IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 12960/06

In the matter between:

K TAFIRA	**First Applicant**
P MPOFU	**Second Applicant**
L KHUMALO	**Third Applicant**
T NKOSIYABO	**Fourth Applicant**
L J NDLOVU	**Fifth Applicant**
S MOYO	**Sixth Applicant**
T NCUBE	**Seventh Applicant**

and

M NGOZWANE	**First Respondent**
M MACANDA	**Second Respondent**
THE MINISTER OF HOME AFFAIRS	**Third Respondent**
THE DIRECTOR-GENERAL OF HOME AFFAIRS	**Fourth Respondent**
B MKWEBHANE-TSHEHLE	**Fifth Respondent**
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	**Sixth Respondent**

JUDGMENT

RABIE J:

INTRODUCTION

This matter concerns the legality and constitutionality of the procedures and processes put in place by the department of Home Affairs at the Rosettenville Refugee Reception Office and the Marabastad Refugee Reception Office in respect of persons who wish to apply for asylum in terms of the Refugees Act, Act 130 of 1998 (hereinafter "the Refugees Act").

The first and second respondents are respectively the Heads of the aforesaid two refugee reception offices. The third and fourth respondents are the Minister of Home Affairs and the Director-General of Home Affairs respectively. The fifth respondent is the Director of Refugee Affairs. The sixth respondent is the Standing Committee for Refugee Affairs.

The matter began as an application brought by the seven applicants – all of whom wished to be granted asylum – on an urgent basis in this court on 26 April 2006. However, subsequent to certain undertakings being provided by the respondents, *inter alia,* to grant each of the applicants an asylum seeker permit in terms of section 22 of the Refugees Act, the parties agreed to remove the matter from the roll to allow sufficient time for the filing of answering and replying papers. The matter was subsequently re-enrolled for hearing.

The applicants approached this court in their own interest and in the public interest. The case revolves around the issue of whether the procedures put in place by the respondents to deal with applications for asylum, are lawful in terms of the Refugees Act, the Regulations made under that Act, the

Constitution and international law.

THE FACTS

The facts of the present matter, which are to a large degree common cause, are the following: All seven of the applicants are Zimbabweans. They crossed the border into South Africa illegally. The applicants alleged that they all called at respectively the Marabastad and Rosettenville refugee reception offices in order to apply for asylum. The respondents denied that the first applicant ever called at any office and I shall refer to this issue below. Five of the applicants were told that they did not qualify for refugee status and the other one was "advised" that she did not qualify for asylum. I shall refer to the position of this particular applicant in more detail below.

The processes put in place by the department, which is the subject of determination in the present matter, were the result of an attempt by the department to combat the ever increasing difficulties experienced by the department in handling the vast number of applications with which it was confronted on a daily basis. Especially in recent years, South Africa has become the prime destination of literally hundreds of thousands of refugees, mostly from the southern regions of Africa. It seems to be clear that the department has too few officers in the field and an ever increasing backlog exists in respect of applications for asylum. Why more personnel have not been appointed is not clear and was not addressed in the present matter, but what is clear, is that the present compliment of staff cannot deal with the numbers of applicants for asylum. I shall refer to this aspect again later in this judgment.

One consequence of this situation was that long queues of applicants formed outside the refugee reception offices on a daily basis and which eventually, as could be expected, resulted in a health hazard being created. This situation was created, according to the respondents, because the department immediately set the procedure in terms of section 21 of the Refugees Act in motion when an applicant approached the office for the first time and tried to make sure that such a person was fully processed and left the office with a section 22 permit in his possession. According to the department this system proved unworkable, frustrating and provoked widespread criticism for the simple reason that it was only possible to process approximately 400 applications per office out of the approximately 900 persons who called at such an office per week.

In the Western Cape province the department attempted to resolve this situation by limiting the number of applications per day. This policy was found by the Western Cape division of this court to be unconstitutional. (Cf Kiliko v The Minister of Home Affairs 2006 (4) SA 114 (C)).

