

SOUTH AFRICA / JUDGMENT

M.A.M and Another v Director-General: Home Affairs and Another (23987/2024) [2025] ZAWCHC 226 (29 May 2025)

[2025] ZAWCHC 226**COURT**

Western Cape High Court, Cape Town

BEFORE

Da Silva Salie

CASE / FILE NUMBER

23987/2024

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FLYNOTES: IMMIGRATION – Asylum seeker – Review of rejection decision –

Reasons

provided – Acknowledged criminalization of homosexuality and prior imprisonment but dismissed fear of persecution – Internally contradictory and factually incoherent – Profound misunderstanding of legal standards governing asylum – Unintelligible and irrational decision – Falls within category of exceptional circumstances that exempt exhausting internal remedies – Application granted – Refugees Act 130 of 1998, s 24(3)(c) – Promotion of Administrative Justice Act 3 of 2000, s 7(2)(c).

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 23987/2024

In the matter between:

M[...] A[...] M[...]

First Applicant

F[...] V[...] H[...]

Second Applicant

And

DIRECTOR-GENERAL: HOME AFFAIRS

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

Coram Da Silva Salie J Date of Hearing 29 May 2025

Judgment

delivered 29 May 2025 Attorneys For Applicants Craig Smith & Associates Ref: Mr Craig Smith
Counsel for Respondents Adv. Ntokozo Mjiyako Attorneys for Respondents State Attorneys Ref:
Ms Karjiker

JUDGMENT DELIVERED AFTER HEARING ON 29 MAY 2025

DA SILVA SALIE J:

Introduction:

- [1] This is an application in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) read with section 33(1) and (2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
- [2] This matter was argued before me earlier today. The facts and the submissions by the parties were argued and ventilated in full during the hearing this morning. This judgment is delivered ex tempore and does not rehash the facts and the respective submissions in detail, save to the extent necessary and I deal with the crux of the matter and as set out later in this judgment.
- [3] The applicants seek the following relief:
 - (a) an exemption in terms of section 7(2)(c) of PAJA from having to exhaust internal remedies.
 - (b) the review and setting aside of a decision by the Refugee Status Determination Officer (RSDO), issued in terms of section 24(3)(c) of the Refugees Act 130 of 1998 (“the Refugees Act”); and
 - (c) an order remitting the application to a different RSDO for reconsideration de novo.
 - (d) costs

Background:

- [4] The First Applicant is an adult Muslim male citizen of Chad who alleges that he fled persecution on the grounds of his sexual orientation, which is criminalised in his country of origin. He was arrested in Chad during 28 September 2022 whereafter he was convicted on charges of homosexual activities and sentenced to 18 months imprisonment. On appeal, his sentence was reduced to 12 months with the option of paying a fine.
- [5] He was released from prison in February 2023. He entered South Africa in May 2023, by way of a visitor's visa. The first applicant ("applicant") has a long-term partner, the second applicant, who is a South African citizen and medical doctor. In and during 2024 he applied for asylum in terms of the Refugees Act 130 of 1998. His most recent interview was on 13 September
2024. The reasons provided by the Refugee Status Determination Officer ("RSDO") for rejecting his application are quoted as follows: (Record page 48)

"Reasons for Decision"

Passing laws in Chad is not the monopoly of the Parliament. Such power belongs concurrently to the Parliament and the Executive Branch (article 137). There is a reserved legislative domain defined by the Constitution (article 127). All other matters that have not been expressly identified to be within the ambit of the reserved legislative domain fall under the executive domain. Existing legislation on matters belonging to the executive domain can be modified by a decree after consultation with the Supreme Court (article 138). Any subsequent intervention of the Parliament in the executive domain shall be established by the Supreme Court before its eventual modification by decree.

During the discussion of a bill, if the Government is of the view that a proposal or an amendment falls outside the reserved legislative domain, it can draw the attention of the Parliament by raising the inadmissibility (irrecevabilité) of such a proposal or amendment. In case of disagreement between the National Assembly and the President of the Republic, either party can defer the matter to the Supreme Court that shall take a decision within eight days (Article 140 of the Constitution).

The judiciary is independent from the Executive and the Legislature. Judges remain in function on a permanent basis, and they are only subject to the law in the exercise of their function.

The judiciary comprises the Supreme Court which is the highest court in judicial matters, Courts of Appeal, the High Military Court, Tribunals and the Justices of the Peace.

The administration of judiciary (including the appointment, promotion, discipline and responsibility of judges, etc) is the responsibility of the High Court of the Judiciary (HCJ). The HCJ proposes Judges to the President for appointment and promotion. The Council is chaired by the President of the Republic, with the Minister of Justice and the Chairperson of the Supreme Court respectively as first and second Vice-Chairs. The other members of the HCJ are judges

elected by their peers. When sitting on disciplinary matters, the HCJ is presided over by its second Vice-Chair.

