THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 11681/12

In the matter between: Reportable

SCALABRINI CENTRE, CAPE TOWN & 8 OTHERS **APPLICANTS**

And

MINISTER OF HOME AFFAIRS & 4 OTHERS **RESPONDENTS**

Coram: ROGERS J

Heard: **7 FEBRUARY 2013**

Delivered: **19 MARCH 2013**

JUDGMENT

ROGERS J:

[1] The applicants are the Scalabrini Centre Cape Town and its trustees (I shall refer to them collectively as 'Scalabrini'). Scalabrini is a non-profit organisation which exists to assist migrant communities and displaced people. The first respondent is the Minister of Home Affairs ('the Minister'). The second respondent is the Director-General ('the DG') in the Department of Home Affairs (the 'DHA'). The third respondent is an official in the DHA with the title Chief Director, Asylum Seeker Management. The fourth respondent is the Standing Committee for Refugee Affairs ('the SCRA'), the body established by s 9(1) of the Refugees Act 130 of 1998 ('the Act'). The fifth respondent is the Minister of Public Works.

[2] On 19 June 2012 Scalabrini launched an application in which it sought urgent interim interdictory relief (Part A of the notice of motion) and final review relief (Part B of the notice of motion). The requested relief concerned a decision by the DHA to close the Refugee Reception Office ('RRO') in Cape Town (the 'CT RRO'). The application was opposed by the first to fourth respondents ('the respondents'). They filed answering papers in respect of the Part A relief on 27 June 2012. Those answering papers also contained the bulk of their response to the Part B relief. Replying papers were filed on 9 July 2012. The Part A relief was argued before Davis J on 19 July 2012. On 25 July 2012 he delivered a reasoned judgment pursuant to which he ordered that pending the final determination of the Part B relief the respondents were to ensure that an RRO remained open and fully functional within the Cape Town Metropolitan Municipality at which new applicants for asylum could make application for asylum and be issued with permits in terms of s 22 of the Act.

[3] On 6 August 2012 the respondents delivered an application for leave to appeal against Davis J's judgment. On 15 August 2012 Scalabrini applied in terms of rule 49 (11) for leave to execute, ie for an order that the interim relief granted by Davis J would operate pending the outcome of the proposed appeal. I was informed from the bar that on 5 September 2012 Davis J refused leave to appeal and granted leave to execute. Presumably leave to execute was granted in anticipation of a further application by the respondents to the Supreme Court of Appeal ('the SCA') for leave to appeal. Such an application to the SCA was thereafter delivered.

[4] Despite the orders made by Davis J, the DHA did not on or after 25 July 2012 maintain an RRO in Cape Town at which new asylum seekers could make asylum applications and obtain s 22 permits. Indeed, it is common cause that no such RRO has existed in Cape Town since 30 June 2012 (the last day of operations having been 29 June 2012). Scalabrini launched a contempt application. Prior to the hearing of the contempt application, and on 1 November 2012, the SCA directed that the respondents' application for leave for appeal be argued orally, with the parties to be ready to argue the appeal if called on to do so. I was informed from the bar that when the contempt application came before Davis J he declined to hear it in the light of the SCA's direction.

[5] In regard to the Part B relief, the respondents filed the record contemplated in rule 53 (1), following which supplementary founding, answering and replying papers were delivered. The Part B relief was argued before me on 7 February 2013. Scalabrini was represented by Mr S Budlender assisted by Ms N Mayosi. The respondents were represented by Mr MTK Moerane SC assisted by Messrs L T Sibeko SC and GR Papier. I reserved judgment. On 25 February 2013 the respondents delivered a further affidavit to which Scalabrini replied on 7 March 2013. I shall explain later he circumstances under which this occurred.

The grounds of review in summary

[6] There are three grounds of review.

[7] The first is that the decision to close the CT RRO was made without consultation with the SCRA, in alleged violation of s 8(1) of the Act. Important questions in this regard are whether by 30 May 2012 (when the consultation alleged by the respondents occurred) the DHA had already made the closure decision; and whether in any event what occurred on 30 May 2012, on its own or in conjunction with other circumstances, constituted 'consultation'. Since this ground of review concerns alleged non-compliance with a statutory requirement for making a valid closure decision, it is unaffected by whether or not the decision was 'administrative action' as defined in the Promotion of Justice Act 3 of 2000 ('PAJA').

[8] The second ground is that there was no proper consultation or opportunity for representations by persons affected by the closure decision. Here the characterisation of the decision as 'administrative' action is relevant though Scalabrini argues that even if PAJA does not apply it can succeed on the principle of legality. Further questions relevant to this ground of review concern the determination of the date by which the closure decision was taken and whether any interaction which took place between the DHA and stakeholders prior to the decision date satisfied the alleged requirement that the DHA consult with affected persons and give them an opportunity to make representations.

[9] The third ground is that the closure decision was irrational and unreasonable and based on irrelevant considerations and on a failure to take into account relevant considerations. Scalabrini argues that it can maintain this ground of review even if PAJA is inapplicable. A consideration of this ground will, as preliminary matter, require a consideration of the content and import (both factually and legally) of the closure decision.

<u>The legal framework</u>

[10] In terms of s 8(1) of the Act the DG may establish as many RROs in the Republic as he or she, 'after consultation with' the SCRA, 'regards as necessary for the purposes of this Act'. Section 8(2) states that an RRO must consist of at least one Refugee Reception Officer ('RR Officer') and one Refugee Status Determination Officer ('Determination Officer'). Although the express terms of s 8(1) deal only with the establishment of an RRO, it has been held, and was common cause before me, that s 8(1) by necessary implication empowers the DG to disestablish an RRO and requires consultation with the SCRA in regard to such disestablishment (see *Somali Association for South Africa & Another v Minister of Home Affairs & Others* 2012 (5) SA 634 (ECP) at 639F-I).

[11] Section 9(1) of the Act establishes the SCRA. Section 9(2) stipulates that the SCRA must function without bias and must be independent. The composition of the SCRA is dealt with in s 10. It must consist of a chairperson and such number of other members as the Minister may determine, having regard to the likely volume of

work to be performed by the SCRA. Section 10(2) lays down that the chairperson and other members must be appointed by the Minister 'with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of their office properly.'

[12] Chapter 3 of the Act (ss 21-24) deals with applications for asylum. The term 'asylum' is defined in s 1 as meaning 'refugee status' recognised in terms of the Act while 'asylum seeker' means a person who is seeking recognition as a refugee in the Republic. The word 'refugee' is defined as 'any person who has been granted asylum in terms of this Act'. Section 3 sets out the qualifications for asylum status. A person so qualifies 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 formal 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 a whole in his or her country or 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).'

[13] In terms of s 21(1) an application for asylum must be made 'in person' in accordance with the prescribed procedures to an RR Officer 'at any' RRO. In terms of s 21(2)(d) the RR Officer must (after complying with his or her other duties under that section) refer the application to a Determination Officer who then determines the application in accordance with s 24.

[14] The process of adjudicating an asylum application in terms of s 24 may take some time. Section 22 thus makes provision for the asylum seeker to be issued with an asylum seeker permit. Section 22(1) states that the RR Officer must issue such a permit pending the outcome of the asylum application. A s 22 permit entitles the asylum seeker to sojourn in the Republic temporarily, subject to any conditions

determined by the SCRA. It is common cause that the permit entitles the holder to live, work and study in South Africa and to receive public health care.

[15] The s 22 permit is issued for a specified period. This period apparently varies from case to case. I was informed from the bar that the period is usually two to six months. In terms of s 22(3) an RR Officer may from time to time extend the period of the permit or amend its conditions.

[16] Because the adjudication of asylum applications often takes a long time (I was informed that there are some unadjudicated asylum applications going back 12 years), an asylum seeker will usually need to have his or her s 22 permit extended on several, and perhaps many, occasions.

[17] The period between the asylum seeker's entry into South Africa and his or her first presentation to an RRO in terms of s 21(1) is governed by s 23 of the Immigration Act 13 of 2002. In terms of s 23(1) of the Immigration Act the DG may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker. Such a permit is valid for 14 days only. Section 23(2) of the Immigration Act states that if the transit permit expires before the holder has reported in person to an RRO in terms of s 21 of the Refugees Act, the holder shall become an illegal foreigner and be dealt with in accordance with the Immigration Act (including, thus, deportation in terms of s 34). This means that an asylum seeker, if he or she is to comply with the law, must report in person to an RRO within 14 days of arrival in the country through a port of entry.

[18] It appears from the papers in the present matter, and was common cause between counsel, that the vast majority of persons who present themselves at RROs in terms of s 21 of the Refugees Act do not enter South Africa lawfully through a port of entry and do not hold asylum transit permits issued in terms of s 23 of the Immigration Act.[1] Scalabrini's counsel submitted, and the respondent's counsel did not dispute, that an RR Officer is nevertheless obliged to receive the asylum seeker's s 21 application (see *Bula & Others v Minister of Home Affairs &*

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[1] And see *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs & Others* 2010 (5) SA 367 (WCC) para 16.

Others 2012 (4) SA 560 (SCA) para 70-80; *Erosumo v Minister of Home Affairs & Others* 2012 (4) SA 581 (SCA) para 11-13).

[19] The Constitutional Court has said that the condition of being a refugee implies a 'special vulnerability' which is reflected in our legislation governing the status of refugees (*Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) paras 28-30). The DHA's officials have a duty to ensure that intending applicants for refugee status are given 'given every reasonable opportunity to file an application with the relevant refugee reception office' (*Abdi & Another v Minister of Home Affairs & Others* 2011 (3) SA 37 (SCA) para 22).

<u>The facts</u>

[20] By mid-2011 there existed in South African six RROs: at Marabastad in Pretoria, at Crown Mines in Johannesburg, and in Cape Town, Durban, Port Elizabeth ('the PE RRO') and Musina. The first five of these RROs were in major metropolitan centres. Musina is on the N1 just south of South Africa's border with Zimbabwe and Botswana. We thus know that at some stage in the past the DG, after consultation with the SCRA, regarded the establishment of these RROs as being necessary for the purposes of the Act.

[21] The difficult history of the Cape Town RRO in the period from its establishment in 2000 until May 2010 appears from the judgments of this court in *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 (C), *Intercape Ferreira Mainliner (Pty) Ltd & Others v Minister of Home Affairs & Others* 2010 (5) SA 367 (WCC) and *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs & Others* [2010] 4 All SA 414 (WCC). As appears from these cases, the main work of the CT RRO was initially done at Customs House on the Foreshore. The RRO was then moved to Airport Industria and thereafter to Voortrekker Road in Maitland. At each of these offices problems arose in view of the large number of asylum seekers who sought assistance. In the *Intercape Ferreira* case the operation of the RRO was found to be in violation of the applicable zoning scheme and to be

an unlawful nuisance. This led to the move from Airport Industria to Voortrekker Road in Maitland.

[22] Problems of a similar nature then arose at the Maitland office. In the *Voortrekker Road* case Binns-ward J on 3 May 2010 declared the operation of the RRO at the Maitland premises to be an unlawful contravention of the zoning scheme and interdicted the DHA from continuing with the operation. The interdict was suspended for six months subject to the DHA making an application within two months for the amendment of the land use restrictions applicable to the property. The judge also declared the operation to have given rise to an actionable nuisance and in that respect interdicted the DHA from continuing with the operation until abatement steps were taken. He suspended the latter interdict subject to certain abatement steps being effected within two months and others within four months.

