, present and or the future. The Board cannot exclude the possibility that appellant is an economic*

migrant. The perception is that people in SA have better life & that SA is an economically viable country to reside in. It was a planned & calculated move on the part of the appellant to come to SA during 2007. In the circumstance the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him. "

[27] The seventh applicant informed the RAB that he fled Somalia, in December 2009, because of the civil war, that his brother died in the year 2007 as a result of the war between AI-Shabaab and the Government. The RAB recorded that the applicant stayed for two years in Somalia after the death of his brother and that nothing happened to him during that time and that he never relocated elsewhere in Somalia during that time. It is also recorded that he stated that he subsequently fled to Kenya, Mozambique, Zimbabwe until he arrived in South Africa. The RAB recorded the following –

"The appeal Board finds the appellant did not suffer persecution or harm in terms of section 3 of the Refugee Act. The Board further finds that he does not have a well-founded persecution. The Appellant was not compelled to leave his country of origin, he managed to stay in the same region after his brother's death in 2007 and nothing happened to him. There is nothing from his evidence which indicated that he was persecuted in his country of origin. The Board finds that he came to South Africa seeking a better life. It is unlikely that the appellant will face a reasonable possibility of harm or persecution were he to return to Somalia. The appellant on appeal records can return safely to his country origin, there are areas which are identified not to be affected by civil war and are government's control."

[28] In so far as the eighth applicant is concerned the RAB recorded that in the DHA form and RSDO's notes this applicant stated that there was a civil war between Al-Shabaab and the Government since 2006, that her family house was bombed and destroyed due to the civil war, that her father, brother and daughter were killed. She told the RAB that because of the civil war she left Somalia and went to Kenya, settling on the border area between Kenya and Somalia for a period of two years during which nothing happened to her. She told the RAB that she left Kenya because of the poor and unbearable living conditions and starvation. The RAB recorded that she stated that subsequent to leaving Kenya during 2008, she went to Tanzania where she was arrested and imprisoned for a year and three months because she was an illegal immigrant. The RAB further recorded that she stated that in January 2010, she returned to Kenya and then went back to Somalia arriving there in April 2010. The RAB further recorded that she stated that upon her arrival in Somalia she noticed that there was still instability although nothing happened to her upon her return. Due to this instability she decided to leave Somalia and travelled to South Africa.

[29] During her appeal hearing she stated that she came to South Africa to seek protection. The RAB recorded the following in respect of this applicant –

> *"The appellant claims that she was persecuted because of the civil war that occurred in the year 2006, she claimed that her life was in danger. Her story lacks substance and she failed to demonstrate that she was harmed or persecuted in any way. She has merely relied on the general instability in her home country but there is nothing which shows a sustained and systematic violation of her human rights. She was in Kenya for a period of two years where nothing happened to her and she left Kenya because of unbearable living conditions and starvation ...The Board finds that the appellant did not suffer persecution or harm in terms of section 3 of the Refugees Act. The Board further finds that she does not have a well-founded fear of persecution. The appellant in April 2010, she availed herself to the protection of her country of origin when she went back to Somalia. The Board finds that nothing happened to her upon return to her country of origin. She was not compelled to leave her country of origin. The Board further finds that she stayed in Kenya for a period of two years and was given protection by that country. There is nothing from her evidence which indicated she was persecuted in Kenya because of her nationality. She left Kenya because she was seeking a better life for herself and her children. It is unlikely that the appellant will face a reasonable possibility of harm or persecution if she were to return to Somalia. The appellant on appeal records there is nothing that indicates that she was either tortured, physical attacked or arrested while she was in her country during 2010. She can return safely to her country of origin, there are areas which are identified not to be affected by civil war and are under government's control."*

[30] As far as the ninth applicant is concerned the RAB recorded that he mentioned that his mother died in 2008 and that he does not know the whereabouts of his father, that he had no education, did not belong to a political party and was never arrested by Government forces. The RAB further recorded that this applicant herded camels when he lived in Somalia and that he left due to the fighting between AI-Shabaab and Government soldiers. The applicant informed the RAB that he was personally affected by the political instability in Somalia when AI-Shabaab and Government soldiers fought in the area where he was herding camels, just outside Kismayo, but neither he nor the camels were harmed in that shootout.

