

Refugee Status and Procedural Fairness

Case: *LK v Chairperson Standing Committee for Refugee Affairs and Others (D3492/2019) [2023] ZAKZDHC 6 (15 February 2023)*

INTRODUCTION

The case of *LK v Chairperson of the Standing Committee for Refugee Affairs and Others (D3492/2019) [2023] ZAKZDHC 6 (15 February 2023)* addresses pivotal issues regarding the determination of a person's refugee status and procedural fairness surrounding such matters.

BACKGROUND

A refugee is an individual who has been forced to flee conflict or persecution and has crossed an international border to seek safety. They cannot return to their country without risking their life or freedoms. It is a legal term that carries with it certain protections to which only refugees are entitled. The applicant in this case is an orphan who, after her parents were killed in the Democratic Republic of Congo ("DRC"), resided for years with her late parents' friends. When compelled to leave their home, she travelled to South Africa to reunite with her sister. The applicant's sister is a refugee, resident in South Africa in terms of a temporary asylum permit originally issued to her in 2008.

The applicant had been residing in South Africa since she was sixteen years old. Attempts by the applicant and her sister (with the assistance of a social worker) to finalize the foster care process were abortive and no concrete steps relating thereto had been taken by the time that the applicant attained majority. Once the applicant became a major, she applied for asylum in terms of the Refugees Act 130 of 1998.

On 26 March 2019, the applicant was detained and kept in custody ahead of a contemplated deportation. On 18 April 2019, the applicant's detention, for the purposes of her deportation to the DRC, was extended for a further 90 days.

On 29 April 2019, the applicant's attorneys launched an urgent application for orders directing that the applicant be released from detention and that such release order operate in effect as an interim interdict with immediate effect against her further arrest, pending the outcome of Part B of the application (which was a review of the first respondent's decision to reject the applicant's

By **Phathutshedzo Tshindane** (Candidate Attorney), **Michelle Venter** (Associate) and **Pierre van der Merwe** (Partner)

30 July 2024

application for asylum). The Court granted an interim Order on 3 May 2019 and the applicant has remained in South Africa in terms of that Order since.

CENTRAL ISSUE

The detention of the applicant was the genesis of the application before the Court in this case. The court was required to decide whether the decision of the Standing Committee for Refugee Affairs to withdraw the applicant's refugee status was unlawful and unconstitutional, and whether the High Court should substitute that decision by declaring that the applicant qualifies for refugee status and, in so doing, direct the respondents to issue her with documentation recognising her refugee status.

LEGAL FRAMEWORK

The legal framework is cemented in the Refugees Act 130 of 1998, which outlines the measures or standards for granting refugee status and the procedures to be followed in the determination process. Section 21(2A) of the Act requires that every applicant when making an application, should declare "all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum". The case also investigates the interpretation of what constitutes a "well-founded" fear of persecution, as stated in section 3 of the Refugees Act 130 of 1998.

COURT'S INTERPRETATION

Essentially, the applicant argued that her status as a dependent of Ms. K (being a destitute member of Ms. K's family) entitled her to be granted asylum in terms of the Act. The core of the applicant's application is that being a dependent of a refugee as contemplated in section 3(c) of the Act is a self-standing category under which asylum can be granted to an applicant.

The Court did not agree with this argument. Firstly, the Court found that the applicant did not establish that she had fled her home country because she feared persecution.

The Court stressed that the applicant was not compelled to flee for any of the reasons stated in section 3 of the Refugees Act 130 of 1998, as the applicant was thrown out of her guardian's home due to accusations of infidelity.

Secondly, an important factor to note is that the legislation recognises that one genuine refugee is sufficient to gain asylum for their immediate family as well. section 21B obliges a person who applies for refugee status and "who would like one or more of his dependents to be granted refugee status" to include the details of such dependents in the application when applying for asylum. This provision is beneficial as it enables families, likely having faced significant challenges, to stay together or reunite. However, the Act also introduces a necessary additional verification process to prevent non-qualifying applicants from falsely claiming familial connections or exploiting a refugee's status and legal presence in the Republic for their own benefit. The argument put forth by the applicant, conflicted with the clear provisions of the Act and the procedural framework intended by the Legislature.

The Court therefore concluded that the first respondent's decision to refuse the applicant's application for asylum was legitimate and reasonable.

CONCLUSION

This case is a landmark in the regulation of refugee law, emphasising critical issues of procedural fairness, the interpretation of refugee status, and the scope of judicial review. It underscores the importance that refugee claims must be evaluated comprehensively, considering all relevant factors together under the Refugees Act 130 of 1998. This case emphasizes that asylum cannot be granted based solely on one factor but requires a holistic assessment of the applicant's circumstances and claims in light of legal provisions and procedural safeguards. It reinforces the principle that the interpretation of refugee law must be nuanced and contextual, balancing humanitarian concerns with legal clarity to ensure the integrity of the asylum process.

Please note: Each matter must be dealt with on a case-case basis, and you should consult an attorney before taking any legal action



Pierre van der Merwe
(Partner)



Michelle Venter
(Associate)



Phathutshedzo Tshindane
(Candidate Attorney)