[23] The DHA did not apply for an amendment to the land use restrictions applicable to the Maitland property. The extended date by which the RRO operation should have ceased at the Maitland premises pursuant to the *Voortrekker Road* judgment was 13 September 2010. The DHA did not, however, cease the operation on that date. The RRO remained operational at the Maitland premises until 29 June 2012. It is the cessation of the operation at the RRO after that date which is in issue in the present case.

[24] On 3 May 2012 the DHA gave notice of a refugee stakeholder meeting to be held on 7 May 2012. The stakeholders were various NGOs, including Scalabrini. The minutes reflect that at the commencement of the meeting Mr Mohapleloa, Acting Director in the DHA and Head of the CT RRO, stated that the purpose of the meeting was to 'inform stakeholders of the recent developments at' the RRO in Maitland, 'specifically towards the notice of termination of lease… received from the Landlord of the access road'. The Maitland premises comprised several properties leased by the Department of Public Works ('the DPW') for use by the DHA. One such property, leased from Creative Property Marketing CC ("CPM'), was used as an access road. It was the termination of this lease to which Mr Mohapleloa was referring. It appears from other documents that CPM had by that stage instituted eviction proceedings.

[25] Mr Yusuf Simons, the DHA's Provincial Manager: Western Cape, then made a presentation on 'infrastructure developments'. He summarised the history of the problems which the CT RRO had encountered at its various premises. He concluded, according to the minutes, by indicating

'that the DHA will engage the landlord for a possible extension and in the event of refusal the DHA will investigate alternative ways to accommodate the different categories of Refugee Services. Further consultation with stakeholders will take place after engagements with the relevant internal and external stakeholders.'

[26] Stakeholders were invited at the meeting to provide proposals and inputs. Most stakeholders thought the Maitland site was the most appropriate location for the RRO and had ideas for helping the DHA to remain there and to alleviate the operational pressures on the RRO. It was also suggested that the use of Customs House might be reconsidered. A representative of Scalabrini expressed concern that the DHA might be intending to relocate RROs near South African borders and to close the CT RRO. In reply the DHA's Deputy-Director-General: Civic Services indicated that 'engagements will take place and all proposals will be considered'. The minutes continue:

'He reiterated that the intention of this meeting was to consult and inform Stakeholders of the current challenges and not to close down the office. The intention of the DHA is to continue servicing clients at the Maitland Office and to come up with a strategy on how and where to service clients in the event of possible closure.'

[27] On 18 May 2012 the DHA and DPW concluded a written settlement agreement with CPM in which it was confirmed that the access road lease would terminate on 10 July 2012. The Departments were *inter alia* to pay CPM's legal costs of the ejectment proceedings.

[28] According to Scalabrini there was a further meeting between the DHA and stakeholders on 23 May 2012. Scalabrini alleges that at this meeting the DHA announced that new asylum seekers arriving at South African borders would need to present themselves to an RRO in Musina, Pretoria or Durban. The DHA also informed the meeting that a new RRO was to be opened in Mpumalanga close to the Mozambican border (the proposed Lebombo RRO). The CT RRO and the PE

RRO would henceforth concentrate on finalising existing s 21 applications. In the case of Cape Town this would possibly be done at Customs House.

[29] I should interpose here to note that by this time the RRO at Crown Mines at Johannesburg had been closed. This occurred in June 2011 pursuant to an order of the South Gauteng High Court made on 25 March 2011. No new RRO was opened in Johannesburg. The files at Crown Mines were transferred to the Pretoria RRO. The PE RRO had also been closed at the end of November 2011 following the termination by the landlord of the lease. Each of these closures gave rise to legal proceedings because of the DHA's failure to open another RRO in the relevant metropolitan area. In the case of Johannesburg, the proceedings resulted in a judgment of Legodi J on 14 December 2011 in *Consortium for Refugees and Migrants in South African & Others v Minister of Homes Affairs & Others* (unreported – 'the *Consortium* case'); while in the case of Port Elizabeth there was a judgment by Pickering J on 16 February 2012 in the *Somali Association* case cited earlier. Although these judgments found that the DHA's decisions not to maintain RROs in Johannesburg and Port Elizabeth were unlawful, no RROs were or have been maintained in either of these metropolitan areas.

[30] Scalabrini relies on what happened at the meeting on 23 May 2012 as evidence that by that date the DHA had already decided permanently to close the CT RRO for new applicants. In their answering papers the respondents did not dispute Scalabrini's version of the meetings. At the hearing Mr Moerane expressed himself to be uncertain as to whether any such meeting had taken place – there was no minute of the meeting and no reference to it in any other contemporaneous documents. While that is puzzling, I cannot ignore Scalabrini's uncontested evidence. In the event, it would not affect the outcome if the evidence concerning the meeting were ignored.

[31] On 25 May 2012 Scalabrini's attorneys wrote to the DHA with reference to the meeting held on 7 May 2012. They requested documents reflecting the DHA's attempts to find alternative premises and also requested a copy of the notice of eviction which CPM had given. They repeated their concern that the DHA intended to move RROs to the border. They disputed the legality of any such move but said

that it would in any event be unlawful for services to asylum seekers in Cape Town to be summarily terminated or to be terminated without prior public consultation in terms of s 4 of PAJA.

[32] On 30 May 2012 the DHA (including the DG) met with the SCRA, which at that time comprised Mr K Sloth-Nielsen as chairperson and Ms J Mungwena. The minutes reflect that three matters were discussed: the closure of the PE RRO, the closure of the CT RRO, and the opening of a new RRO at Lebombo in Mpumalanga.

[33] In the context of the PE RRO closure, the DHA reported that due to various legal challenges relating to RRO operations in metropolitan areas the DHA was of the view that RROs were not suitable for such areas. There was also a 'policy shift' which had been discussed at cabinet level to move RROs closer to ports of entries. These were among the reasons given in the minutes as to why the DHA had decided to close the PE RRO.

[34] In regard to the CT RRO, the minutes referred to the court order in the *Voortrekker Road* case and to the termination of the access road lease. The DHA reported that consultation had taken place with stakeholders on 7 May 2012 and that 'a follow-up meeting is scheduled to take place in early June 2012 to advise stakeholders of the final decision'. Other sites had been investigated but found to be unsuitable. The minutes continue:

'The Department has therefore taken a decision to close this office. New asylum seekers that have not interacted with the Department will have to report to the other existing RRO [sic]. Measures must be put in place to timeously advise new entrants at ports of entries that there would no longer be an RRO in Cape Town from 29 June 2012.'

[35] In regard to the new RRO, the minutes stated that the DHA had identified Lebombo as suitable for the opening of a new RRO because it was in easy reach of persons entering South Africa. All the 'resources' that were employed at the CT RRO would be moved to the Lebombo RRO.

[36] The contents of the minutes as summarized above cover the first 12 paragraphs of the minutes. Paragraph 13 (the final paragraph) reads thus:

'The Standing Committee approved the decision to closure of [sic] the Port Elizabeth and Cape Town Refugee Reception Offices and further approved the establishment of the Lebombo Refugee Reception Office.'

[37] On 5 June 2012 Scalabrini's attorneys, having not received a reply to their letter of 25 May 2012, wrote a further letter in which they referred to an article in the *Cape Times* quoting a DHA official as saying that new asylum applications would be directed to RROs other than Cape Town. Scalabrini's attorneys repeated their contention that a failure to process new applications in Cape Town would be unlawful. The DHA was called upon to admit or deny by close of business on 11 June 2012 whether with effect from 30 June 2012 new applicants would no longer be assisted in Cape Town.

[38] There was no immediate response to this letter. However on 6 June 2012 stakeholders, including Scalabrini, were invited to a stakeholder meeting to take place on 8 June 2012. The invitation stated that the purpose was to 'share some light and insight into the impending closure of the [CT RRO] with effect from 30th June 2012'. The invitation stated that the closure would have immediate implications, one of which was that new applicants would be directed to other RROs to submit their applications.

[39] At the meeting on 8 June 2012 the DHA informed stakeholders that negotiations with the landlord in respect of the access road had failed. The Maitland office would thus close at the end of Friday 29 June 2012. All new asylum seekers would, with effect from Monday 2 July 2012, be told to apply at other RROs in the country. The presentation made by the DHA at the meeting recorded that 'section 22 extensions and outstanding adjudications of those asylum seeker cases who lodged their applications at the Maitland centre will be processed at Customs House'. The DG and the chairperson of the SCRA were present at the meeting. The DG stated that he had consulted with the SCRA on 30 May 2012 regarding the closure. Mr Sloth-Nielsen stated that the SCRA would be considering the matter on 15 June 2012 – a rather puzzling statement, given para 13 of the minutes of the meeting of 30 May 2012.

[40] On 12 June 2012 (prior to the date on which the SCRA was supposedly to be meeting to consider the matter) Mr Sloth-Nielsen wrote to the DG stating that the SCRA 'after consultation with you on 30 May 2012 and consideration of the reasons advanced by the Department, approves the decision to close the [PE and CT RROs] and approves the decision to establish a [RRO] at Lebombo'.

[41] On 19 June 2012, the day on which Scalabrini launched its application, the DG wrote to Scalabrini's attorneys in response of their letter of 4 June 2012. The DG stated that the decision to close the CT RRO had been taken in consultation with the SCRA on 30 May 2012. The decision was said to have been necessitated by the order in *Voortrekker Road* and by the termination of the lease. He also referred to the meetings held with stakeholders on 7 May 2012 and 8 June 2012. He said that the assistance which the DHA would continue to provide to 'existing refugees and asylum seekers' beyond 29 June 2012 was the result of this consultation and had been decided upon 'to reduce any prejudice that may be suffered by refugees and asylum seekers who are already in Cape Town Metropolitan area and the greater Western Cape Province'. He warned that this outcome was not to be construed as 'normal operations' of an RRO but was aimed only at minimizing any prejudice to 'existing refugees and asylum seekers'. New applications for asylum would have to be made at other RROs.

Nature and content of impugned decision

[42] The impugned closure decision is not the decision to cease operations at the Maitland premises. The closure decision is the decision not to maintain an RRO in Cape Town. There are two possible ways of viewing the decision though I do not think anything turns on it. If one regards an RRO as the specific building at which services are offered to asylum seekers, one would say that the impugned decision was the decision not to open a new RRO in Cape Town after the Maitland RRO was closed.

[43] I think, though, that the more sensible view is that a decision to establish an RRO in terms of s 8 (1) could be, and would ordinarily be, a decision to establish an RRO in a particular place (eg Cape own) without confining the DHA to running the

office from a specified site in that area. Once a decision was taken (as it was some years ago) to establish an RRO in Cape Town, the precise location of the building or buildings in Cape Town from which the DHA operated its RRO was a purely organisational matter. The DHA might chose to operate from several locations within a city. These locations could properly be regarded as parts of the single RRO in that city. I doubt, for example, whether it could be said that a new s 8(1) decision was taken, or needed to be taken, when the DHA moved its operations from Airport Industria to Maitland in 2009. The work of the CT RRO was simply reorganised. This was indeed the view of Binns-Ward J in the *Voortrekker Road* case (paras 10-14). Viewed in this way, the cessation of operations at the Maitland office was not in itself the closure of the CT RRO. Rather, the DHA decided, when it could no longer operate from the Maitland premises, to close the CT RRO, so that there would no longer exist anywhere in Cape Town an office at which new asylum seekers would be entitled to present their s 21 applications.

