



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

File Ref No: GP/1415/0433

In the matter between:

MT

Complainant

And

THE REFUGEE APPEAL BOARD

First Respondent

THE CHAIRPERSON OF THE REFUGEE APPEAL BOARD

MR. MALEMATJA MOHALE

Second Respondent

THE DEPARTMENT OF HOME AFFAIRS

Third Respondent

THE MINISTER OF HOME AFFAIRS

Fourth Respondent

FINAL REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission / the SAHRC) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as 'state institutions supporting constitutional democracy'.
- 1.3. In terms of Section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.3.1. Promote respect for human rights and a culture of human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Section 184 (2) (a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5. The *South African Human Rights Commission Act* (the SAHRC Act),¹ further supplements the powers of the Commission. The SAHRC Act confers powers on the Commission to *inter alia* conduct or cause to be conducted any investigation necessary for the exercise of its broad powers under the Constitution.

¹ Act 40 of 2013

2. THE COMPLAINANT

- 2.1 The Complainant is an adult male asylum seeker, originally from the Democratic Republic of the Congo.
- 2.2 The Complainant's name and further particulars have been withheld from this report for the purposes of his safety.² He will be referred to throughout this report as the 'Complainant'. The Complainant's name and other necessary particulars have been provided to the Respondents.

3. THE RESPONDENTS

- 3.1. The First Respondent is the Refugee Appeal Board (RAB / the First Respondent), an independent body established in terms of section 12 (1) of the Refugees Act³ (the Refugees Act), with quasi-judicial functions.
- 3.2. The Refugee Appeal Board can sustain, substitute or set aside a decision of a Refugee Status Determination Officer, who makes determinations on asylum claims.⁴
- 3.3. The Second Respondent is Mr. Malematja Mohale, the Chairperson of the Refugee Appeal Board, cited in his official capacity.
- 3.4. The Third Respondent is the Department of Home Affairs (the Department) cited herein given its mandate to control, regulate and facilitate immigration and the movement of persons and its oversight of the asylum system in South Africa.

² In *AS and Others v Minister of Home Affairs and Others 2010/0101* (Unreported) the court ordered that the applicant, and his family's names and personal information be kept confidential on the basis that he was seeking asylum and feared persecution in his country of origin

³ Act 120 of 1998 as amended

⁴ See Refugee Appeal Board Rules, 2013

- 3.5. The Fourth Respondent is the Minister of Home Affairs cited herein given that the Minister exercises oversight of the Refugee Appeal Board and is responsible for the administration of the Refugees Act in terms of Section 6 (2) of the Refugees Act.
- 3.6. The Commission notes that the Department of Home Affairs does not control the daily operations of the Refugee Appeal Board. In this regard, the Department and the Minister are cited herein given that the Minister exercises oversight of the RAB and has an interest in the findings and recommendations contained in this report.
- 3.7. As will be evident from paragraph 7 below, on receipt of the Commission's provisional report, the Department of Home Affairs requested that it be extracted from the report. The Commission has considered this request and elected to retain the Department of Home Affairs as a Respondent in this report given its interest in the findings and recommendations. No relief however is sought against the Department.

4. THE COMPLAINT

- 4.1. In October 2014, the Commission received a complaint from the Complainant.
- 4.2. In the complaint, the Complainant alleged, amongst other things, that:
 - a. He is an asylum seeker who fled from his country of origin, the Democratic Republic of the Congo (DRC), due to political persecution and arrived in South Africa in 2003;
 - b. He is married and has 5 children;
 - c. His wife and children have a separate file at the Department of Home Affairs for their asylum applications and the Complainant has been unsuccessful in consolidating his and his family's asylum applications under one file;

- d. Shortly after arriving in South Africa, the Complainant applied for asylum in terms of the Refugees Act;
- e. He received a Temporary Asylum Seeker permit;
- f. He continually renewed, and continues to renew his asylum seeker permit;
- g. In 2009, his asylum application was rejected by a Refugee Status Determination Officer as unfounded in terms of Section 24 (3) (c) of the Refugees Act;
- h. Thereafter, he appealed the decision to reject his asylum application to the Refugee Appeal Board;
- i. This appeal is reflected on his asylum seeker permit which reads: 'TO BE BOOKED FOR RAB HEARING';
- j. To date, he has not been notified of a date for his appeal hearing by the Refugee Appeal Board.