Article 157 of the Constitution provides that the Supreme Court comprises five chambers, including: the Judiciary Chamber, the Administrative Chamber, the Constitutional Chamber, the Audit Chamber and a non-permanent chamber composed of seven (7) deputies and four (4) judges of the Supreme Court elected by their peers to sit in cases of high treason.

As a result, all the tasks assigned to the former Constitutional Council and the former High Court of Justice are now devolved to the Supreme Court.

You were arrested and sentenced by the court by the court because of your sexual oriatiantaion and homosexuals' are not allowed in your country. You stated that you was released by the court because you have use a lawyer. When I accessed your information concerning Homosexuals there's a separation of powers between the executive and the judicial power in terms of the homosexual laws (eg). The Government doesn't allow same sex relations and the courts released the offenders.

Therefore your application has been rejected as Unfounded in terms of the Refugee Act No. 130 of 1998." (emphasis own)

- [6] The core of the application is that the RSDO's reasons were unintelligible, irrational and failed to consider the applicable law and the country of Chad's conditions, in particular their position on homosexuality and the other relevant factors of this asylum application.
- [7] The First Applicant submitted in support of his application for asylum that he fled Chad after being convicted and imprisoned solely for being a homosexual man. He further stated that his safety and freedom remain threatened in Chad, where homosexuality is a criminal offence. He also indicated that his family had disowned him and that he faces persecution both from the State and society at large in his home country.

Central issue: Whether the reasons are intelligible?

- [8] The central issue before this Court is whether the decision by the RSDO constitutes administrative action reviewable under PAJA and whether it falls within the category of decisions that are unintelligible or irrational for purposes of exemption from the duty to exhaust internal remedies. The respondent submits and argues that the reasons were not only adequate but so too clear. The argument follows on behalf of the respondent that the applicant does not vindicate its submission that the matter reaches the threshold as an "exceptional circumstance" to approach this Court for judicial scrutiny without exhausting the internal remedies available to him. Consequently, it is argued for the respondent that the application falls to be dismissed with costs.

- [9] During the hearing of this matter, State's counsel submitted that the applicant had not exhausted internal remedies and is thus non-suited to bring this application. He also argued that the written reasons given by the RSDO (set out above) were adequate, and that if the applicant had any difficulty with it, he ought to have requested more comprehensive reasons in terms of section 5(1) of PAJA.
- [10] The applicants submit that the refusal letter is unintelligible and irrational and thus constitutes a non-decision for purposes of PAJA. They contend that the reasons were not capable of engaging with, nor could they have assisted the First Applicant to pursue an appeal to the Refugees Appeal Authority ("RAA"). They accordingly seek exemption under section 7(2)(c) of PAJA.

Discussion:

- [11] This brings me to consider the RSDO's reasons for refusal through the lens of its adequacy and intelligibility, as this lies at the heart of the applicant's review. During argument this morning, both counsel, Mr. Smith and Mr. Mjiyako, were ad idem that the crux of this matter, the proverbial vexed question herein, is whether the reasons were unintelligible and whether in fact the applicant had exhausted its internal remedies.
- [12] The RSDO concluded that the applicant's asylum claim was 'unfounded', relying primarily on the assertion that the judiciary in Chad is independent, and that although homosexuality is criminalised, some courts had released offenders. I find the argument by State's counsel that these reasons were clear and adequate rather problematic. The conclusion of the reasons is internally contradictory and factually incoherent. It accepts the factual basis of criminalisation of homosexuality, with consequent criminal convictions and punishments in the applicant's home country of Chad, whilst simultaneously rejecting the credibility of the applicant's claim of fear future persecution.
- [13] In my view, the reasoning reflects a profound misunderstanding of the legal standards governing asylum, especially the well-founded fear of persecution required under section 3(a) of the Refugees Act. The RSDO's failure to assess the applicant's circumstances against the objective country conditions – and without

reference to UNHCR materials or other international sources – undermines the lawfulness of the decision in particular the

construction of the reasons as set forth in the refusal. No attempt was made to test or evaluate the applicant's claim that his prior arrest, imprisonment, and societal ostracization due to his homosexuality posed a continued threat. In my view, this reasoning is not only egregiously unmeritorious – it represents a failed attempt to even appear specious, let alone appear as if cogent. It is devoid of factual or legal coherence, fails to engage with the core of the applicant's claim, and disregards the legal framework that governs asylum decisions and our international obligations on the rights of LGBTQIA+ persons.