[44] There is another, and more important, question regarding the true import of the closure decision. Scalabrini presented its case on the basis that as from 30 June 2012 new asylum seekers would not only have to make their s 21 applications at another RRO in South Africa but would also have to obtain their s 22 extensions at another RRO. In other words, there would be no office at Cape Town where asylum seekers who had submitted their s 21 applications and obtained their s 22 permits from the RRO at (say) Musina could obtain their s 22 extensions in Cape Town.

[45] If new asylum seekers who have to go elsewhere for their s 21 applications and their s 22 permits could obtain s 22 extensions in Cape Town, the closure decision would be significantly less burdensome for them. Notionally they could, within 14 days of entering South African through a northern border, present themselves at one of the RROs in the northern part of the country and then move to Cape Town where they could obtain their s 22 extensions pending the adjudication of their asylum applications. The need to return to the north on several (perhaps numerous) occasions to obtain extensions was one of the aspects stressed by Scalabrini in attacking the rationality of the closure decision, though (as will appear hereunder) Scalabrini points out that even if s 22 extensions could be done in Cape Town the asylum seeker would still need to return to the original RRO for other

attendances relating to the adjudication of his or her application and relating to any relevant appeal or review proceedings arising from an adverse decision.

[46] In oral argument Mr Moerane, in response to a question from the court, stated his understanding to be that new asylum seekers would indeed be entitled to obtain their s 22 extensions in Cape Town. Despite an element of ambiguity in some of the formulations of the closure decision, Mr Moerane's understanding appeared to me inconsistent with the facts contained in the record. I thus indicated that if this was really the position it would need to be confirmed by an affidavit by the DG.

[47] The facts in the record which appeared to me to be inconsistent with the right by new asylum seekers to obtain s 22 extensions in Cape Town include the following:

[a] One of the DHA's justifications for the closure of the PE RRO in its meeting with the SCRA on 30 May 2012 was that metropolitan areas were (in the DHA's view) unsuitable for RROs. This reasoning applied as much to an office dealing with s 22 extensions as to an office dealing with s 21 applications and the issuing of s 22 permits. The statistics provided by the DHA reflect, for example, that in the first four months of 2012 there were 5 946 new asylum applications received at the CT RRO. In the same period there were 52 666 applications for s 22 extensions. The extension applications must thus contribute in large part to the operating conditions which the DHA regard as unsuitable in metropolitan areas.

[b] The DHA's formulation of its decision in the invitation to stakeholders of 6 June 2012 was that 'new applicants' would be directed to other RROs to submit their applications. The other aspects of the formulation, while not being entirely clear, certainly do not suggest that any of the processes involved in new applications (of which the obtaining of s 22 extensions forms part) would be handled in Cape Town.

[c] At the meeting of 8 June 2012 the DHA's presentation stated that 'new comers' would be told to apply at other RROs. The same presentation stated, under the heading 'Decentralization of services', that the DHA's Barrack Street office

would deal with refugee identity documents and passports (these are services for persons who have already been determined to be refugees), while Customs House would handle 'section 22 extensions and outstanding adjudications of those asylum seeker cases who lodged their applications at the Maitland centre'. In context, the 'section 22 extensions' were, like the 'outstanding adjudications', those of persons who had lodged their (original) applications at the Maitland office. Given the decision to close the Maitland office after 29 June 2012, only persons who lodged their s 21 applications and obtained their s 22 permits by 29 June 2012 would have their s 22 extensions dealt with at Customs House in Cape Town.

[d] That this was the intended import of the decision is also clear, I consider, from the DG's letter of 15 June 2012. He emphasised to Scalabrini's attorneys that the operations at Customs House would not be 'normal operations' of an RRO. Customs house would only serve 'existing' refugees and asylum seekers to avoid prejudice to refugees and asylum seekers who were already in Cape Town. New asylum seekers after 29 June 2012 did not fall within the limited class of persons for whom the DG regarded it as fair to maintain operations at Customs House. The fact that the services which would continue to be offered in Cape Town were confined to existing asylum seekers and refugees in the Cape Town area was repeated in para 112.2 of the DG's answering affidavit. And in the DG's supplementary answering affidavit he stated in para 19 that the offices at Customs House and Barrack Street would between them 'offer a full spectrum of services to asylum seekers <u>who were already in the system when the CTRRO was closed</u>' (my emphasis). This formulation does not suggest the offering of any services to asylum seekers falling outside this class.

[e] The DHA's stated intention is ultimately to close the Cape Town office altogether once existing matters are finalised.[2] Although this may take several years, the fact that the office is temporary is inconsistent with an intention to offer any services to new applicants.

[2] See, for example, para 34 of the DG's supplementary answering affidavit (record 465).

[48] During the hearing of the Part A relief Davis J sought clarity on this very point. This was mentioned by Scalabrini in its application for leave to execute, where its deponent stated that the DHA's senior counsel had confirmed that new asylum seekers could not have their files (which would be opened at some other RRO) transferred to Customs House in Cape Town. In response the DG stated (in the application for the leave to execute) that it was pointed out during the Part A argument that asylum seekers 'who were already in the system' could make a request that their files be transferred to an RRO closer to them. In reply, Scalabrini's deponent repeated that in the Part A hearing the DHA's senior counsel had specifically stated, after taking instructions, that new applicants would <u>not</u> be able to transfer their files to Cape Town. The DG's statement could thus only apply to persons who had lodged their applications prior to 30 June 2012. Davis J's judgment on the Part A relief reflects this understanding – at pp 26-27 he specifically refers to the fact that the effect of the closure decision on new Cape Town-based asylum seekers was that they would need to commute between Cape Town and other RROs in the north of the country to get their s 22 extensions.

[49] I cannot, on the papers, determine precisely what the DHA's counsel told Davis J in the Part A hearing, though his judgment reflects an understanding in line with what the applicants say. Be that as it may, the high water mark of the DG's affidavit in the application for the leave to execute was that new applicants could make a 'request' to have their files transferred to a closer RRO. The DG did not say that new applicants had the <u>right</u> to have their files transferred. Given the DHA's reasons for closing RROs in Port Elizabeth and Cape Town, it would seem most unlikely that the DHA would as a matter of course accede to requests to transfer files from other RROs to Cape Town. And a transfer of files on a large scale and on an ongoing basis would seem to be a recipe for administrative chaos. (I should mention, though, that the passages to which I have referred in the application for leave to execute dealt with the question whether new asylum seekers would be able to have their <u>files transferred</u> to Cape Town. As will appear hereunder, it seems that there is a distinction between transferring a file and <u>obtaining an extension</u> – it appears that a file transfer may not be necessary in order for an asylum seeker to have his s 22 permit extended at an RRO other than the one at which he first applied.)

[50] After I had reserved judgment, the respondents on 25 February 2013 filed a supplementary affidavit by the DG on this question. The respondents requested an opportunity to reply, which they did by affidavits delivered on 7 March 2013. The DG stated in his affidavit that the respondents had at no stage authorised DHA officials to refuse s 22 extensions at what he styled the 'Cape Town temporary refugee facility' (meaning the facility at Customs House) in respect of asylum seekers whose s 22 permits were issued elsewhere; that officials have regularly since 29 June 2012 granted such extensions in Cape Town; and that it is common practice for the DHA to permit the transfer of an asylum seeker's file from one RRO to another on application by the asylum seeker in circumstances which 'reasonably and clearly warrant' such transfer. He referred to an order granted by agreement on 22 October 2008 in *Hirsi & Others v Minister of Home Affairs & Others* WCHC Case 16863/08, in which the court declared as unlawful a refusal by the Director: Refugee Affairs Cape Town to renew, at the CT RRO, s 22 permits issued at other RROs and directed that the Director could not refuse so to renew s 22 permits simply on the ground that the original permit was issued at another RRO. The DG mentioned certain earlier orders to similar effect. The DG then referred to a more recent case, *Zihalirwa & Others v Minister of Home Affairs & Others* WCHC Case 20988/12, a matter in which Fourie J gave judgment on 6 December 2012. In *Zihalirwa* the applicants relied on the order in *Hirsi*, and on the earlier orders to similar effect, in support of relief in similar terms to that granted by agreement in *Hirsi*. The *Zihalirwa* case concerned an alleged refusal by Customs House officials on certain dates in October 2012 (ie after the closure decision became operative) to grant extensions. The DHA in *Zihalirwa* denied that DHA officials had refused to grant extensions and put up evidence to show that on the dates in question various s 22 extensions were granted at Customs House in respect of asylum seekers who had obtained their original permits elsewhere. In his judgment Fourie J found that the applicants had failed to establish that the DHA was refusing to grant extensions or acting inconsistently with *Hirsi* and the other cases.

[51] The DG concluded by stating that extensions are thus currently done in Cape Town in accordance with *Hirsi*, and that all asylum seekers with s 22 permits who find themselves in Cape Town have been and will continue to be assisted to obtain extensions in Cape Town, even if their permits were issued elsewhere. He also

stated that the transfer of files between RROs is done 'as a matter or practice' but added the following:

'In respect of the Cape Town Temporary Facility, transfers as of right are no longer possible as there is no longer an RRO in Cape Town. However, applications for file transfers are considered and granted by the Cape Town Temporary Facility Manager on merit in instances where there are reasonable and good grounds for such transfer.'

[52] In reply to the DG's supplementary affidavit Scalabrini's deponent drew a distinction between [a] the alleged extension in Cape Town of s 22 permits issued elsewhere; [b] the transfer of an asylum seeker's file. She pointed out that unless an asylum seeker's file is transferred from the RRO where he first applied, the asylum seeker would (even if extensions could be obtained at another RRO) still have to travel to the original RRO to attend an interview with the Determination Officer and then to collect the determination. If the determination was to reject the asylum application as 'unfounded' and he wished to appeal, he would have to travel again to the original RRO to lodge his notice of appeal, to attend the appeal hearing and collect the appeal decision. Alternatively, and if the application was rejected as 'manifestly unfounded', he would have to travel to the original RRO to collect the decision of the SCRA on automatic review. If he obtained asylum status, he would need to attend at the original RRO to obtain his ID book, get his refugee certificate extended and so forth. All of these attendances at the original RRO could only be avoided by a transfer of his fie to a more conveniently located RRO. In respect of file transfers, there is, as the DG's affidavit itself states, no right to have a file transferred from the original RRO to the Cape Town facility. Scalabrini's deponent stated that in practice asylum seekers, who have little knowledge of the law and often face language difficulties, confront the apparently unguided discretion of DHA officials in regard to file transfers, and usually end up having to continue dealing with their original RROs. She referred to confirmatory affidavits from five asylum seekers setting out their inability to obtain files transfers from Pretoria and Musina to Cape Town. One of these asylum seekers was allegedly told, in the presence of a Scalabrini trustee (whose confirmatory affidavit was attached), that the Cape Town office was trying to get rid of files and that a file transfer to Cape Town was only possible for the terminally ill. The Scalabrini deponent also referred to affidavits from two attorneys at the UCT Refugee Clinic confirming that these were not isolated

examples (they list 61 asylum seekers whom they have unsuccessfully tried to assist with file transfers). Finally, the Scalabrini deponent stated that in response to a recent request to the State Attorney for clarification regarding various aspects of the DG's supplementary affidavit, the State Attorney had advised that only 24 files have been transferred to Cape Town since August 2012. (The State Attorney's response did not, despite request, disclose how many file transfers had been requested. I note, in this regard, that the DHA's statistics for the first quarter of 2012 indicate that there were about 1 500 new s 21 applications per month at the CT RRO. One may confidently assume that all or the vast majority of these are people who wish to reside and work in Cape Town pending the finalisation of their applications. It follows that only a very small proportion of asylum seekers who are now being compelled to make their s 21 applications at other RROs are having their files transferred to Cape Town.)