4.3. The Complainant approached the Commission seeking assistance in securing a date for his appeal hearing from the Refugee Appeal Board (RAB).

4.4. The Complainant explained to the Commission that he was under enormous stress due to the uncertainty of waiting in excess of a decade to have his asylum application finalised.

4.5. In particular, the Complainant detailed to the Commission the negative impact the delay in processing his asylum claim has had upon his family and work life, as well as his psychological well-being, given the lack of finality on his asylum claim.

5. STEPS TAKEN BY THE COMMISSION

5.1. The complaint was administered in terms of the South African Human Rights Commission Complaints Handling Procedures, Government Gazette No. 34963 of 27 January 2012.

- 5.2. On 7 November 2014, the Commission addressed correspondence to the Deputy Director General (DDG) of Immigration Services, Mr. Jackson MacKay, within the Department of Home Affairs, requesting reasons for the delay in processing the Complainant's asylum claim.
- 5.3. On 12 November 2015, Mr. MacKay responded to the Commission and advised that the Commission should engage directly with the Chairperson of the Refugee Appeal Board.⁵
- 5.4. On 13 November 2015, the Commission addressed correspondence to the Second Respondent and the RAB.
- 5.5. In the correspondence, the Commission set out the version of the Complainant, which is fully set out in paragraph 4 of this report, and called for a response.
- 5.6. Further, in the correspondence, the Commission sought the following from the RAB, in addition to their response:
 - 5.6.1. A date for the Complainant's RAB hearing; alternatively reasons for a hearing date not being scheduled despite the long lapse of time since the Complainant appealed the decision to reject his asylum claim; and
 - 5.6.2. A consolidation of the asylum applications of the Complainant and his family under one file.
- 5.7. In support of the request to consolidate the Complainant's file with that of his family, the Commission attached copies of the Complainant's marriage certificate as well as copies of the asylum permits of the Complainant; his wife and his children.

⁵ Please see note 5 above.

- 5.8. No response was received to the correspondence from the Commission by the RAB.
- 5.9. Follow up correspondence was sent to the RAB by the Commission on:
- 5.9.1. 9 January 2015;
 - 5.9.2. 2 February 2015;
 - 5.9.3. 10 February 2015;
 - 5.9.4. 3 March 2015;
 - 5.9.5. 27 August 2015; and
 - 5.9.6. 15 September 2015.
- 5.10. Correspondence was addressed to both the Second Respondent, as well as the Senior Administration Officer of the First Respondent, Ms. Sarie Brits.
- 5.11. No written response has been received to any of the correspondence from the Commission to date. After the Commission issued its provisional report on the matter, the Commission received a response from the RAB.
- 5.12. Given the lack of a written response to the Commission's letters, the Commission contacted the Second Respondent telephonically on 28 April 2015.
- 5.13. The Second Respondent undertook to look into the matter and revert with a date for the hearing of the appeal as soon as possible.
- 5.14. On 11 May 2015, the Complainant advised the Commission that he had indeed been contacted by the Second Respondent who advised him that he was in the process of trying to locate the Complainant's file.
- 5.15. On 27 August 2015, the Commission again contacted the Second Respondent telephonically.

- 5.16. The Second Respondent requested that we forward the correspondence sent to him to Ms. Sarie Brits of the First Respondent, for her urgent response. He confirmed the email address for Ms. Brits during the telephone conversation.
- 5.17. The Commission thus forwarded the correspondence to Ms. Brits on 27 August 2015.
- 5.18. Despite these numerous attempts to elicit a response no written response was received from the RAB.
- 5.19. The RAB has been aware of the Commission's involvement in the matter since November 2014, but failed to adequately respond both to the Commission and the Complainant.