[31] The RAB then, with reference to the version mentioned above, records -

> *"This is in essence what compelled the appellant to leave his country of origin. The appellant never made out a case to justify persecution on the grounds envisaged in S3 of*

Act, 130 of 1996. The appellant throughout his case was silent on the issue of his fear of being persecuted, be it the past, present and or the future. There was no link between the appellant's mother death & appellant's relocation to SA more than four years later. Appellant entered SA to benefit from the rights afforded to refugees under the Refugees Act, 130/1998. Appellant fabricated his claim to fall within the parameters of refugee law. In the circumstances the Appeal Board finds that the appellant has not discharged the burden of proof which rested on him. The appellant's unwillingness to return to the Somalia, based on this factual enquiry, is not based on a well-founded fear of persecution. Appeal Board accordingly finds that the appellant does not have a reasonable fear of persecution should he return to the Somalia. The appellant when asked what would happen to him should he return to Somalia replied that the fighting problem still exists even now in Somalia. The Appeal Board finds that the appellant's case is not coherent and plausible & appellant accordingly does not deserve to be given the benefit of the doubt."

[63] Having dealt with the individual treatment by the RAB of each of the eight asylum seekers, the high court proceeded to deal first, with the submission on behalf of the appellants, that the RAB had adopted an overly restrictive approach to the issue of 'persecution', as provided for in s 3*(a)* of the Act. The high court went on to hold that it was 'immediately apparent' that when dealing with each appeal the RAB focused on whether the asylum seekers were personally exposed to conduct amounting to persecution and whether each was exposed to a personal threat causing him or her to flee Somalia. The RAB considered whether the asylum seekers had other family members living with them when they decided to leave Somalia and whether such family members would have experienced similar threats as those faced by them. The high court reasoned as follows:

'The basis for this approach is clear, if the civil war was the reason for the asylum seekers to flee Somalia, clearly the violent circumstances presented by that armed conflict cannot be selective, everyone living in the affected area would have been under threat.'

[64] The high court held that the finding by the RAB that there was no threat to the lives of the eight asylum seekers was based on the evidence presented by them and that there was no restrictive approach by the RAB on the question of 'persecution'. It found

that the eight asylum seekers failed to present evidence that the personalised threats endured giving them no real choice but to escape Somalia.

[65] Mlambo JP went on to find that the criticism on behalf of the appellants that the RAB had failed to apply the provisions of s 3*(b)* was also misconceived. In that regard, the high court stated that it was clear from the reasoning of the RAB that it had applied the provisions of that subsection. The reasons provided for refusing the appeal, so the high court held, indicated that s 3 had been holistically applied. It concluded that it was clear that the RAB had applied its mind to the facts and bore in mind the provisions of s 3 *(a)* and *(b)*. The high court held it against the eight asylum seekers that they had failed to mention any circumstances or facts that suggested that their personal safety was at risk nor had any showed compulsion forcing them to flee Somalia. In this regard the high court stated that the first to third asylum seekers referred to generalised civil war reasons. The fourth, the high court said, merely referred to Al-Shabaab's attempted recruitment of him, which caused him to flee Somalia. The sixth asylum seeker, the high court found, had remained in Somalia for a period of two years after his brother was killed and then left Somalia although nothing appears in that period to have intervened to cause him to leave Somalia. The fifth asylum seeker, the court found, decided to leave Somalia on the basis of a single firefight between Al-Shabaab and government forces. The seventh asylum seeker, so the high court held, left Somalia and remained in Kenya for two years before she went to Tanzania, from where she returned to Somalia where she suffered no persecution at all and then left for South Africa. The eighth asylum seeker was a herder and came closest to the violence when on one occasion he was herding camels and there was a fight between Al-Shabaab and government forces. He was not injured nor was he the target of either. The high court came to the conclusion that the RAB could not be faulted.

[66] The high court criticised the present appellants for attempting to straightjacket the RAB and compelling them to apply a 'blanket' approach to asylum seekers from Somalia, which approach was legally unsustainable and would render the RSDOs and the RAB redundant. The high court iterated that the approach to reviews of this nature was that a

court should show due deference to specialist entities. The high court warned against judicial activism. It found ultimately that the RAB had not acted unlawfully.