- [14] In *Makumba v Minister of Home Affairs* 2014 JDR 2674 (WCC), in an application for the setting aside of the RSDO and remit to another RSDO, the Court dealt with the issue of an applicant who had sought asylum based on fear of persecution in her home country of Malawi for being lesbian. In setting aside the decision of the RSDO, the judgment sets out at paragraph 13 and 15 thereof that Section 3 of the Refugees Act is the operative provision in determining refugee status; section 2 of the South African international obligations under Article 1A(2) of the 1951 Refugee Convention and the United Nations High Commission for Refugees (UNHCR), at paragraph 8 thereof reads:

“Sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion. Claims relating to sexual orientation and gender identity are primarily recognized under the 1951 Convention ground of membership of a particular social group.”

- [15] Not only does the RSDO reasons not in any way give recognition of our Constitutional and international obligations in recognition of the above, the RSDO's reference to a separation of powers in Chad lacks relevance to the applicant's persecution claim and his previous prosecution and imprisonment based on his sexual orientation as a gay man. The theoretical independence of the judiciary cannot override the reality that consensual same-sex conduct remains criminalised in Chad, and that the applicant was in fact prosecuted and imprisoned under those laws. If anything, the position can only be worse for him should he return as he would be a convicted person of homosexual offences. Upon conviction, he would be a repeat offender. The assertion that 'courts released offenders' ignores that harm has already occurred and fails to address the applicant's fear of re-arrest or societal persecution. After all, the laws and regulations of a country reflect its social boni mores.
- [16] The RSDO's reasons lack any intelligible or informative content that could assist the applicant in formulating an internal appeal. This falls squarely within the principles established in *Link v Director-General: Home Affairs* 2020 (2) SA 192 (WCC) and *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC), which make clear that a decision which is unintelligible or constitutes a 'non-decision' justifies direct review.
- [17] In this matter, the: “Reasons for the decision” is characteristic of a sequence of illogical babble. Words and sentences placed together under the heading “reasons” do not make it more than what it is: unintelligible. In administrative law, a decision is unintelligible when the reasons provided fail to convey the factual or legal basis of the decision, are irrational or incoherent and does not enable the affected party to determine whether or how the decision may be challenged. Such is the case here.
- [18] The refugee status determination officers cannot hide behind the hurdle for applicants having to proceed to exhaust his or her “internal remedy” when it provides unintelligent, obtuse and unfathomable reasoning. It must apply his or mind to the decisions it sets out. In

my view, the reasons by the RSDO falls squarely within the category as an “exceptional circumstance”. Section 33(2) of our Constitution, dealing with administrative action, guarantees that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The RSDO herein is bound by such obligation, his powers are not unfettered and he was required to apply his mind in a manner which provides reasons which are clear, adequate and provide a meaningful basis from which the applicant can in fact comprehend, request further reasons and decide in an informed manner as to his further rights and remedies in law or make an informed decision about his future, act with self-determination and consider his well-being.

- [19] The applicant cannot be faulted for failing to request further or comprehensive reasons. What reasons could follow an unintelligent set of “reasons” as these? While Link confirms that parties should ordinarily seek written reasons under section 5(1) of PAJA, this is not an immutable requirement. Whereas here, the reasons already provided are manifestly nonsensical and irrational, it would serve no purpose to request elaboration. The reasons merely needed to be read (or stated as it was) to be rejected for being unintelligible. Requesting additional reasons would not have cured the defect, nor would it have enabled a meaningful appeal to the Refugee Appeal Authority.
- [20] It follows that the applicant has discharged the burden of demonstrating exceptional circumstances under section 7(2)(c) of PAJA. The reasons provided to the applicant by the RSDO were unintelligible and the administrative action is reviewable on the grounds that it was not rationally connected to the information before the RSDO.
- [21] In the circumstances, and for the reasons as set out above it is just and equitable to set the decision of the RSDO aside and order that the applicant be re-interviewed before a new refugee status determination officer, for reconsideration and taking into account all relevant factors and then setting out adequate and clear reasons for the decision.

Order:

- [22] In the result, I make the following order:
- (a) The First Applicant is exempted from the requirement to exhaust internal remedies in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000.
 - (b) The decision of the Refugee Status Determination Officer, dated 13 September 2024, rejecting the First Applicant’s application for asylum is reviewed and set aside.
 - (c) The matter is remitted to a different RSDO for reconsideration within six (6) months of the date of this order.
 - (d) The respondents are ordered to pay the costs of the application jointly and severally, on Scale B, the one paying the other to be absolved.

DA SILVA SALIE, J

JUDGE OF THE HIGH COURT

WESTERN CAPE

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