In an attempt to regulate the process and to prevent long queues from forming, and also in an attempt to reduce the number of asylum seekers, the department, through its Marabastad and Rosettenville offices, devised two new processes. These are the processes which form the subject of the present application.

The first process is the so-called "appointment system" which simply means

that when an asylum seeker attends the refugee reception office for the first time, he is not seen by a refugee reception officer who assists him in completing the necessary application and supplies him with an asylum seeker permit (the so-called "section 22 permit"), but he is merely given an appointment slip on which appears a date on which he must return to the office for his consultation with the refugee reception officer. On that day he would be assisted with his application under section 21 of the Refugees Act and be granted a section 22 permit.

According to the papers before this court and submissions from the bar, such an appointment can be as far as six months to almost a year in the future. On behalf of the applicants it was submitted that during such period the asylum seeker remains an illegal foreigner and is liable to be arrested, detained and deported – the reason being that the mere fact of such an appointment, or the possession of an appointment slip, creates no rights for the particular asylum seeker. On behalf of the respondents it was submitted that this was not necessarily so. I shall refer to this issue again below.

The second system devised by the Marabastad and Rosettenville offices of the department, is the so-called "pre-screening procedure". According to the respondents this procedure was adopted because it was realised that many of the applicants were not really desirous of wanting asylum or, having regard to the reason that they gave for wanting asylum, would not even remotely qualify for asylum. According to the respondents it emerged that many of the people who called at the offices were in reality job seekers, prospective students or

simply wanted to legitimise their stay in South Africa and could, therefore, not be considered to be refugees as defined in the Refugees Act.

According to the respondents a meaningful mechanism had to be found to ensure that those who were scheduled to see the refugee reception officer were desirous of wanting refugee status and, in addition, would on some reasonable basis qualify for asylum. According to the respondents the idea was not to assess the merits of the application of every applicant, but rather to determine whether the person attending the office had come with the intention of being classified as a refugee, and if so, whether he could qualify for asylum on the strength of the reason he gave for requesting asylum.

According to the respondents it was believed that two questions would assist in distinguishing the genuine asylum seeker from someone who actually wanted some other type of permit, and in addition, in distinguishing a real candidate for asylum from one with no prospects of success at all. These questions were posed on a so-called "pre-screening form" which refugee seekers were asked to complete on arrival at the refugee reception office. The first of these questions was why the applicant was applying for asylum and the second question was why he had left his own country, or what would happen if he went back to the country. The asylum seekers were given only a brief period of time to complete these forms and they had to do so (by writing down their particulars and answering the aforesaid two questions), outside the offices in the car park of the building. They furthermore had to complete the form without any assistance and without the benefit of interpreters. These forms were then

taken into the offices and considered by an official.

At the Rosettenville office the officers, according to the respondents, did not restrict themselves to giving advice, pursuant to the pre-screening forms, but actually made decisions in this regard and communicated them to the affected persons. The respondents stated that they have since realised that such a practice was in conflict with the provisions of the Refugees Act and as such unlawful and that those decisions were null and void. Since the launch of the present application that procedure had been abandoned. It is common cause that not only some of the applicants, but also a vast number of other asylum seekers had their applications turned down as a result of this unlawful procedure.

According to the respondents neither of the aforesaid offices any longer take decisions on the basis of the pre-screening forms, but merely give advice to such asylum seekers. So, for example, if it transpires that an asylum seeker merely wanted a study permit, the officer would advise him to approach another office in the department dealing with such permits. According to the respondents, such a person would not be prevented from applying for a section 22 permit if he insists on doing so. However, in terms of this new procedure the asylum seeker is still required to answer the aforesaid two questions on the pre-screening form and if, on the basis of the answer to the two questions, the indication is that something other than asylum is being sought, such a person is given a written document in which he is advised that the permit that is being

sought may only be issued by another office of the department and the person will be advised to approach that office. The respondents further added that "(a)ll that was done is that persons who came to the offices were asked to fill in forms so that it could be ascertained why they had approached the office, and, if for asylum, whether, having regard to the reason they are seeking asylum, they could qualify therefor".