[53] In regard to s 22 extensions, Scalabrini's deponent stated that although, after 29 June 2012 and until the *Zihalirwa* decision on 6 December 2012, there was virtually no prospect of getting a s 22 extension in Cape Town where the original permit was issued elsewhere, there had been a slight change in practice following the *Zihalirwa* decision in that some s 22 extensions were now being done at Customs House. She said, however, that whether this was permitted in any particular instance was 'haphazard, irregular and unpredictable'. She referred to the accompanying affidavits of four asylum seekers who had recently been refused extensions in Cape Town because they obtained their original permits elsewhere; and she also referred to an affidavit by an attorney at the UCT Refugee Clinic confirming that these were not isolated instances (the Clinic is currently assisting 33 clients who are being refused extensions in Cape Town on the basis that there original permits were issued elsewhere).

[54] In the light of this rather confusing picture, one may be forgiven for wondering whether the closure decision is not impeachable on the simple basis that it was vague and uncertain in its content, to the point where asylum seekers and those seeking to assist them are left unclear as to what can and cannot still be done in Cape Town and what the criteria are for determining whether particular matters can or cannot be dealt with in Cape Town. However, that was not the basis of the review

and I must thus attempt to make sense of things as best I can. In doing so, it is necessary to distinguish between the consequences which the DHA intended the closure decision to have and the consequences which in law follow from the decision.

[55] At a factual level, I regard it as clear that the DHA intended the closure decision to mean, firstly, that after 29 June 2012 new s 21 applications could not be lodged and further processed in Cape Town. By 'further processed' I mean steps relating to the adjudication of the s 21 application and further appeal or review steps where applicable. As noted, this would have the result, unless there was a file transfer, that the asylum seeker would have to attend at an RRO elsewhere in South Africa on at least three occasions (if his application succeeded) and on further occasions (if his application failed and there was an appeal or review). I find, further, that the DHA, if it thought at all about file transfers when making the closure decision, had no intention to allow file transfers as of right or to permit discretionary file transfers on a large scale, and that file transfers would be granted, if at all, as an exception (though criteria in that regard were not formulated and announced as part of the closure decision). I also find that the possibility of file transfers, if it was present to the DHA's mind in making the closure decision, was only viewed as a temporary measure, because the DHA's ultimate intention was for the temporary facility in Cape Town to close once the applications of asylum seekers who were already in the system by 29 June 2012 had been finally determined. Once that occurred, there would no longer be a Determination Officer in Cape Town.

[56] As to s 22 extensions (which, on the basis of Scalabrini's supplementary papers, I assume could notionally be made in Cape Town without a file transfer), I find no clear evidence that the DHA intended, when making the closure decision, that a s 22 extension could as of right be made in Cape Town where the s 21 application was lodged and the original s 22 permit issued at another RRO. The evidence in the record to which I have referred indicates, to my mind, that the DHA intended that the only s 22 extensions that would continue to be handled in Cape Town were those of asylum seekers already in the Cape Town system as at 29 June 2012. The orders in *Hirsi* and the earlier similar cases were made at a time when there was a fully-fledged RRO in Cape Town. I do not think the DHA would have

regarded those orders as remaining applicable in circumstances where there was no longer an RRO in Cape Town. However, the DHA has subsequently, on occasions, granted s 22 extensions to persons who obtained their original permits elsewhere. The extent to which it has done so is impossible to determine on the papers. It is clear from Scalabrini's supplementary affidavits that s 22 extensions in Cape Town have often been refused. It is probable that the implications of the orders in *Hirsi* and similar matters were not considered by the DHA at the time of the closure decision and that subsequent decision-making on s 22 extensions by DHA officials has thus been haphazard and inconsistent and has perhaps also been influenced by threats of legal action. The result is that the closure decision has *de facto* meant that many asylum seekers who would have wished to make their s 21 applications in Cape Town and to seek their s 22 extensions here either have been brought under the impression that they cannot obtain s 22 extensions in Cape Town or, if they have tried to get extensions here, have met inconsistent treatment and sometimes been refused extensions in circumstances where this would not have occurred but for the closure decision.

[57] So much for what the DHA intended and for what factually occurred. It is now necessary to consider the legal consequences of the closure decision. Leaving aside extensions under s 22(3), ss 21 to 24 seem to me to contemplate a process dealt with at a single RRO. I do not say that an asylum seeker's file cannot be transferred from the RRO where he originally applied to another RRO but the Act does not expressly envisage a situation in which any of the steps in sections 21 to 24 will be dealt with at an RRO other than the one at which the s 21 application is lodged. Whether the same applies to s 22 extensions is less clear. Whereas s 22(1) and s 24 refer to '<u>the</u>' RR Officer and '<u>the</u>' Determination Officer, meaning the relevant officer at the RRO where the application has been lodged, s 22(3) states that '<u>a</u>' RR Officer may grant an extension. This may suggest that an RR Officer at <u>any</u> RRO may grant an extension. I do not know whether this was the basis of the applications which led to the agreed orders in *Hirsi* and the earlier cases. I confess that I do not regard this as the most natural reading of s 22(3) in its context. If s 22(3), properly construed, refers to the RR Officer at the RRO where the original permit was issued, the closure decision means in law that persons who have been

compelled after 29 June 2012 to make their s 21 applications at another RRO would not be entitled to have their permits extended by an RR Officer in Cape Town.

[58] However, I shall assume that s 22(3) means that an RR Officer at any RRO may (and must) extend a permit, regardless of where the original permit was issued. On this interpretation, a right to obtain extensions in Cape Town would require there to an RR Officer in Cape Town. An RR Officer is an officer of an RRO (see s 8(2)). So there cannot be an RR Officer in Cape Town unless there is an RRO in Cape Town. But the DHA closed the CT RRO with effect from 29 June 2012. The Act does not permit the existence of an RRO which, at the DHA's discretion, performs only some of the services required by the Act. In particular, if an RRO exists, an asylum seeker may as of right present his s 21 application to that RRO (see the word 'any' in s 21(1)). The Act does not permit the DG to maintain in Cape Town an RRO which will handle s 22 extensions but which will not receive s 21 applications. An office either is or is not an RRO. If an office is not an RRO, no extensions can be granted at the office because *ex hypothesi* there can be no RR Officer to grant them; if the office is an RRO, a new asylum seeker who wishes to present his s 21 application at that office cannot be turned away.

[59] This does not mean that if the DHA validly decided to close the CT RRO with effect from 30 June 2012, it could not complete existing matters at Customs House. It may well be a necessary implication in the Act that if an RRO is closed it may nevertheless continue to perform the functions of an RRO in relation to persons who have already presented their s 21 applications at that RRO. This might follow if one reasons that once an asylum seeker has presented his s 21 application at a particular RRO he has the right to have his application adjudicated by the Determination Officer at that RRO. If this is so, it would be impossible to close an RRO unless one recognised that the office could continue to operate as such in respect of existing matters while ceasing to function as such in respect of new matters. On this view there is still an RRO in Cape Town in respect of s 21 applications presented on or prior to 29 June 2012 but no RRO for new matters (Pickering J may have had this distinction in mind at 638J-639G of the *Somali Association* case). The limited CT RRO is in a winding-down phase (hence the DG's reference to a 'temporary facility'). The important point is that the DHA cannot in law

maintain the position that there is an ongoing RRO in Cape Town to deal with s 22 extensions for new asylum seekers but which refuses to receive the s 21 applications themselves. And factually I do not think the DHA ever intended there to be a halfway house of this kind.

[60] There is thus be a partial disconnect between the *de facto* position and the legal position. In my view, the decision to close the CT RRO (if it was valid) meant in law that there was no longer an RRO in Cape Town for any purposes other than finalising s 21 applications already lodged in Cape Town on or before 29 June 2012 (this would include s 22 extensions for these asylum seekers). The DHA's conduct, after 29 June 2012, in occasionally granting other s 22 extensions in Cape Town and in accepting a few file transfers appears to me to be incompatible in law with a closure of the CT RRO. I appreciate that Scalabrini and other NGOs would, in the interests of their clients, prefer the position to be that such extensions and file transfers can still occur. I fear, though, that unless there is an RRO in Cape Town, this is not legally permissible.

[61] I thus intend to approach the case on the basis [a] that in law the closure decision means that persons who did not lodge their s 21 applications at the Maitland office by 29 June 2012 have to present their s 21 applications, obtain their s 22 permits, get their s 22 permits extended, and ultimately have their asylum applications adjudicated, at an RRO other than in Cape Town; [b] that the current factual position accords substantially with the legal position, save that a comparatively small number of file transfers for new applicants are (inconsistently with the legal position) being permitted and that some s 22 extensions for new applicants are (again inconsistently with the legal position) being granted in Cape Town while others are being refused; [c] that the eventual factual position, once the temporary Cape Town facility has finally disposed of applications lodged on or before 29 June 2012, will be the same as the legal position (ie nothing more will happen in Cape Town).

[62] Given the fact that the Crown Mines and PE RROs closed prior to June 2012, the RROs which a new Cape-Town based asylum seeker could approach after 29 June 2012 would be Durban, Pretoria and Musina. The distances from Cape Town

to Durban, Pretoria and Musina are about 1 270 kms, 1 312 kms and 2 000 kms respectively. The Lebombo RRO, when it opens, will be about 1 742 kms from Cape Town. The respondents stated in their answering papers that the Lebombo RRO was intended to open in December 2012 but it was common cause at the hearing before me on 7 February 2013 that it is still not open.

Applicability of PAJA

[63] The question whether the closure decision is 'administrative action' for purposes of PAJA has a bearing on the second and third grounds of review. It is thus convenient to address it at this point. In the *Consortium* case *supra* the DHA's counsel conceded that the decision in that case not to establish an RRO in Johannesburg was 'administrative' action' for purposes of PAJA (see para 25). However the DHA in the present case submitted, as was its right, that the concession in *Consortium* was wrongly made.

[64] The argument focused mainly on whether the closure decision adversely affected the rights of any person within the meaning of s 1 of the definition of 'administrative action'. The respondents' argument was that the Refugees Act did not confer on asylum seekers the right to make s 21 applications at a place of their choosing. Their right is to apply at any RRO, and this is a right which they continue to enjoy.

[65] The same argument was advanced before Davis J at the Part A hearing. He held that the closure decision was 'administrative action'. He referred to two competing views on the concept of adverse effect on rights, namely [a] action which determines rights (the determination theory); or [b] action which takes away or deprives persons of rights (the deprivation theory). He said that the respondents' argument rested on the deprivation theory. With reference to Hoexter *Administrative Law in South Africa* 2nd Ed at 222 and paras 43 and 45 of the judgment in *Joseph v The City of Johannesburg* 2010 (4) SA 55 (CC), Davis J expressed a preference for what may be styled a flexible determination theory. On the basis of this test, he found that the closure decision materially and adversely affected the rights of asylum seekers who wished to make use of an RRO in Cape Town.

[66] Davis J's decision on this question does not render the point *res judicata,* because his decision was given in the context of the interim Part A relief where it was expected that the same question would again arise for final decision in the Part B relief.[3] It is arguable that the rules of precedent nevertheless apply and that I am thus bound to follow Davis J's decision on a point of law unless I am satisfied that it was clearly wrong. However, and particularly since his judgment is under appeal, it may be safer for me to explain why I agree with his ultimate conclusion.