6. **APPLICABLE LEGAL FRAMEWORK**

The United Nations Convention relating to the Status of Refugees⁶ and Protocol Relating to the Status of Refugees⁷

- 6.1. South Africa is a party to both the United Nations Convention relating to the Status of Refugees (the 1951 Convention) and the Protocol Relating to the Status of Refugees (the Protocol).
- 6.2. As a party to both the 1951 Convention and the Protocol, South Africa has committed to upholding and protecting the rights of those who have fled their countries of origin and seek safety in the Republic. The protections in the 1951 Convention and the Protocol find expression in South Africa's domestic legislation.

⁶ Known as the 1951 United Nations Convention

⁷ 1967 Protocol Relating to the Status of Refugees

The (former) Organization of African Union Convention Governing Specific Aspects of Refugee Problems in Africa⁸

6.3 South Africa is also party to the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention). The protections in the OAU Convention are found in section 3(b) of the Refugees Act. This section expands the definition of a refugee to include persons fleeing from external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of their country of origin or nationality.

The Constitution of the Republic of South Africa

6.4 Section 33 of the Constitution⁹ provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It also provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons for the decision.

Domestic Legislation

The Refugees Act

⁸ Known as the OAU Convention of 1967

⁹ In particular, Section 33 of the Constitution provides that:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - a. Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. Impose a duty of the state to give effect to the rights in subsections 1 and 2; and
 - c. Promote efficient administration.

- 6.4.1 The Refugees Act provides that a person qualifies for refugee status, if, owing to a well-founded fear of being persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his origin and is unable or unwilling to avail himself or herself of the protection of that country.
- 6.4.2 Or 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.
- 6.4.3 The Refugees Act provides for the determination of refugee status by a Refugee Status Determination Officer.
- 6.4.4 An asylum seeker must present himself or herself at a Refugee Reception Office in order to apply for asylum, where his/her application is determined by a Refugee Status Determination Officer (RSDO).
- 6.4.5 The RSDO makes a decision as to whether or not the asylum seeker is in fact a refugee in terms of the Refugees Act.
- 6.4.6 In terms of section 24, the RSDO may grant or refuse asylum in South Africa.
- 6.4.7 An application may, amongst other things, be rejected by an RSDO as 'unfounded'.
- 6.4.8 An applicant whose application is rejected as unfounded may then lodge an appeal with the RAB.
- 6.4.9 In terms of section 14 of the Refugees Act, the RAB must amongst other things determine any appeal lodged in terms of this Act.

6.4.10 After hearing an appeal, the Appeal Board may confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24 (3).

The Refugee Appeal Board Rules¹⁰

6.4.11 The Refugee Appeal Board Rules do not stipulate a time period within which an appeal must be heard.

6.4.12 The Refugee Appeal Board Rules provide that the RAB may decide to hear two or more appeals together where decisions are taken in respect of persons who are members of the same family.

Promotion of Administrative Justice Act

6.4.13 'Administrative action' is defined in the Promotion of Administrative Justice Act¹¹ as, broadly, any decision, or failure to take a decision, by an organ of state when exercising a public power or performing a public function in terms of legislation, which adversely affects the rights of any person (our underlining).

6.4.14 'Decision' under PAJA includes the failure to take a decision.¹²

6.4.15 Section 6 (2) (g) of PAJA provides for an administrative review where there has been a failure to take a decision.

6.4.16 Section 6 (3) (a) of PAJA allows for an administrative review where there has been an unreasonable delay in taking a decision and there is no law that prescribes a period within which the administrator must take the decision.