[67] In relation to the burden of proof in applications for asylum status and appeals before the RAB, the high court held that it was 'ill-conceived' to postulate that there was a shared burden of proof regarding eligibility for refugee status. The high court held that para 196 of the UNHRC Handbook did not support that view. The following passage of the judgment is relevant:

'It is correct that the handbook states that there is a duty to ascertain and evaluate all relevant facts which is the shared responsibility of the applicant and the examiner. That does not mean that the burden of proof regarding refugee status eligibility is now shared. What is shared is the responsibility to put all relevant facts before the RAB which is then required to provide information at its disposal and conduct research in respect of the state of affairs in the country of origin of the applicant. However, at the end of the day, the burden of proof still rests with the applicant and not with the RAB. It is correct that the RAB has a duty to gather information should this be necessary. Information gathering is done when it becomes apparent that such information could assist in deciding the application or appeal. An asylum seeker has the burden of placing the necessary facts before the RSDO or RAB why he/she should be granted asylum . . . The fact of the matter is that the asylum seekers presented cases that lacked any substance regarding their qualification or entitlement to refugee status in South Africa. There is therefore no merit to the submission of the applicants that the burden of showing entitlement to asylum status was shared between them and the RAB.'

[68] In relation to the contention by the appellants that an asylum seeker's credibility was overemphasised by the RAB when it came to the assessment of the application for refugee status, the high court held that it had no merit. In this regard, it stated the following:

'The RAB found that it could not believe the applicants on their versions that they were personally at risk and that they were forced to flee Somalia. In fact, where the RAB made credibility findings this is borne out by the facts before it. The applicants' submission suggests that the RAB shouldn't have paid any attention on that aspect. This cannot be and I fail to find a basis that gives a Court the latitude to dictate to the RAB, as the specialist appellate tribunal in refugee status determination matters, how to assess the material placed before it especially where the issue of

credibility features. On the objective facts before it, the RAB found inconsistencies and it was entitled to consider them and their impact on its decisions. That Courts may approach those same issues differently is no acceptable yardstick to set aside the decisions of the RAB which are contrary to those of the Courts.'

[69] In respect of the appellants' complaints that the *audi* principle was not observed, the high court found that they too were without merit. It said the following:

'It is clear from the factual matrix regarding each asylum seeker that the RAB committed no procedural irregularity, when dealing with the appeals. The asylum seekers were each provided with an ample opportunity to participate in their appeal hearings. They were allowed to present their cases and to answer any questions that arose. The country of origin information argument is misplaced. There was no need on the RAB to confront the asylum seekers with country of origin information as the asylum seekers failed on their own to come up with substantive bases justifying the grant of refugee status. They presented hopelessly inadequate cases and the RAB can therefore not be faulted for denying them refugee status.'

[70] Turning to the appellants' complaint regarding the lack of interpreters, Mlambo JP held, at para 54 of the judgment, that in this case all the applicants had been assisted by their own interpreters during the appeal hearings and that there could therefore be no suggestion of any prejudice to any of them. In the result, the application for review was dismissed with each party to pay its own costs. It is against the aforesaid conclusions and the resultant order that the present appeal is directed. In the paragraphs that follow I deal with whether the conclusions reached by Mlambo JP were justified.

Discussion and conclusions

The duty to assist to obtain relevant information and evidence so as to have as full a picture as possible on which to predicate a decision on refugee status

[71] A good starting point when applying the provisions of the Act, as recognised by the high court, and with reference to *Ruta*, is an appreciation of the importance of the principle of *non-refoulement,* entrenched in s 2. The RSDOs, the RAB and finally the high court, were mistaken in their view of how the statutory process leading up to the adjudication of an application for refugee status or an appeal was designed to unfold. In

terms of s 21(2)*(b)* of the Act, a Refugee Reception Officer (RRO) must, at source, in accepting an application form from an asylum seeker, 'see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard'. In terms of s 21(2)*(c)* a RRO 'may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application.' Section 24(1)*(a)* of the Act makes it clear that upon receipt of an application for asylum, the RSDO, 'in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer'. Furthermore, he or she, where necessary, 'may consult with and invite a UNCHR representative to furnish information on specified matters'.[13] Additionally, he or she may, with the permission of the asylum seeker, provide the UNCHR with such information as may be requested.[14] As pointed out on behalf of the appellants, s 26(3) of the Act provides that the RAB may invite the UNCHR representative to make oral or written representations; request the attendance of any person who is in a position to provide relevant information; of its own accord, make further enquiry or investigation; and request the applicant to appear before it to provide such further information as it may deem necessary.