According to the respondents this process is valid and legal. According to the applicants this process is illegal and unlawful. I shall revert to this issue below.

THE RELIEF CLAIMED

The relief claimed in paragraphs 2, 3 and 4 of the amended notice of motion relate to the applicants themselves and is aimed at the rescission of the decisions taken by the officials of the department of Home Affairs rejecting the applicants' applications for asylum and for an order directing the fourth respondent and his subordinates to process and consider the applicants' applications for asylum in a lawful manner and to issue permits to the applicants in terms of section 22 of the Refugees Act.

Prayer 5 to 13 of the notice of motion relate to so-called general relief. More particularly prayer 5 is for a declaratory order that the current practice and policy of receiving applications for asylum at the Marabastad and Rosettenville refugee reception offices are unlawful. Prayer 6 and 7 is for an order directing

the respondents to receive and process applications for asylum in a non-discriminatory and fair manner and to implement the Refugees Act in dealing with such applications. Prayer 8 and 9 are aimed at rectifying the position of unknown applicants for asylum whose applications had been rejected as a result of the unlawful practices employed by the respondents. This entails advertisements of the fact that such processes were unlawful, that persons who were subjected thereto are entitled to have their applications re-assessed and that persons who have applied for asylum but have not yet received section 22 permits, be awarded such permits as a matter of urgency. Prayer 10 relates to the granting of permits to certain categories of applicants. This prayer was abandoned by the applicants during the hearing of the matter and no more needs to be said about that. Prayer 11 is for a declaratory order that the fifth respondent, in her capacity as the head of The Refugees Directorate, is the accountable official for ensuring that the procedures used to process asylum applicants in the Marbastas and Rosettenville offices are lawful. Prayer 12 is for an order directing the sixth respondent to fulfil its obligations under section 11(g) of the Refugees Act by monitoring the decisions of the refugee status determination officers at the aforesaid offices. Prayer 13 is aimed at the appointment of a curator *ad litem* on behalf of the class of persons seeking asylum under the Refugees Act via the aforesaid two offices. Prayer 14 is for an order directing the respondents to provide this court, by not later than one month after the date of this order, with a report in the form of an affidavit by the fourth respondent, which affidavit shall deal with, *inter alia*, the steps that have been taken to ensure compliance with the order, and matters ancillary thereto, including delivery of such reports to the applicants' attorney of record and the

curator *ad litem* and the right of the curator *ad litem* to re-enroll this matter for the purpose of considering the report and in the responses thereto and to consider the further conduct of the matter.

THE CONSTITUTIONAL AND LEGISLATIVE SETTING FOR APPLICATIONS FOR ASYLUM

In 1995 South Africa became a party to the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees and the 1969 Organization of African Unity Convention Concerning the Specific Aspects of Refugee Problems in Africa. In line with South Africa's international obligations in this regard, the legislature enacted the Refugees Act. (Cf the long title and the preamble of the Refugees Act; Minister of Home Affairs Others v Watchenuka and Another 2004 (4) SA 326 (SCA) at para 2).

The provisions of the Refugees Act and Regulations dealing with applications for asylum and the issuing of asylum seeker-permits are the following: Section 21, which deals with applications for asylum, provides as follows:

"(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

(2) The Refugee Reception Officer concerned-

(a) must accept the application form from the applicant;

(b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;

(c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and

(d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to

a Refugee Status Determination Officer, to deal with it in terms of section 24."

Section 22 deals with "asylum seeker permits" or "section 22 permits" as they are commonly known. Such a permit must be issued to the applicant for asylum pending the outcome of his or her asylum application. Section 22 provides as follows:

"(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21 (1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

(2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991, becomes null and void, and must forthwith be returned to the Director-General for cancellation.

(3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

(4) The permit referred to in subsection (1) must contain a recent photograph and the fingerprints or other prints of the holder thereof as prescribed.