[67] I am not convinced that the answer to the problem in this case is to be found in the competing deprivation and determination theories. That analysis appears more suitable to cases where a person is refused a benefit for which he is entitled to apply but to which he cannot assert a right (applications for permits, licenses and so forth). The decision-maker determines the applicant's rights by deciding the application. If the decision-maker refuses the application, he has not taken away any right vested in the applicant but rather has failed to confer a right on the applicant. I respectfully suggest that whatever the theoretical foundation for the conclusion may be, there is no real doubt in our law that such a refusal constitutes 'administrative action'.[4] The present case is quite different. The decision to close the CT RRO is not a decision which has determined that any particular asylum seekers are not entitled to refugee status or s 22 permits or s 22 extensions. The decision merely means that asylum seekers cannot apply for these benefits in Cape Town.

[68] I thus view the present matter more simply. Prior to the closure decision new asylum seekers had the right to make their s 21 applications at RROs in Cape Town, Pretoria, Durban and Musina. In terms of s 21(1) a new asylum seeker could present himself at any of these four RROs. The effect of the closure decision is that new asylum seekers can now only present their s 21 applications at one of three RROs. Their right, viewed in the abstract, to make a s 21(1) application at 'any' RRO remains, but the substantive content of that right has changed for the worse, since it no longer encompasses an entitlement to make a s 21 application in Cape Town. I

[3] See *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45E-49A.

[4] The citation of cases (including decisions of the Constitutional Court and the SCA) where this was clearly regarded as so obvious as not to require specific treatment would be otiose but they include PAJA reviews in regard, for example, to decisions on fishing quotas, radios licenses and rezonings.

thus consider that the right which s 21(1) confers on new asylum seekers, while it has not been taken away, has been adversely affected by the closure decision.

[69] Whether an effect is 'adverse' is a matter of degree, to be determined with reference to the nature of the statutory right, the extent of the alteration to its substantive content, and the factual environment within which the right is to be exercised. A trivial change with minor resultant inconvenience might well not be branded as 'adverse' within the meaning of PAJA. The present case, however, is not on the borderline. (In making this observation on the word 'adverse', I do not overlook what Nugent JA said in *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* 2005 (6) SA 313 (SCA) at para 23, namely that it would be paradoxical for administrative action to be characterized by its effect in particular cases, either beneficial or adverse. He said that the qualification of 'adverse' effect, particularly when seen in conjunction with the requirement of 'direct and external legal effect', was probably intended to convey that administrative action

'has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals'.

I take this passage to mean that a decision, in order to constitute 'administrative action', must at least have the capacity to affect legal rights adversely, even though in the event the effect on some of the parties is not adverse. After all, judicial review is invariably concerned with acts which some or other person is complaining about as having an adverse effect. But I do not need to decide this – if adverse effect, or the capacity to affect adversely, is required, it is satisfied in this case; if the effect need not be adverse, a conclusion against the respondents on this part of the case is an *a fortiori* one.

First ground: consultation with SCRA

[70] As mentioned earlier, it is common ground that it is a necessary implication in s 8(1) that the DG can close an RRO and that his closure decision, like an establishment decision, requires prior consultation with the SCRA. The question is whether the DG did consult with the SCRA. In the Part A hearing Davis J answered this question adversely to the respondents. I do not think the affidavits which were filed subsequent to the Part A hearing cast significant further light on the matter.

[71] Before considering what has been said about 'consultation' in other cases, the immediate statutory context must be mentioned. This is not a case where there must be consultation with a person who may be adversely affected by a proposed decision. The SCRA is a statutory body whose members the lawmaker intended to be possessed of experience, qualifications and expertise in the matters with which the Act is concerned (s 10(2)). The SCRA's functions under s 11 include the formulation and implementation of procedures for the granting of asylum and the regulation and supervision of the work of RROs. The requirement of consultation in s 8(1) was thus clearly imposed because the lawmaker expected that the SCRA would have important, valuable and potentially influential contributions to make regarding the need to establish or close RROs.

[72] There are two points to emphasize from the cases: [a] At a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice (see *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164 (QB) at 167g-h; *Hayes & Another v Minister of Housing, Planning and Administration, Western Cape & Others* 1999 (4) SA 1229 (WC) at 1242 c-f). Consultation is not to be treated perfunctorily or as a mere formality (*Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111(PC) at 1124 d-f). This means *inter alia* that engagement after the decision-maker has already reached his decision or once his mind has already become 'unduly fixed' is not compatible with true consultation (*Sinfield & Others v London Transport Executive* [1970] 2 All ER 264 (CA) at 269 c-e). [b] At the procedural level, consultation may be conducted in any appropriate way determined by the decision-maker unless a procedure is laid down in the legislation. However, the procedure

must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered (A*ssociation of Metropolitan Authorities supra* at 167 h-j; *Hayes supra* at 1242 c-1243 b).

[73] In the present case the SCRA was essentially confronted on 30 May 2012 with a decision which the DG had already made. The minutes unmistakably record that the DHA advised the SCRA of its decision in respect of the various RROs and of the reasons for those decisions. At the termination of the DHA's presentation the SCRA 'approved' those decisions. The requirement in s 8(1) is not that the SCRA should 'approve' the DG's decision. It is conceivable that the DG might differ from the SCRA. He makes the final decision. The requirement in s 8(1) is consultation. The minutes reflect that the DG and his officials arrived at the meeting having already decided what they intended to do. At very least, the DG's mind was by that stage 'unduly fixed'.

[74] It is not only that the DG had already settled on a course of action. There is no indication in the minutes that the views of the SCRA were invited or that any discussion took place on the merits of the decision. The SCRA was not, in advance of the meeting, provided with information and afforded an opportunity to make further enquiries or to submit proposals. Either because the SCRA misconceived its functions and duties, or because the SCRA realised that the DHA had already made up its mind, the SCRA simply 'approved' the decision at the end of the meeting. Davis J said that the SCRA merely 'rubber-stamped' the DG's decision – an accurate conclusion in the circumstances.

[75] It is simply not possible, in a matter of such importance and complexity, that genuine consultation could have occurred at a single meeting where the proposed course of action was announced. I find it inconceivable that the SCRA would not, in a process of genuine consultation, have debated the fairness and wisdom of closing the CT RRO. History shows that thousands of asylum seekers wish to present their s 21 applications in Cape Town and to reside and work in Cape Town pending the

adjudication of their applications. The SCRA, in a genuine process of consultation, would surely have wished to obtain clarity on what exactly the decision entailed. The minutes simply refer to a decision to close the CT RRO, with new asylum seekers having to report to other RROs. The minutes reflect no discussion on whether new applicants could still get s 22 extensions in Cape Town and whether they could get file transfers to Cape Town. I have already discussed at some length the subsequent confusion in this regard. Perhaps some of this confusion might have been avoided if the SCRA had been properly consulted. I would have expected the SCRA to wish to interrogate whether it was appropriate to require new asylum seekers either to remain permanently in the north of South Africa or to commute between Cape Town and the north every time they needed a s 22 extension or had to attend an interview in connection with their asylum applications. If this was going to be the general position, they would surely also have wished to discuss what exceptions would be made, what criteria would apply in the making of exceptions, the steps to be taken to communicate criteria to new asylum seekers and so forth.

[76] I have already mentioned the puzzling feature that despite the wording of the concluding paragraph of the minutes of 30 May 2012, Mr Sloth-Nielsen, the chairperson of the SCRA, stated at the meeting of 8 June 2012 that the SCRA would only be considering the matter on 15 June 2012. There is no evidence as to what further consideration the SCRA in fact gave the matter prior to its letter of 12 June 2012 (when it again 'approved' the various decisions). There is no evidence of further communication between the SCRA and the DHA on the matter between 30 May 2012 and 12 June 2012. Furthermore, on 8 June 2012 the DHA publicly announced its decision to stakeholders. This is consistent with the final decision having been taken prior to that date. The SCRA's chairperson attended the meeting of 8 June 2012. He could not have left that meeting believing that the SCRA could still have any influence on the decision.

[77] Mr Budlender relied on various documents in the rule 53 record to support an argument that the DHA reached its decision well before 30 May 2012. I have no doubt that the formation by the DG of his conclusion occurred over a period of time but for purposes of this application it is sufficient to find, as I do, that the DG arrived at the meeting with the SCRA on 30 May 2012 with a fixed view, that at the end of

the meeting the SCRA without further debate approved the decision, and that the decision was publicly announced on 8 June 2012. This is not sufficient to meet the requirement of consultation.

[78] The respondents' counsel submitted that the SCRA did not attend the meeting of 30 May 2012 as strangers to the business of the CT RRO. The SCRA's members were aware, for example, of the history of the CT RRO, of the *Voortrekker Road* judgment and the termination of the access road lease. I accept this but it does not show that there was any, let alone genuine, consultation with the SCRA in regard to the decision to discontinue the CT RRO. As late as 7 May 2012 the DHA was telling stakeholders that it was still engaging with the landlord of the access road, that it was the DHA's intention to continue servicing asylum seekers at the Maitland office, and that if this proved not to be possible the DHA 'would investigate alternative ways to accommodate the different categories of Refugees Services' and 'come up with a strategy on how and where to service clients in the event of possible closure'. If matters were in truth as open-ended as the minutes of the meeting suggest, the solution of permanently closing the CT RRO could not be said to have been the obvious or only solution as at 7 May 2012. There is no evidence of engagement between the DHA and the SCRA in the period from 7 to 30 May 2012 during which the SCRA would have become aware of the radical proposal to close the CT RRO.

[79] Since in my view there was no compliance with the mandatory requirement of consultation, the closure decision was unlawful and is thus liable to be set aside in terms of ss 6(2)(f)(i) and 6(2)(i) of PAJA and in any event in terms of the legality principle.

<u>Second ground: procedural fairness/public consultation</u>

[80] Since this matter may go on appeal it is appropriate for me to state my conclusions on all the grounds of review. The second ground is put by the applicants on two bases: [a] that the DG failed to comply with his obligation of procedural fairness as set out in PAJA; [b] alternatively, and if PAJA is not applicable, that the legality principle required the DG not to make his decision without consulting

publicly, including with NGOs such as Scalabrini, and that he failed so to consult. Davis J did not find it necessary to decide these matters in the Part A hearing.

(a) Section 4 of PAJA

[81] I have found that the closure decision was 'administrative action' which 'adversely' affected the rights of new asylum seekers who wished to apply for asylum in Cape Town and to remain in Cape Town pending the adjudication of their applications. The new asylum seekers in question, being a 'group or class of the public', fall within the definition of 'public' in s 1 of PAJA. The adverse effect on them was and is material, particularly in that the finalisation of their applications and the obtaining of extensions will require them either to commute on several occasions to the north of the country or to abandon their preferred course of residing in Cape Town during the adjudication process.

[82] The DG was thus *prima facie* required to give effect to the right to procedurally fair administrative action by following one or more of the procedures listed in s 4(1). The respondents' primary argument against the application of s 4(1) was that the closure decision was not 'administrative action', an argument I have rejected. However, the arguments on that question pointed to a further issue, namely whether it was practically possible to comply with s 4(1) in relation to a decision of this kind, given that the affected persons were an unidentifiable group who were not in South Africa. This might lead to the conclusion that in terms of s 4(4) a departure from the requirements of ss 4(1) to (3) was reasonable and justifiable. The respondents in their answering papers did not in terms invoke s 4(4) but I shall assume in their favour that an argument based on s 4(4) is open to them.