[72] In *Gavric v Refugee Status Determination Officer*, in dealing with s 24 of the Act in relation to an exclusion hearing, the Constitutional Court said the following:

'Section 24(1) of the Act provides that an RSDO may, when considering an asylum application, request further information from an applicant, the Refugee Reception Officer, or the United Nations High Commissioner for Refugees (UNCHR) representative. The Handbook recognises that it may be necessary for the RSDO to assist an applicant in obtaining relevant information in order to properly determine the application. This is premised on the factual reality that persons fleeing their country often arrive with the barest necessities and often cannot afford legal representation.'[15]

[73] Regulation 4 of the Regulations in force prior to them being substituted in 2020 provided that an RSDO was obliged to ensure that an asylum seeker is provided adequate

[13] Section 24(1)*(b)* of the Act.
[14] Section 24(1)*(c).*
[15] *Gavric v Refugee Status Determination Officer* [2018] ZACC 38; 2019 (1) SA 21 (CC).

interpretation. Regulation 5 stated that 'where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process.' Where it was not practicable, an applicant would be required to provide an interpreter. In the latter event, an applicant must be given at least seven days advance notice. The measures referred to in the preceding paragraphs were clearly designed to ensure effective communication and to ensure efforts towards the presentation of as full a picture as the circumstances permitted before an assessment ensued and a decision on refugee status was reached.

[74] The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status[16], under the heading, 'Establishing the Facts' and the subheading 'Principles and Methods', states the following:

'195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support he's statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. 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 also be statements not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

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

[16] Under the 1951 Convention and the 1967 Protocol relating to the status of refugees-reissued, Geneva 2011.

statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.'

[75] Significantly, for present purposes, paragraphs 198 and 199 of the Handbook read as follows:

'198. A person who because of his experience, was in fear of the authorities in his own country may still feel apprehensive vis- ́a -vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case

199. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.'

[76] As can be seen, and as recognised in the statutory scheme, prior to amendment, the refugee status determination process was an inquisitorial and facilitative one. To this end, the RSDOs and the RAB failed to fulfil their statutory and Constitutional obligations. The RAB ignored the statutory construct and the principles enunciated by our courts and the dictates of the UNHCR Handbook.

[77] Section 24 presently provides that the RSDOs must, in dealing with an application, bear in mind the provisions of the Promotion of Administrative Justice Act 3 of 2000, and ensure that an applicant fully understands the procedures, her or his responsibilities, and the evidence presented and may consult the UNCHR representative or invite such representative to provide information concerning the application.

[78] Regulation 8 of the presently applicable regulations states that an applicant must in the prescribed form indicate a proficiency language of choice and that all information or any documentation submitted together with the application is binding on the applicant and may not be amended.

[79] Regulation 14(5) of the present regulations provides that during an interview with an asylum seeker an RSDO may require any further information, evidence, clarification, or corroboration from the asylum seeker and require further information, evidence, clarification or corroboration from any other relevant person, body, or source. Regulation 14(6) provides that the RSDO must test any claim made by an applicant against such information, documents or evidence that is at her or his disposal. It permits the RSDO to obtain legal advice, where necessary. The RSDO may consult decisions of the relevant Standing Committee and the Refugee Appeals Authority.

[80] As can be seen, the architecture of the Act and the Regulations, as presently framed, do not militate against the applicable paragraphs of the Handbook or the decisions of our courts referred to above. On the contrary they are as insistent, if not more so, that the principles set out above must be followed and applied. The obligation, presently, on the part of the RSDO, to observe the provisions of PAJA confirms that the Refugee Reception Officers, the RSDOs and the Appeals Authority must be scrupulous in observing a fair procedure, the first part of which is to assist an asylum seeker at the outset and then to assist in gathering evidence to enable as full a picture as possible on which to predicate a decision. That was the position before the amendments to the Act were affected and the Regulations substituted. It has not changed.

[81] While the high court was correct about an asylum seeker having to ultimately show that she or he meets the statutory standard, an aspect which I will later in this judgment explore further, it erred in holding that the RAB was confined to the record before it and to the evidence thus presented. In *Refugee Appeal Board v Mukungubila* at para 34, Maya P said the following:

‘Of further critical importance is the fact that the RAB is vested with appellate jurisdiction in the wide sense. Thus, it is in the same position as the RSDO and is not bound to decide the merits of the appeal within the confines of the latter’s record. It is at large to make its own enquiries and even gather evidence, if necessary. This is so because s 26(3) of the Refugees Act specifically entitles it, inter alia, to invite the United Nations High Commissioner for Refugees to make oral or written submissions; request the attendance of any person who, in its opinion, is in a position to provide it with relevant information; of its own accord make further enquiries or investigation and

request the applicant to appear before it and to provide any such other information as it may deem necessary.'[17]