¹⁰ The Refugee Appeal Board Rules, 2013, G.N. 37122

¹¹ Act 3 of 2000

¹² See the definition section of PAJA

Case law

- 6.5 In the case of *Tantoush v Refugee Appeal Board*¹³ the court affirmed that the decisions of both RSDOs as well as the Refugee Appeal Board amount to 'administrative action' under Section 1 of PAJA.
- 6.6 In *Katabana v the Chairperson of the Standing Committee for Refugee Affairs*¹⁴, the Court found that the applicant had been waiting for more than three years for a decision on his asylum claim. It held that for the applicant to have to wait further for the decision would not be in the interests of justice (in this particular case the court substituted the decision of the Standing Committee for Refugee Affairs).
- 6.7 In the case of *Mbanga v MEC for Welfare, Eastern Cape and Another*¹⁵, an applicant for a social grant (an old-age pension) waited for more than two and a half years with no response from the Eastern Cape Department of Social Development. The court held that three months was a reasonable time within which the application for the grant should have been considered, finding the delay unreasonable.
- 6.8 In particular, Judge Leach stated¹⁶ that while '*patience is a virtue, I venture to suggest that even the patience of Job would have been tested by the inefficiency of the officialdom in this case, as notwithstanding regular enquiries being made to the Department of Welfare in Port Elizabeth, time passed without any indication whether the applicant's application had been granted or refused.*'
- 6.9 In the case of *Vumazonke and Others v MEC for Social Development and Welfare for Eastern Cape Province*¹⁷ the officials had a duty to take decisions in respect of the applicants' applications for disability grants. There was no law that prescribed a time period within which such decisions had to be taken. In addition, decisions had

¹³ 2008 (1) SA 232 (T)

¹⁴ Unreported judgment no. 25061/2011. 14 December 2011

¹⁵ 2002 (1) SA 359 (SE):369B-G

¹⁶ 2002 (1) SA 359 (SE):662 H-I

¹⁷ ECJ (050/2004) [2004] ZAECHC 40 (25 November 2004): 39

not been taken despite the passage of time. Judge Plasket held that in the circumstances, there had been an unreasonable delay in taking the decisions. He held that any delay beyond three months is unreasonable in the absence of special circumstances. The applicants in this case were entitled to appropriate relief for the infringement of their fundamental right to lawful administrative action occasioned by the Department's failure to take a decision on their applications.

7 THE PARTIES' INPUT ON THE PRELIMINARY REPORT

7.1 In line with its procedures, the Commission issued its preliminary report to the parties for comment.

7.2 On 31 March 2016, the Commission received a response from the RAB.

7.3 The response states that:

7.3.1 Ms. Sarie Brits of the RAB stated to the Chairperson of the RAB that she did not receive any correspondence from the Commission;

7.3.2 The landlines of the RAB can only make outgoing calls and cannot receive calls from the 'outside' *'so Ms. Brits could only have received phone calls through her personal cellphone, which does not seem to have been the case'*;

7.3.3 Mr. M. Chipu ceased to be the Chairperson of the RAB with effect from 30 September 2015 thus any correspondence sent to him from the Commission post this date would not have been received.

7.4 On 23 March 2016, the Commission received a response from the Deputy Director General: Immigration Services, within the Department of Home Affairs.

7.5 In the response, the Department states that:

7.5.1 The Department has not been engaged on the matter to date despite initial correspondence from the Commission where after it referred the Commission to the RAB;

7.5.2 The former Chairperson of the RAB, Mr. Chipu, left the employ of the RAB on 30 September 2015;

7.5.3 The RAB operates independently of the Department and the Department does not hold sway over their day to day operations;

7.5.4 Despite the independence of the RAB, the Department has noted a significant backlog at the RAB due to limited resources and budget. In this regard, the Department has held several meetings with the RAB. In addition, the Minister travelled to the United Nations High Commissioner for Refugees (UNHRC) in 2015 to discuss, amongst other things, a backlog eradication process at the RAB. In this regard, the UNHCR and the DHA currently have a working group in place to address the modalities of a planned intervention to address backlogs at the RAB. The UNHCR has been asked to fund a segment of the backlog;

7.5.5 An internal review process of the RAB revealed that the RAB backlog '*has been found to be intractable...*' due to amongst other things, the readjudication approach being adopted by the RAB and the requirement for in-person hearings;

7.5.6 In order to address the issue of capacity of the RAB, the Minister is in the process of tabling a Bill through Parliament which will enable the future appointment of RAB members on a more flexible basis in order to address the backlog of the RAB.

7.6 Following receipt of the comments from the Department of Home Affairs, on 25 July 2016 the Commission sent a copy of the Provisional Report to the Minister of Home Affairs for comment and input. Having received no response by 16 August 2016 as was requested, the Commission resent the correspondence to the Minister on 3 October 2016. No response has been received, to date.