[83] The argument, as applied specifically to the decision to close the CT RRO, can be put thus. By 30 May 2012 the DG decided to close the CT RRO with effect from 30 June 2012. This meant that procedural fairness, if applicable, would need to have been complied with during (say) April and May 2012. However, the persons who would be adversely affected by the decision were persons who would have wished to present themselves for the first time at an RRO in Cape Town on or after 30 June 2012. A new asylum seeker who was in South Africa in April/May 2012 (the

period during which a fair process, if required, had to occur) could not realistically be regarded as part of the class of adversely affected persons, since he could simply present himself to the CT RRO in the period up to 29 June 2012. It is not plausible that a new potential asylum seeker who was in South Africa in the period April/May 2012 would have wanted to be heard on a decision to close the CT RRO with effect from 30 June 2012. His remedy was simply to make his application to the CT RRO prior to the cut-off date, something which, having regarding to s 23 of the Immigration Act, he was in any event obliged to do within 14 days of his arrival in South Africa. While the closure decision would or might adversely affect people who only arrived in South Africa during or after June 2012, it would not have been possible to give them a hearing, or would at any rate not have been reasonable to require the DG to give them a hearing, during April/May 2012, because they would not yet have been in South Africa, might not even have decided yet to come to South Africa, and would be most unlikely in any event to respond to any process for hearing the public. Although the respondents' counsel did not put the point quite in this way, I think it presents the argument in its strongest form and it is the form in which I put it to the Scalabrini's counsel for comment.

[84] Mr Budlender accepted, I think, that it was not realistic to suppose that a new asylum seeker who might be adversely affected by the closure decision would have responded to a public invitation to make comment. His argument was that NGOs such as Scalabrini would have represented the interests of potential new asylum seekers. If a fair process as contemplated in s 4 is concerned with hearing only affected persons (either in person or through a representative), this would not be a sufficient answer. The closure decision did not adversely affect the rights of Scalabrini and the other NGOs nor could they have claimed, in making representations on the proposed closure decision, to be the agents of an identified group of new asylum seekers.

[85] However, I think it is too narrow a view to say that s 4 confines the requirement of fair process to a process of hearing an extant and identifiable group of adversely affected people or their agents. The purpose of procedural fairness is ultimately to achieve outcomes which are just and fair and which are seen to have been arrived at in a just and fair way. Where administrative action is proposed which

will adversely affect the public, there may often be an extant group of people who will be immediately affected but often the proposed action will also have future effects on people who, at the time of the decision, are not yet in contemplation as persons who will be adversely affected. Often these 'future victims' of the proposed decision will be the more numerous group. While their identity will not be known (they themselves might not yet know that their circumstances will ever bring them within the purview of the proposed decision), we are fortunate to live in a society where there are many organisations which concern themselves with public causes and with the welfare of others and where there are altruistic individuals with the knowledge, experience and skill to make useful representations on matters affecting the public. If at all possible, s 4 of PAJA, which gives effect to the fundamental right to just administrative action in s 33 of the Constitution, should be interpreted in a way which requires the views of public interest groups and individuals to be heard before action is taken which materially and adversely affects the public, even though the affected persons themselves might be unable to provide input and may not even yet be identifiable.

[86] In my opinion, s 4 is capable of such an interpretation. One of the procedures a decision-maker may follow under s 4(1) is to hold a public inquiry in terms of s 4(2). There is nothing in s 4(2) to indicate that only affected individuals or their agents may be heard. It is true that the notice and comment procedure set out in s 4(3) requires the decision-maker to take appropriate steps to communicate the administrative action 'to those likely to be materially and adversely affected by it' and to call for comment 'from them'. This does not, however, exclude the possibility of obtaining comment from others as well. An invitation for comment published in the press would typically elicit responses from interested NGOs, and I do not think that the decision-maker could properly refuse to take their representations into account. Perhaps most importantly, s 4(4)(a) states that the decision-maker may 'depart' from the requirements of s 4(1) to (3) if it is reasonable and justifiable to do so. The word 'depart' does not mean that procedural fairness can be thrown overboard altogether in such circumstances (unless, of course, the circumstances of the case are such as to make a complete abrogation of the requirement fair and reasonable). In my view, the extent of departure must be tailored to meet the circumstances which make a departure fair and reasonable; the departure must be no greater than is justified by

those circumstances. This would generally entail that the decision-maker should follow some other procedure calculated to achieve as far as reasonably possible the right to procedurally fair administrative action.

[87] If one assumes in the present case that a public inquiry in terms of s 4(2) would have been too time-consuming and that compliance with s 4(3) was not feasible because the persons likely to be adversely affected could not realistically have been invited to make comment, the obvious course would have been to seek comment from the organisations who would have participated in a public inquiry had one been held in terms of s 4(2). We know that in this case the DG had a mailing list of relevant NGOs with whom he met from time to time and whom he styled 'stakeholders'. He plainly regarded their views as relevant and potentially helpful. His engagement with them must have been prompted by a very proper sense of fairness. It thus cannot be said that a modified form of fair process in relation to the closure decision was not available to the DG.

[88] This leaves the question whether the actual engagement with the stakeholders met the requirement of procedurally fair administrative action. The respondents contend that it did. I disagree. The minutes of the meeting of 7 May 2012 indicate that the DHA's position as communicated to stakeholders was that the DHA intended to continue operating from the Maitland office if at all possible. The stakeholders were told that if this failed, the DHA would investigate alternatives and need to come up with an alternative strategy and that the DHA would consult further with stakeholders. It was not put to stakeholders at the meeting of 7 May 2012 that the DHA had in mind, if it had to vacate the Maitland premises, to permanently close the CT RRO to new applicants nor were views on such a possible course of action invited. Nor was it suggested that the CT RRO might be closed on the supposed ground that Cape Town was not a strategically important location for an RRO (a consideration on which the respondents placed much emphasis in their answering papers – I shall discuss that aspect when dealing with the third ground of review).

[89] There were further meetings on 23 May 2012 and 8 June 2012. On Scalabrini's version, the closure decision was already announced on 23 May 2012. This is not denied, though I have already mentioned the question-mark raised by Mr

Moerane as to whether a meeting took place on this date at all. At any rate, there is no evidence that the purpose of the meeting on 23 May 2012 was to obtain stakeholders' comment on a proposed decision to close the CT RRO. And by 8 June 2012 there can be no doubt that the closure decision had already been made.

[90] I thus find that the closure decision is liable to be set aside in terms of s 6(2)(c) of PAJA.

(b) Public consultation as part of legality principle

[91] If PAJA does not apply, the applicants contend that consultation with stakeholders was nevertheless required by the legality principle. Since the decision to close the CT RRO was the exercise of a public power, the legality principle applies to the DG's decision. The argument is founded on the proposition that the principle of rationality as one of the requirements for the lawful exercise of public power under the principle of legality (as to which see *Pharmaceutical Manufacturers Association of SA & Other: In re Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) paras 83-86) is concerned not only with the rationality of the merits of the decision but also with the rationality of the process by which it is reached.

[92] An important decision in this regard is the judgment of the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (3) SA 293 (CC). This case concerned the President's power to grant pardons under s 84(2)(j) of the Constitution. The President had embarked on a process of considering pardons for persons convicted of politically-motivated crimes. Various NGOs applied for an interdict to prevent the President from granting pardons without hearing the victims. The high court granted the interdict on the basis that the granting of pardons was administrative action and that the victims were entitled to procedural fairness under PAJA. The Constitutional Court confirmed the interdict but did not decide whether the granting of the pardons would constitute administrative action. The Constitutional Court based its decision instead on the principle of legality, which required pardons to be 'considered and decided upon rationally'. This meant that the process determined by the President had to be rationally related to

the achievement of the objectives of the process. Although the executive has a wide discretion in selecting the means to achieve its objectives, the courts are obliged to examine the means selected to determine whether they are rationally related to the objectives sought to be achieved (paras 49-52). The exclusion of victims from the process did not pass constitutional muster, having regard to the objectives of the pardon process in question (paras 53-68 and 70-71).

[93] The process element of rationality was considered again in *Democratic Alliance v President of South Africa & Others* 2013 (1) SA 248 (CC). After referring to *Albutt* and several other cases, Yacoob ACDJ, who delivered the unanimous judgment of the court, confirmed in unequivocal terms that both the process by which a decision is made and the decision itself must be rational (paras 33-34). In para 36 he said the following:

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

[94] In *Democratic Alliance* this exposition of the law led to the ultimate conclusion that there was an absence of a rational relationship between means and ends in the President's appointment of Mr Simelane as the National Director of Public Prosecutions. There were *prima facie* indications of misconduct by Mr Simelane wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who was sufficiently conscientious and had enough credibility to do that important job effectively (para 89). Despite this *prima facie* indication, the President did not follow a process of further investigation in order to determine the doubts raised as to Mr Simelane's suitability: 'There is no rational relationship between ignoring the findings of the Ginwala Commission without more and the purpose for which the power had been given' (para 88).

[95] The purpose of the power conferred by s 8(1) of the Refugees Act is to ensure that there are as many RROs in South Africa as are needed for the purposes of the Act. Ultimately the person whose judgment on that question is decisive is the DG but in order to reach his conclusion he must follow a process which is rationally connected to the attainment of that purpose. Section 8(1) imposes one express process requirement as an aid to rational decision-making, namely consultation with the SCRA. This does not mean, however, that nothing else need be done. Internally the DG must follow a proper process of investigation. In addition, however, I consider that he could not achieve the statutory purpose without obtaining the views of the organisations representing the interests of asylum seekers. His decision obviously would affect asylum seekers. The information available to the DHA internally and through the SCRA might tell the DG what he needed to know concerning the DHA's operational procedures, its capabilities and its history of operational problems in Cape Town but would not give him the perspective (or the full perspective) from the asylum seekers' side. This perspective appears to me to have been of obvious importance in reaching a rational conclusion as to whether or not an RRO in Cape Town was needed.

[96] In assessing the rationality of the process followed by the DG, it is important to remind oneself that consultation with the NGOs would not have been a new or alien process for the DG. He recognised them as stakeholders and apparently did in general consult with them on important developments. At the meeting of 7 May 2012 the DHA said that there would further consultation with stakeholders if efforts to remain at the Maitland premises failed. This renders all the more inexplicable the DG's failure to do so.

[97] Accordingly, and even if PAJA is for any reason not applicable, I consider that the closure decision was, in terms of the legality principle, unlawful in view of the failure to consult with and obtain the views of stakeholders.

<u>Third ground of view: unreasonableness/irrationality of closure decision</u>

[98] The third ground is that the closure decision was irrational, unreasonable, and was materially influenced by irrelevant considerations and by a failure to take

into account relevant considerations. Once again, Scalabrini contends that it should succeed on this basis even if PAJA is inapplicable.

(a) PAJA

[99] Taking irrelevant considerations, and failing to take relevant considerations, into account are grounds of review in terms of s 6(2)(e)(iii) of PAJA. Administrative action is also reviewable in terms of s 6(2)(f)(ii) if there is no rational connection between the action and the purpose for which it was taken or the purpose of the empowering provision or the information before the decision-maker or the reasons given by the decision-maker. Finally for present purposes, administrative action is reviewable in terms of s 6(2)(f) if the decision is so unreasonable that no person could have so exercised the power or so performed the function in question.