[82] Counsel on behalf of the respondents did not take issue with this statement of the law. He merely submitted that the obligation on the part of a decision maker to be of assistance was only triggered when the information supplied by an applicant was such that it merited further enquiry and that in the present case, the basic information supplied was so poor that no assistance or enquiry was merited. That submission is without foundation. The high court's own recital of what served before the RSDO and the RAB indicates that there was indeed a basis for further enquiry and scrutiny. That information, it will be recalled was the material on which the RSDO and the RAB purported to make credibility findings. It must be borne in mind that the statutory scheme set out above, the decisions of our courts and international best practice as reflected in the Handbook, consonant with our Constitutional values, all dictate that an asylum seeker should be assisted to present as full a picture as the circumstances permit. The high court ought to have concluded that the RSDOs and the RAB failed in this fundamental duty. If either or both had complied with their duties a more detailed picture might well have emerged. The details presented to the high court were, as pointed out earlier, not before the RAB.

Failure by the RAB to consider the applicability of s 3(b) of the Act

[83] Furthermore, it is abundantly clear that the appellants are correct in their submissions, that neither the RSDO nor the RAB considered the application of s 3*(b)* of the Act. Even on the most basic information supplied by the asylum seekers to the RSDOs and the RAB, a case was made for a consideration of whether there were events in Somalia 'seriously disturbing or disrupting public order in either in part or the whole . . . country', compelling the eight asylum seekers to seek refuge elsewhere. At the very least it merited further scrutiny and the obtaining of further information and evidence. It is apparent that the decisions reached by the RSDOs and the RAB were limited to a consideration of the application of s 3*(a)* of the Act and that any reference to the safety situation in Somalia was coincidental or related to the application by them of s 3*(a)* of the

[17] *Refugee Appeal Board v Mukungubila* [2018] ZASCA 191; 2019 (3) SA 141 (SCA).

Act. There is force in the submission on behalf of the appellants, referred to earlier in this judgment, that the decisions appear in the form of a template followed by the decision makers and that they even contain the same spelling and grammatical errors. Instead of blaming the eight asylum seekers for seeking a blanket approach, there should be introspection on the part of the respondents as to whether they could not justifiably be accused of a blanket obstructive approach. The high court erred in concluding that the application of s 3 *(b)* of the Act was considered by the RAB.

Narrow view of persecution

[84] Moreover, the appellants also justifiably complained that the RSDOs and the RAB took an impermissibly narrow view of persecution when it considered the applications for refugee status. As shown above, in five of the decisions, the RAB asserted that the appellants before it needed to show that they were persecuted for political reasons. Section 3*(a)* provides that refugee status may be afforded to any person who has well-founded fear of persecution on wider grounds, namely, 'by reason of his or her race, tribe, religion, nationality, political opinion or membership of a political social group'. This too, ought to have been recognised by the high court. The appellants submitted that, in any event, many of them met even the narrow criteria applied by the RSDOs and the RAB, especially those who referred to attempted recruitment by Al-Shabaab.

[85] The appellants pointed out that the 2010 UNHCR guidelines confirmed that fear of recruitment or retaliation from Al-Shabaab for failing to join is indeed a form of persecution. That fear was certainly expressed by some of the eight asylum seekers. It was simply afforded no validity at all by the RAB. Furthermore, the RAB adopted the attitude that threats to family and friends do not qualify as fear of persecution. The UNHCR Handbook, at para 43, makes it clear that those claims had to be considered in determining whether an asylum seeker had a well-founded fear that he or she will sooner or later become a victim of persecution. In the present instance they were not considered.

Failure to apply the audi principle

[86] There is also substance to the complaint by the appellants that the eight asylum seekers were not afforded an opportunity to respond to that which the decision makers

considered adverse to their case. Fundamental fairness dictates that such an opportunity should be afforded to an asylum seeker. They need to know the substance of alleged adverse information and provided an opportunity to controvert it.[18] The high court had held that there was no need for the RAB to confront the asylum seekers with country of origin information, as they had failed on their own, to come up with substantive bases justifying the grant of refugee status. Besides the error of that assessment due to a failure to obtain further information and evidence, it also flies in the face of the decision of the Constitutional Court in Gavric, at paras 79-80, and against a principle of long-standing. The Constitutional Court in Gavric stated the following:

'[A] person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the *maxim audi alteram partem* (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.