8. ANALYSIS AND FINDINGS

8.1 Before going into the findings made by the Commission it is important to note that the Commission is enjoined by virtue of the Constitution and the SAHRC Act, to issue recommendations for the promotion and strengthening of protections of human rights.

8.2 Having noted the significant backlogs referred to in paragraph 7.5.4 above, its own experience in the course of investigating this matter, and the plight of persons who are impacted by delays in the processes of the RAB, their heightened vulnerability, the Commission proceeds to issue the recommendations below. These recommendations are intended to strengthen and mitigate adverse impacts on persons seeking to secure refugee status in our country.

8.3 It is recorded that during its investigation into this matter, the RAB issued the Complainant with a hearing date. The hearing was subsequently held on 26 April 2016, after which a decision to uphold the appeal and grant the Complainant refugee status was made. Despite the granting of a hearing date and the RAB's subsequent finding that the Complainant is a refugee, the Commission nevertheless finds it necessary to proceed to make certain findings against the RAB in respect of its conduct. These findings follow hereon.

- 8.4 During the Commission's investigation, the RAB did not respond to the Commission's numerous enquiries regarding the Complainant's hearing, made both in writing over a period of a year, and telephonically.
- 8.5 The Commission was thus unable, prior to the issuing of its preliminary report, and now its final report, to ascertain the reason for the unduly long delay in setting down the hearing of the Complainant's appeal against the decision of the RSDO.
- 8.6 In the absence of such information and based on the facts before it as well as an application of the legal principles set out above, the Commission finds that the RAB's delay in communicating a date for the Complainant's hearing, thereby resulting in the failure to take a decision on his appeal, amounts to 'administrative action' in terms of PAJA.
- 8.7 Further, the Commission finds that the RAB's failure to take a decision on his appeal until recently falls foul of the law in that:
- a) An unreasonable time period passed since the Complainant lodged his appeal with the RAB without receiving any response from the RAB;
 - b) In the event that the Complainant's version is accepted, the RAB failed to set a date for his hearing for approximately 6 years;
 - c) In the event that the appeal did not come to the attention of the RAB when the appeal was initially lodged in 2009 (for whatever reason), the RAB has been aware of the matter through the Commission's intervention since November 2014 and failed to hear the appeal until 6 April 2016, after this report was issued in draft form;
 - d) The RAB's failure to take a decision on the Complainant's asylum application adversely affected his rights in that, as an asylum seeker, he has not been

able to travel, amongst other things and his status in South Africa remained precarious and temporary for an unacceptable and unlawful amount of time;

- 8.8 The Commission finds that the Complainant's fundamental right to lawful administration in terms of the Constitution has been infringed.
- 8.9 On conclusion of its investigation, a preliminary version of this report was circulated to the First and Second Respondents for comment and input.
- 8.10 As is set out above, the First Respondent denies receipt of correspondence from the Commission.
- 8.11 In March 2016, following receipt of the Commission's provisional report, the First Respondent contacted the Complainant to schedule the hearing of his appeal, which was then heard on 6 April 2016 and both he and his family have been granted refugee status.

9. RECOMMENDATIONS

9.1 The Commission recommends that:

- a) The First Respondent issues the Complainant with a written apology for failing to adjudicate his matter timeously and failing to respond substantively to numerous requests for information regarding his hearing.
- b) The First Respondent furnishes the Commission, within 3 months of this report, a report detailing the back-log of appeal matters that are yet to be heard as well as steps it intends to take to address the back-log of appeal matters.

- c) The First Respondent takes steps, **within 30 days**, including putting up notices at Refugee Reception Offices and its offices, to notify the public of the telephone numbers and / or cell phone numbers that can be used to contact it, given that the landlines do not take incoming calls as per the First Respondent's response to the Commission. In addition, First Respondent must ensure that those telephone numbers are properly attended/ staffed and answered when called.

10. APPEAL

- 10.1 You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**Appeals' Unit
South African Human Rights Commission
Private Bag X2700
Houghton
2041**

SIGNED ON THIS THE 4th DAY OF AUGUST 2017.



Adv. B. Majola

Chairperson

South African Human Rights Commission