[100] The purpose of the power in s 8(1) of the Refugees Act is expressly stated: to ensure that there exist in South Africa as many RROs as are necessary for the purposes of the Act. Those purposes include, in accordance with South Africa's international obligations, the receiving and determination of asylum applications and the issuing and extension of asylum seeker permits pending the final determination of asylum applications.

[101] In about 2000, when the Act came into force, the then DG determined that it was necessary for the Act's purposes that there should be an RRO in Cape Town. He also determined that there should be RROs in other major metropolitan centres such as Pretoria, Johannesburg, Durban and Port Elizabeth. It is hardly surprising that he should have concluded that RROs should be established in the most populous centres in the country because that is where one expect most asylum seekers to reside, work and receive basic public services during the period of the adjudication of their asylum applications. History has proved the DG to have been correct, at least insofar as Cape Town is concerned. Over the period 2000 to June 2012 many thousands of asylum seekers presented their asylum applications at the CT RRO and returned to the CT RRO to have their permits extended and for attendances related to the asylum applications. Clearly those were persons who

were residing and working in the greater Cape Town area pending the determination of their applications.

[102] It is an important feature of this part of the case that the court is not enquiring into the reasonableness and rationality of a s 8(1) decision made as the first entry on a clean slate. We are dealing with a closure decision reversing an earlier decision that an RRO in Cape Town was necessary for the purposes of the Act and where one has an intervening history of 12 years' actual experience of the use made of the CT RRO. It is thus significant, in my view, that one does not find anywhere in the papers an assertion by the DG that he considers that an RRO is no longer needed in Cape Town, let alone an explanation as to why an RRO which was previously thought necessary is no longer so regarded.

[103] The only reasons for the closure decision given by the DG in his letter faxed to Scalabrini's attorneys on 19 June 2012 were the termination of the access road lease and the order in the *Voortrekker Road* case. Those are reasons why the DHA had to vacate the Maitland premises. They are not in themselves reasons for closing the CT RRO (ie for deciding that there would henceforth be no RRO in Cape Town). These particular circumstances do not show that the DG considered that an RRO in Cape Town was no longer necessary for the purposes of the Act, any more than the DHA's inability to continue operating from the Airport Industria premises in 2009 was relevant to the need for an RRO in Cape Town. In fairness to the DG, I think he probably mentioned only these two reasons in his letter because he saw himself as explaining why the DHA was no longer servicing clients at the Maitland premises. I do not view with a cynical eye (as Mr Budlender I think wished me to do) the further reasons given by the DG in the answering papers, which are more directly concerned with the decision not to maintain an RRO anywhere in Cape Town.

[104] From the answering papers the following further factors emerge as possible reasons for the closure decision: [a] that the DHA has identified metropolitan centres as undesirable locations for RROs, given the history of challenges relating to nuisance and land use control; [b] that the DHA is in the process of considering the efficacy of relocating RROs to ports of entry near the north of the country where most asylum seekers enter South Africa; [c] that the CT RRO was not strategically

located and did not justify the existence of a fully-fledged RRO, having regard to the fact that a negligible number of the asylum seekers who present their applications in Cape Town enter South Africa through the two Cape Town ports of entry (the harbour and the airport), instead coming into South Africa by land from our northern neighbours, either illegally or through ports of entry on South Africa's northern borders (particularly Zimbabwe and Mozambique). (These three factors were also relied upon by the DHA to justify the closure of the PE RRO: see *Somali Association* at 638F-H.)

[105] The idea of relocating RROs to ports of entry near our northern borders was mentioned in the answering papers as a policy shift which was under consideration by the DHA. According to the minutes of the meeting of 30 May 2012 this proposed policy has been discussed at cabinet level. The policy, it clearly emerges from the papers, has not yet been finalised and adopted. It is not clear to me that the DG in fact claims that this proposed policy is one of his reasons for the closure decision. The DG's first answering affidavit could be read as merely identifying the direction to which the government's mind was turning in view of the DHA's identification of metropolitan areas as unsuitable for RROs[5] though there are passages in the DG's supplementary affidavit which suggest that the policy was a material consideration.[6] However, if this was one of his reasons, it was in my view an impermissible reason. Firstly, the proposed policy has not in fact been finalised and adopted. Second, and more importantly, the policy would only be a permissible one if it served the statutory purpose mandated by s 8(1), namely ensuring that there exist in South Africa the RROs needed to carry out the Act's purposes. The answering papers do not say that the proposed policy of moving RROs to our northern borders has as its object to ensure that South Africa has all the RROs that are needed properly to give effect to the requirements of the Act. The policy might, for example, be driven by the DHA's convenience or be a means of making entry into South African by asylum seekers difficult and inconvenient. To the extent that it rests on the same thinking which underlies the contention that Cape Town is not a 'strategic' location for an RRO, it is deeply flawed for reasons to which I now turn.

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[5] Paras 51-56 (record 153-154).
[6] Para 20 (record 456-457).

[106] The contention that Cape Town is not strategically located comes the closest to advancing a reason consistent with the purpose of the power conferred in s 8(1) – it could well be regarded as unnecessary to have an RRO at a strategically unimportant location. But this depends on what is meant by 'strategic'. The only permissible sense, in the context of s 8(1), is 'strategic' as meaning necessary for the purposes of the Act. Now what the DG meant by 'strategic' was that Cape Town was not the location of the ports of entry through which the vast majority of asylum seekers who thronged the CT RRO entered South Africa. The respondents' counsel put the point thus in their heads of argument:

'Logic dictates that new applicants for asylum should submit their applications under sections 21 and 22 at the port of entry that they use to enter the Republic so that they may immediately be provided with the protection envisaged in the section 22 permit before venturing into the vastness of the country with its impending risks from predatory rogues and exploitation by unscrupulous thugs.'

[107] So far from being a logical consideration, the port of entry used by an asylum seeker is, in my view, an irrelevant consideration which is not directed at the purpose mandated by s 8(1). In terms of s 23 of the Immigration Act an asylum seeker may obtain an asylum transit permit at a port of entry (that process is not at issue in this case) and then has 14 days in which to present himself to an RRO. That is more than enough time for the asylum seeker to reach any part of the country, including Cape Town. Moreover, an RRO is obliged to receive an asylum application even if the asylum seeker has entered the country unlawfully. Persons who enter the country unlawfully will also find their way to metropolitan areas throughout the country, including Cape Town. Accordingly, ports of entry on our northern borders are not the only places, nor even the most likely place, where asylum seekers would be expected to need facilities for purposes of presenting their s 21 applications and obtaining their s 22 permits (ie for purposes of their first presentation at an RRO). The facts known to the DG confirmed this. Over the period 2000 to June 2012 the CT RRO was an extremely busy RRO. In the first four months of 2012 the CT RRO received substantially more new applications than the RROs in Durban and Musina – 5 946 (about 1 500 new applications per month: an

annualised figure of 18 000).[7] This was not because asylum seekers were being forced to come to Cape Town due to the absence of 'strategic' RROs further north. They were clearly presenting themselves here out of choice. The northern ports of entry are thus not 'strategic' in any sense relevant to s 8(1).

[108] A consideration of the nature of the entire process for obtaining refugee status merely confirms that RROs near northern ports of entry are not 'strategic' in a permissible sense. What I have mentioned in the preceding paragraph is the asylum seeker's first presentation at an RRO – our northern ports of entry are not 'strategic' even in relation to the first attendance. As a fact, though, the process does not end there. The asylum seeker needs to present himself at an RRO on a number of occasions thereafter over a period which may last months, even years. RROs to handle those further attendances are needed for the Act's purposes. There is nothing 'strategic' about locations near our northern ports of entry insofar as those further attendances are concerned. Nobody expects asylum seekers to live and work exclusively near our northern ports of entry over the period during which their asylum applications are determined, just because that is where they entered South Africa. That is not where work opportunities, accommodation and public facilities exist on the scale necessary to enable asylum seekers to survive with basic dignity while their applications are adjudicated or where their existing family and communities (which many of them already have in South Africa) reside. The notion that the closure of the CT RRO was somehow a decision taken in the best interests of asylum seekers themselves is not borne out by the facts and verges on the cynical.

[109] These considerations lead to the inevitable conclusion that the DG could not have regarded Cape Town as being 'not strategic' in any sense relevant to the purpose of the power conferred by s 8(1). If that is so, he made the closure decision for a reason not authorised by s 8(1) and by taking into account an irrelevant consideration (the location where asylum seekers enter South Africa) and ignoring a

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[7] According to the respondents these figures for new applications were unnaturally high for the CT RRO due to an influx of Zimbabwean asylum seekers during the first few months of 2012. However the statistics show that over the same period the s 22 extensions handled at the CT RRO exceeded those done in Durban and Musina to an even larger extent (52 666 as against 16 794 and 14 860 respectively), a phenomenon which could not be attributable to a short-term spike.

relevant consideration (that large numbers of asylum seekers wish to present their asylum applications in Cape Town and to reside here while their applications are assessed). But if the DG did, by 'strategic', have subjectively in mind what was necessary for the Act's purposes, his conclusion that Cape Town was not a strategic location for an RRO was not rationally connected to the purpose of the s 8(1) power nor to the information known to him. The phrase 'rational connection' in s 6(2)(f)(ii) refers to an objectively rational connection, regardless of what the DG may subjectively have believed (see *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) paras 20-21). What I have said in the preceding two paragraphs shows why there is no rational connection between [a] the statutory purpose of ensuring that South Africa has the RROs needed to achieve the Act's purposes and [b] a view that because most asylum seekers in Cape Town do not enter South Africa though a port of entry in Cape Town there is no need for an RRO in Cape Town.

[110] The resultant decision is also grossly unreasonable in its effect. Thousands of asylum seekers will either have to abandon the idea of residing in the Cape Town area while their asylum applications are assessed or they will need to spend time and money to travel on a number of occasions to RROs in the north of the country. If they have work in Cape Town, they may lose it because of the need to take off three or four days for each attendance at an RRO. If they have dependants, they would need to leave them in the care of others or travel with them. It appears from the DG's answering affidavit[8] that he intended his decision to be a discouragement to asylum seekers to reside in Cape Town over the period during which their application are assessed (we know that this period may last many months and even years). He said that one of the reasons he considered it prudent to close the CT RRO to new applicants was 'to discourage people from going so far inland to seek asylum'. This was beneficial to the DHA because in those cases where asylum applications failed it would be cheaper for the government to deport the asylum seekers from northern ports of entry than from Cape Town. It is grossly unreasonable, in my view, to require asylum seekers to reside for a protracted

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[8] Paras 98-99 (record 178-179).

period in a location close to a northern port of entry (the position might be different if the entire process was one which could be finalised within a few weeks).

[111] Mr Moerane conceded in argument that if (as I have found) new asylum seekers need to travel to northern RROs to obtain s 22 extensions the closure decision was unreasonable. I think it is an unreasonable decision even if the s 22 extensions could be done in Cape Town. I agree with Davis J's observation in his Part A judgment (p 35) that the closure decision imposes an 'untenable burden' on a vulnerable group. A conclusion by the DG that an RRO was not needed in Cape Town was one which in my opinion a reasonable decision-maker in the circumstances could not have reached (this being the s 6(2)(h) test – see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) para 44).