In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way. In *Foulds*, Streicher J held that a decision maker was under an obligation to disclose adverse information and adverse policy considerations, and an affected person an opportunity to respond thereto. If an administrator is minded to reject the explanations of an interested party, she should at least inform the party why she is so minded, and afford that party the opportunity to overcome her doubts.'

Interpreters

[87] Insofar as the appellants' complaint against the failure to provide interpreters is concerned, the position is complicated in that the statutory obligation to provide interpreters is restricted to where it is reasonably practicable to do so. And the position is further complicated when an asylum seeker arrives with an interpreter in tow, leaving the RSDO or the RAB in an invidious position. In my view, the statutory obligations, the decisions of our courts, and international best practice, make it clear that the decision-maker should be attuned to ensuring that there is effective communication and that effective assistance in rendered. This is exemplified by the new statutory requirement,

[18] See *Gavric* fn 18 above paras 79-80 and *AOL v Minister of Home Affairs* 2006 (2) SA 8 (D) para 13.

referred to earlier, that care should be taken, with reference to PAJA, to ensure that an applicant for refugee status fully understands his or her rights and obligations and the evidence presented. This was essentially so even prior to the amendment.

Onus, credibility, and adjudication

[88] It was submitted on behalf of the appellants with, reference, *inter alia*, to *FNM v Refugee Appeal Board (FNM),*[19] that there is a shared burden of proof in relation to meeting the requirements for refugee status, between the applicant and the decision maker, which, it will be recalled, was rejected by Mlambo JP. *FNM*, in dealing with the burden of proof, *relied on Tantoush v Refugee Appeal Board and Others (Tantoush).*[20] At para 48 of *FNM*, the following appears:

'In summarising the nature of the burden of proof in its decision, the RAB simply stated that the burden rested on the applicant. It made no reference to the required inquisitorial and facilitative approach. Nor did it refer to the lower standard of proof that applies or the requirement of a liberal application of the benefit of doubt principle. No reference was made to its powers under s 26. Nor were any used.'

[89] In *Tantoush*, the court held, with reference to a case decided in the United States of America, namely*, Immigration and Naturalization Service v Cardozo Tonseca,*[21] that in relation to determining qualification for refugee status – in the case before it in relation to persecution – the test is 'a reasonable possibility of persecution' and that the ordinary civil standard of proof is too onerous. In this regard, reliance was also placed on *Fang v Refugee Appeal Board* and Others[22]and *Van Garderen NO v Refugee Appeal Board and Others (Van Garderen).*[23] In *Van Garderen,* the court stated the following:

'In my view 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 *Van Garderen*, the following appears:

---

[19] *FNM v Refugee Appeal Board* 2019 (1) SA 468 (GP).
[20] *Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 (T)*
[21] *Immigration and Naturalization Service v Cardozo Tonseca* 480 US 421 (1987) at 440.
[22] *Fang v Refugee Appeal Board* and Others 2007 (2) SA 447 (T).
[23] *Van Garderen NO v Refugee Appeal Board and Others* (TPD case no 30720/2006 19 June 2007).

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

[90] It must be said that a careful reading of the judgment of *Cardozo Tonseca* shows that the court did not contrast the ordinary civil standard of proof with the standard to be applied in general in refugee cases. It in fact contrasted two distinct American statutory standards, namely, the standard to meet the requirements for asylum, on the one hand, and the standard to successfully resist deportation, on the other. The analysis of that case in *Tantoush* is thus, strictly speaking, not correct.

[91] Even though *Tantoush* and some of the allied cases and the submissions on behalf of the appellants, referred to in para 74 above, all appear to confuse the duty imposed on the decision maker to assist in gathering evidence and information before an assessment is made with the question of the onus, they are unassailably correct that a duty rests on a decision-maker or examiner to be of assistance to an applicant for asylum status, as envisaged in the UNHCR Handbook, in presenting as full a case as possible before a determination on refugee status is made. This, as discussed above, is borne out by the applicable statutory provisions, reinforced by the decisions of our courts on what a fair procedure should entail, *and* on international best practice, reflected in the UNHCR Handbook.