(5) A permit issued to any person in terms of subsection (1) lapses if the holder departs from the Republic without the consent of the Department.

(6) The Department may at any time withdraw an asylum seeker permit if-

(a) the applicant contravenes any conditions endorsed on that permit; or

(b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or

(c) the application for asylum has been rejected; or

(d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5."

The effect of an asylum seeker permit is that the holder thereof is in the country legally and cannot be arrested and deported to his country of origin.

The aforesaid provisions must be understood in the context of both the Constitution and international law and must, wherever reasonably possible, be given an interpretation that is consistent with the Constitution. This is required by section 39(2) of the Constitution. (See Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) at paras 22-6; De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening) 2002 (1) SA 429 (CC) at para 24; Daniels v Campbell NO and Others 2004 (5) SA 331 (CC) at paras 43-6; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 44). Furthermore, section 39(1)(b) of the Constitution provides that when a court is interpreting the Bill of Rights, a court "must consider international law".

The rights contained in the Bill of Rights apply to all persons within South Africa's borders, irrespective of whether they came to be here legally or not. (See Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC) at paras 26-27; Minister of Home Affairs and Others v Watchenuka and Another (*supra*) at para 25).

Having regard to these principles, it is clear that where procedures or processes under the Refugees Act are applied in a way that prejudices asylum

seekers, this has the potential of gravely violating the constitutional rights of such persons and more particularly their rights to human dignity, life and freedom and security of the person, as enshrined in sections 10, 11 and 12 of the Constitution. The effect of a failure to issue section 22 permits to asylum seekers has been described in Kiliko and Others v Minister of Home Affairs and Others (*supra*) at para 27 as follows:

"Until an asylum seeker obtains an asylum seeker permit in terms of section 22 of the Refugees Act he or she remains an illegal foreigner and as such subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which self-evidently, impacts deleteriously upon or threatens to so impact upon at least his or her human dignity and the freedom and security of his or her person."

The same severe effect on constitutional rights occurs if an asylum seeker, who is entitled to refugee status, has his application erroneously rejected. That is because the asylum seeker, who by definition has a well-founded fear of persecution in his home country, is prevented from staying in South Africa and must return to his home country. Apart from it resulting in a violation of the person's constitutional rights, it militates against the international law principle of *non-refoulement* which provides that states have an international law obligation to refrain from forcibly returning a refugee to a state where he has a well founded fear of persecution. (See Dugard, International Law – A South African Perspective 2000 (2nd ed) from p268).

THE LAWFULNESS OF THE INDIVIDUAL DECISIONS IN RESPECT OF THE APPLICANTS

The relevant provisions of the Refugees Act and the Regulations make it clear that although applications for asylum are to be received by refugee reception

officers, the decisions in respect of such applications for asylum are to be taken by a more senior official – a refugee status determination officer – in terms of section 24 of the Refugees Act. Such decisions taken by a refugee status determination officer must be taken on the basis of a completed B1-1590 form. This is a detailed form asking a wide range of relevant questions and appears as annexure B1-1590 of the Regulations promulgated in terms of the Refugees Act. These provisions are mandatory and a material condition for a decision to be taken on an application for asylum.

In the case of the third to seventh applicants, it is common cause between the parties that the decisions rejecting their applications for asylum were not taken on the basis of the B1-1590 form. Instead, the rejection of the applications of these applicants took place solely on the basis of the brief pre-screening form that had been developed by the Rosettenville Office, that asked only the two questions referred to above. There had been no compliance with the procedures set out in the Refugees Act and Regulations prior to the decisions to reject these applications.

On this basis alone, it is clear that the decisions refusing the applications for asylum of the third to seventh applicants were unlawful and fall to be reviewed and set aside by this court. This is a consequence of section 6(2)(b) of the Promotion of Administrative Justice Act, Act 3 of 2000, which provides that an administrative decision may be reviewed and set aside where "a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

As has been stated before, after the launch of this application, the respondents accepted that the decisions rejecting applications on the basis of pre-screening forms, were unlawful and invalid. As a result the respondents no longer opposed the relief sought in respect of the decisions in relation to the third to seventh applicants.