[112] This leaves the DG's statement that metropolitan areas have been identified by the DHA as an undesirable location for RROs. This is because of the problems the DHA has encountered with nuisance and land use restrictions. I feel a measure of sympathy for the DHA on this score. On the one hand they get told by courts to stop operating at certain premises because they are causing a nuisance or contravening land use restrictions; and then they are criticised by the courts for ceasing to operate RROs in those areas. The DHA's task is made considerably more burdensome by the significant number of unfounded asylum applications by economic migrants (according to the DHA 77% of all applications adjudicated at the CT RRO over the period 2010 – June 2012 were rejected as unfounded or manifestly unfounded). However, undesirability in the sense meant by the DG is not a criterion mandated by s 8(1). If an RRO in a metropolitan area is otherwise needed for purposes of the Act, the fact that the DHA faces practical challenges in operating an RRO in the metropolitan area is not a permissible reason to close (or not to open) an RRO in that area (unless, of course, the purposes of the Act could be achieved substantially as well by an RRO near to but not actually inside the metropolitan area).

[113] Clearly the DHA cannot be expected to do the impossible. If it is not practically possible lawfully to operate an RRO in a particular metropolitan area, the

DG cannot be required to maintain an RRO there, even if he thinks it is otherwise necessary to have an RRO in that area. Although the DG says that the DHA has done 'everything humanly possible' to procure an alternative site for the CT RRO without success,[9] I do not see how the DHA can maintain the position (if it does) that it is not practically possible lawfully to operate an RRO in Cape Town.[10] Pickering J, in his judgment on the DHA's application for leave to appeal in the *Somali Association* case, said that while it might prove difficult for the DHA to secure suitable alternative premises 'it is stretching credulity too far to suggest that it might be impossible to do so in a city the size of Port Elizabeth'. This applies *a fortiori* in Cape Town. The DHA still operates RROs in Durban and Pretoria, both large metropolitan areas. Clearly there are challenges. Some of these are inherent in the nature of an RRO – precisely because the RRO is needed in Cape Town it attracts large numbers of people. Some of the problems the DHA has encountered may, on the other hand (as NGOs like Scalabrini would claim), be attributable to the DHA's failure to address the issue with sufficient energy and skill. And in the case of the CT RRO, part of the problem may be that because the DHA has the misconceived notion that Cape Town is not a 'strategic' location for an RRO and has an eye on the proposed policy of moving RROs near to our northern ports of entry, it has not tackled the identification of new premises for the RRO in Cape Town with the necessary commitment. I cannot determine to what extent these various factors have played their part. Perhaps the DHA has become overly sensitive to the views of neighbours, and is no longer willing to operate from a site unless there are no objections from neighbours (it seems that the DHA jettisoned its preferred new site at Rusper Road in Maitland because three neighbours refused to withdraw objections). If the DHA takes proper steps to avoid the creation of a nuisance, it is simply not plausible that there does not exist anywhere in the metropole a site or sites from which an RRO could be operated. Provided the DHA conducts a lawful operation (which includes providing adequate toilet, cleaning and security facilities to prevent the creation of a nuisance), the fact that neighbours may not like an RRO nearby is not a justification for not having an RRO in Cape Town.

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[9] Answering affidavit paras 45-49 (record 148-153).

[10] Pickering J, in his judgment on the DHA's application for leave to appeal in the *Somali Association* case, said that while it might prove difficult for the DHA to secure suitable alternative premises 'it is stretching credulity too far to suggest that it might be impossible to do so in a city the size of Port Elizabeth'.

[114] Although I have referred to the identification of new premises for the CT RRO, it is by no means clear that the existing premises at Customs House (on its own or in conjunction with other DHA premises in Cape Town) cannot be used for new asylum seekers, at least as a temporary measure. As Davis J pointed out in his Part A judgment, Customs House previously on occasion handled more than 24 000 asylum applications per year, which is somewhat higher than the annualised 2012 figure of 18 000 for Maitland. Furthermore, the DHA appears to claim in its supplementary papers that it can handle the s 22 extensions of new Cape Town based asylums seekers, so that the additional burden of a fully functional RRO would be limited to receiving the initial s 21 applications and issuing the accompanying s 22 permits, and then adjudicating the applications. Although the adjudication requires the attendance of the asylum seeker, it is presumably by appointment.

[115] Finally, although this application concerns the closure of the RRO in the Cape Town metropolitan area, it is quite conceivable that an RRO could be established a short distance beyond the metropolitan boundary in a way which would still adequately meet the needs of the Cape Town based asylum seekers. That is something which could no doubt be explored in consultation with the SCRA and with stakeholders. Scalabrini's supplementary replying affidavit appears to accept that such a course would be acceptable if the challenges of operating an RRO in the metropole were truly insurmountable (which they contest).[11]

[116] In summary, the closure decision is reviewable and liable to be set aside on several of the grounds set out in s 6(2) of PAJA. This conclusion accords with Davis J's more succinctly stated opinion of the *prima facie* position in his Part A judgment.

(b) Legality review

[117] I have formulated the above conclusions with reference to the grounds of review in s 6(2) of PAJA. If PAJA is inapplicable, the closure decision would still be subject to review in terms of the legality principle. This principle is not as narrow as

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[11] Para 35 (record 536).

is sometimes supposed. In the *Pharmaceutical Manufacturers* case *supra* Chaskalson P said that the requirements for the valid exercise of statutory powers as mentioned by Innes ACJ in *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 were 'consistent with the foundational principle of the rule of law enshrined in our Constitution' but that the Constitution 'requires more' (para 83). He then went on to identify this 'something more', namely that the exercise of public power must also be rationally related to the purpose for which the power was given, such rational relationship to be objectively assessed (paras 84-86). The *Shidiack* grounds, as developed in subsequent decisions of the Appellate Division,[12] can be viewed as concerned with subjective considerations – the workings of the decision-maker's mind; the rational relationship ground, by contrast, calls for an objective consideration of the decision. The survival of the *Shidiack* grounds as a component of legality review was confirmed by the Supreme Court of Appeal in *Democratic Alliance & Others v Acting National Director of Public Prosecutions & Others* 2012 (3) SA 486 (SCA) para 30. It follows that even if PAJA is inapplicable the closure decision would be liable to be set aside on review if [a] the decision failed the objective 'rational relationship' test; and/or [b] a failure by the DG properly to apply his mind could be inferred from the gross unreasonableness of his decision or from the considerations which he took into account or failed to take into account.

[118] What I have said in regard to s 6(2) of PAJA is I think sufficient, without the need for further elaboration, to show why, in terms of the legality principle, there was an absence of an objectively rational relationship between the closure decision and the purposes of s 8(1); and why the decision is vitiated by the DG's failure to apply his mind properly to the matter.

<u>Relief</u>

[119] Scalabrini sought in Part B of its notice of motion orders [a] declaring unlawful, and setting aside, the decision to close the CT RRO; [b] directing the

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[12] As developed by the Appellate Division, the *Shidiack* grounds would cover a failure to apply the mind properly by taking irrelevant considerations into account or by failing to take relevant considerations into account: see, eg, *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A) at 152A-D and *During NO v Boesak* 1990 (3) SA 661 (A) at 671H-672D and 675G-676D.

respondents without delay to ensure that an RRO remains open and fully functional within the Cape Town Metropolitan Municipality at which new applicants for asylum can make asylum applications and be issued with s 22 permits; and [c] directing the opposing parties to pay Scalabrini's costs. Mr Moerane submitted that an observance of the separation of powers made it inappropriate in this case to grant consequential orders and that I should thus confine myself to declaratory relief. I do not agree. I have performed a judicial function by applying the law to determine that the closure decision is invalid. The usual course is then to set aside the invalid decision (cf *Eskom Holdings Ltd & Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628) paras 9 and 18). The corollary of a setting-aside in this case is that the CT RRO, the closure of which has not been validly decided, must remain operational. It is for the DHA to decide from what premises the RRO will operate but the rule of law requires that the legal invalidity of the closure decision be reflected in an obligation on the part of the DHA to maintain an RRO in Cape Town. This is very different from ordering the DG to establish an RRO in a new location. The relevant DG already made a valid decision to establish the CT RRO. The effect of this judgment is that the current DG has not made a valid decision to close the said RRO.

[120] If the DHA had complied with the order of Davis J there would now be no difficulty. The CT RRO would be operational, and I would simply order the RRO to remain operational. However, and despite an order by Davis J granting leave to execute, the DHA has not complied with his orders. This is disturbing. Be that as it may, the fact is that there has not since 30 June 2012 been an operational CT RRO. Mr Budlender recognised that in these circumstances it was not realistic to require the DHA to resume operating the CT RRO with immediate effect. He submitted that the DHA should have the CT RRO operational within three months. There is already a binding order against the DHA requiring it to have an RRO operational in Cape Town. The judgment of Davis J in the Part A hearing should at very least have caused the DHA to make contingency plans against the possibility that the SCA would dismiss its appeal in respect of the Part A relief and against the possibility that this court, like Davis J, would in any event find against the DHA in respect of the Part B relief. I thus see no reason to grant a period longer than three months. However, and since the DHA may need to make lease arrangements which run by

the calendar month I shall make the effective date Monday 1 July 2013, meaning that the DHA will be given slightly longer than three months. Of course, the DHA would be entitled to apply on good cause shown for an extension of that period if despite its best endeavours it is not possible to have the RRO operational again within three months (rule 27(1)) though in view particularly of the DHA's disregard of Davis J's order any hint of prevarication by the DHA is likely to be viewed by the court with extreme disfavour. Such an application would need to set out in detail the steps taken by the DHA to comply with the order. Those steps may entail seeking a departure from the usual procurement procedures laid down in the Treasury Regulations (deviation is permissible in the circumstances described in Regulation 16A.6.4).

[121] Mr Budlender asked that I make an order that the DHA provide it with monthly reports of the progress made in making the CT RRO operational, since otherwise Scalabrini would have to wait for the expiry of the three-month period before it could take any action to address inaction by the DHA. This relief was not specifically sought in the notice of motion because it was envisaged that by the time the Part B relief was heard the RRO would be operational by virtue of the Part A relief. The respondents' counsel did not argue that I could not or should not grant ancillary relief along these lines.

[122] I make the following order:

(a) The second respondent's decision, taken by not later than 30 May 2012, to close the Cape Town Refugee Reception Office to new applicants for asylum after 29 June 2012 is declared unlawful and is set aside.

(b) The first to third respondents are directed to ensure that by Monday 1 July 2013 a Refugee Reception Office is open and fully functional within the Cape Town Metropolitan Municipality at which new applicants for asylum can make applications for asylum in terms of s 21 of the Refugees Act 130 of 1998 and be issued with permits in terms of s 22 of the said Act.

(c) During the week commencing Monday 29 April 2013, and again during the week commencing Monday 27 May 2013, the second respondent or his duly appointed representative shall furnish a written report to the applicants' attorneys summarising the steps taken by the Department of Home Affairs up to the date of the report to give effect to para (b) of this order; giving the second respondents' assessment as to whether he expects there to be compliance with the said para (b) by 1 July 2013; and, if the second respondent's assessment is that there will not be compliance by that date, giving the second respondent's best estimate of the date by which there will be compliance.

(d) The first to fourth respondents are directed jointly and severally to pay the applicants' costs of suit, including the costs of two counsel.

ROGERS J

APPEARANCES:

For Applicants: S BUDLENDER & NCUMISA MAYOSI

Instructed by:

Legal Resource Centre & University of Cape Town Refugee Law Clinic

Cape Town

For Respondents:	MTK MOERANE SC (with LT SIBEKO SC & GR PAPIER)
	Instructed by:
	The State Attorney
	Cape Town