[92] The UNHCR Handbook, not unsurprisingly, accepts that, in principle, in meeting the standard for refugee status an applicant bears the burden of proof. That, however, does not mean the standard we would conventionally apply in civil cases, namely that he/she who asserts an entitlement must prove it on a balance of probabilities, is without more, to be applied in refugee cases. In this regard, the UNHCR Handbook, consonant with our Constitutional values, is helpful. As indicated in para 196 of the UNHCR Handbook, referred to above, because of the peculiar situation that refugees find themselves in, corroborative documentation or evidence might not be available and that this factor should be considered. In addition, in paragraph 197 of the UNHCR Handbook, it is postulated that the requirement of evidence ‘should thus not be too strictly applied’.

A decision-maker is also enjoined in terms of paragraph 198 of the UNHCR Handbook to consider that an applicant for refugee status, given what he or she might have been subjected to, might very well be reluctant to speak freely. The inquisitorial and facilitative nature of the proceedings, statutorily dictated, means that an assessment to determine an entitlement to refugee status is more flexible than would otherwise be the case. Simply put, it is for the applicant for refugee status to show that he or she meets the requirements for refugee status, but in considering the application a decision maker must take the aforesaid factors into account. So too, in assessing credibility, these factors must be considered, against the totality of the evidence and information obtained and presented. It is thus a more flexible yardstick.

Substitution order not warranted

[93] It is now necessary to deal with the prayer by the appellants that this Court, after setting aside the order of the RAB, should, instead of remitting the matter for reconsideration, itself decide the applications for refugee status. This submission has a fundamental flaw. The appellants themselves contend that the RSDO and the RAB ought to have engaged in further evidence and information gathering. Part of that process would involve engaging, *inter alia*, with specialist agencies such as the UNCHR. It is clear from the submissions by the appellants themselves that the full spectrum of evidence and information, upon which such a decision can be predicated, is lacking. Moreover, the information supplied by the appellants in their founding affidavit is now outdated, not least because of the long time-lag before the judgment was delivered. As things presently stand, we have no information on record on what the current situation is in Somalia. It must also be emphasised that courts adhere to the doctrine of the separation of powers and are cautious not to trespass on the terrain of other arms of State, not least of all because the administrative functionaries and bodies vested with the power to make decisions are expected to have the experience and specialist knowledge pertaining to their areas of operation and the necessary resources to enable them to perform their functions and execute their duties.[24] It is only in exceptional cases that a court will

[24] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004(7) BCLR 687 (CC); *Makungubila* fn 25 above at para 31*, Logbro Properties*

exercise a power of substitution and will only do so when it is in as good a position as an administrator to make such a decision and the decision by the administrator is a foregone conclusion.[25] For the reasons aforesaid, this is not a case in which a substitution order is justified.

Declaratory orders, structural interdict and those not presaged in the notice of motion not justified

[94] In light of what is set out above the range of declaratory orders sought by the appellants in paragraph 5 is unnecessary. That takes me to the structural interdict sought in paragraph 6 of the notice of motion, set out in para 4 above. It will be recalled that the appellants require the DG and the Minister to investigate and identify the causes of the repeated errors in decision making by the RAB and to develop a plan, in consultation with the first appellant and other interested parties, to address the causes of the repeated errors and to report to this Court, on affidavit within a specified timeline, on its findings and the plans it developed.

[95] The statutory re-modelling referred to earlier in this judgment, namely, the amendments to the Act and the new regulations, have overtaken the relief sought. The legislature has seen fit to replace the RAB with the RAA and has prescribed legal qualifications for its chairperson and for such members as the Minister may determine, having regard to the volume of work it has to perform.[26] Furthermore, an appeal may, in terms of s 8C of the Act, unlike in the past, be determined by a single member or such members as the RAA may deem necessary. The amendments and the accompanying regulations have made it clear that PAJA obligations must be complied with and that the rights of applicants must be respected. It sets out clear obligations resting on an RRO, an RSDO and the RAA, leading up to and including the decision, granting, or refusing an application for refugee status. The Act and the regulations installed a new RAA appeal structure, with qualified persons who, at least notionally ought to be better equipped to

---

CC v Bedderson NO and Others [2002] ZASCA 135, [2003] 1 All SA 424 (SCA) para 21, *Gauteng Gambling Board v Silverstar Development Ltd and Others* (80/2004) [2005] ZASCA 19 para 29.

[25] See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); (2015 (10) BCLR 1199 para 47.

[26] See s 8B(1) of the Act.

see to it that the statutory scheme, which is clear and insistent about the relevant functionaries having to observe the rights of applicants for refugee status, is properly applied.

[96] The amendments also appear to confront the high volumes of work and backlog, by allowing individual members of the RAA to hear and determine appeals. The first appellant and those whose interests it strives to advance and protect would be better served by studying how the new structure operates and how the Act is presently being applied and whether there is adherence to its core principles and then to consider whether an approach to court is warranted. In any event, although there appears to be some force in the submissions that at the time the eight asylum seekers applied there was an obdurate rigidity and perhaps even an obstructiveness on the part of decision-makers and that the decisions evinced a pattern of disregard for fundamental principles, it is also true that what we have before us are the particulars of the cases of the eight asylum seekers and the decisions related to them. In these circumstances, it is somewhat difficult to direct the investigation sought so that an outcome is effective. More importantly, the factors set out earlier in this paragraph, militate against the structural interdict sought by the appellants.

[97] There is one other aspect that requires brief attention. Though not presaged in the notice of motion the appellants, before us, sought alternative relief specified in an annexure to their heads of argument. This included, in the event that we were disinclined to make a substitution order, an order remitting the matter back to the high court and providing for an exchange of further affidavits to deal with*, inter alia*, recent developments that might affect an order of substitution by the high court. The appellants also sought further declaratory orders which would compel the DG and the Minister to provide the high court with details of the present membership of the RAA; the current backlog and the approach that the RAA intends to take in relation to that backlog; the steps the RAA envisages in relation to ensure that past errors do not re-occur; and the steps the DG and the Minister will take to support the RAA. First, it is unfair and unprecedented for a litigant to seek extensive substantive relief not foreshadowed in the notice of motion, especially

when what is sought is not dealt with on affidavit, thus not providing an opponent an opportunity to deal with it. It is simply not relief that I am willing to grant.

[98] I understand the frustration of the eight asylum seekers and the prejudice caused by the years of waiting for their status to be resolved. It appears to me to be fair, after setting aside the decisions refusing refugee status, to order the RAA to hear the appeals afresh and to complete the process and to arrive at decisions, in line with the principles set out above, within a relatively short time frame. The appellants accepted that the new appeals fell to be dealt with in terms of the Act as amended read with the new regulations. The transitional provisions brought about by the amendments to the Act dictate this.[27]

[99] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and substituted as follows:

‘1.1 The applicants’ delay bringing the review of the decisions by the Refugee Appeal Board outside the 180 day time limit prescribed in the Promotion of Administrative Justice Act 3 of 2000 is condoned.

1.2 The following decisions of the Refugee Appeal Board (“RAB”) are reviewed and set aside:

(a) Appeal number 2923/14 of 14 October 2014, dismissing the appeal of Mr Hassan Abdinasir Osman.

(b) Appeal number 3459/14 of 1 December 2014, dismissing the appeal of Mr Ali Jamac Khayre.

(c) Appeal number 1212/14 of 21 November 2014, dismissing the appeal of Mr Abdulkadir Mohamed Omar.

(d) Appeal number 3848/14 of 2 March 2015, dismissing the appeal of Mr Abdirahman Ali Mahamed.

(e) Appeal number 2683/14 of 28 November 2014, dismissing the appeal of Mr Mohomed Ahmed.

---

[27] See s 31 of the Act.

(f) Appeal number 3455/14 of 14 October 2014, dismissing the appeal of Mr Mohamed Mahmud Osman.

(g) Appeal number 538/13 of 26 March 2014, dismissing the appeal of Mrs Maryama Muhumed Kahin.

(h) Appeal number 1790/13 of 22 May 2015, dismissing the appeal of Mr Abdullahi Bashir Hassan.

1.3 The 2nd to 9th applicants' appeals are remitted to the Refugee Appeals Authority for hearings afresh, with hearings to commence not later than Monday 4 October 2021 and decisions to be rendered no later than Friday 5 November 2021.

1.4 The respondents are ordered to pay the appellants' costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.'

3 The hearings and the adjudication of the appeals referred to in the substituted order are to be conducted in terms of the principles set out in paras 71 to 92 of this judgment under the various subheadings.

_____

M S NAVSA

Acting Deputy President

Appearances:

For appellants:	N C Ferreira appearing with C McConnachie
Instructed by:	Lawyers for Human Rights, Johannesburg Law Clinic, Johannesburg Webbers, Bloemfontein
For respondents:	W Mokhare SC and L Mboweni
Instructed by:	State Attorney, Pretoria State Attorney, Bloemfontein.