It was submitted on behalf of the applicants that, notwithstanding the respondents' consent in this regard, it remains necessary for this court to make an order reviewing and setting aside the decisions in respect of the third to seventh applicants. This is because the respondents are currently *functus officio* in respect of the decisions rejecting the applications for asylum and therefore cannot take these decisions afresh of their own accord. I agree with this submission and consequently the relief claimed in paragraph 2 of the notice of motion should be granted in respect of the third to seventh applicants. The result of such an order will be that those applicants will then be able to apply afresh for asylum and have their applications considered and determined in accordance with the Refugees Act and the Regulations.

The position of the first and second applicants is somewhat different to that of the third to seventh applicants. With regard to the first applicant there is a dispute of fact over whether he applied for asylum at all. The respondents maintain that he did not. On behalf of the first applicant it was submitted that the version of the first applicant, *i.e.*, that he attended the refugee reception offices, should be accepted. In this regard reference was made to the detailed

allegations that the first applicant made regarding his application for asylum and the fact that these were confirmed by two independent monitors, Mbiko Moyo and Tobias Hlambelo, who filed supporting affidavits. It was further submitted on behalf of the first applicant that the proof of his version has to be accepted for the simple reason that he could not possibly have hoped to gain anything by bringing this review application if he had not already applied for asylum and had been rejected. It was further submitted that the relief sought in this application would not have the effect of any individual applicant being granted asylum by this court and the first applicant was aware of this. There would, consequently, have been no reason for the applicant to go to the trouble of being involved in this application if he could simply have gone to the refugee reception office and applied for asylum.

Although there is certainly merit in the submissions on behalf of the applicants, it is, in my view, not necessary to resolve this dispute of fact. It would be equally effective if a declaratory order is made clarifying that the first applicant is free to apply for asylum.

With regard to the second applicant, it is common cause that he applied for asylum and on the basis of only a pre-screening form was given "formal advice" to approach the permitting section instead of the refugee reception office. The dispute between the parties is whether this amounted to a decision refusing his application for asylum, as was understood by the second applicant, and which would have been unlawful, or whether it was merely advice which did not affect his rights and, consequently, caused him no

prejudice.

Although the question of the legal effect of such "formal advice" will have to be considered in relation to the general relief sought by the applicants (which is dealt with below), it is not necessary to determine it in relation to the second applicant. The reason being that, according to the respondents, the second applicant never had his application for asylum rejected and, consequently, nothing stands in his way to apply for asylum in the normal course. Similar to the position of the first applicant, the position regarding the second applicant can be resolved by a declaratory order clarifying that the second applicant is free to apply for asylum.

THE APPLICANTS' STANDING TO APPROACH THIS COURT IN THE PUBLIC INTEREST FOR THE GENERAL RELIEF SOUGHT

Apart from the individual relief already dealt with, the remainder of the relief sought by the applicants is sought in the public interest in terms of section 38(d) of the Constitution. The respondents, in their answering affidavits, deny the applicants' standing in this regard, stating that "to make a general challenge, they would have to show that they qualify for asylum".

I do not agree with this submission. It is not a prerequisite that applicants approaching a court in the public interest must show that they have a personal interest in the general relief sought or that they are members of the class affected. In any event, each of the applicants is plainly an asylum seeker and the relief they seek will affect other asylum seekers. There is no doubt that the

applicants have shown that they are acting in the public interest in this particular case. (Cf Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC) at paras 14-18). There is no other meaningful manner in which a general challenge to the polices adopted by the respondents can be brought. The relief sought is general in nature and primarily prospective. Moreover, the applicants plainly act genuinely in the public interest – they will have no personal gain if the general relief is awarded by this court.

The consequences of the infringements of the rights of asylum seekers that the applicants complain of, are severe. If asylum seekers are not properly protected by the respondents' procedures it would severely impact on their fundamental rights to human dignity, life and freedom and security of the person. In Kiliko and Others v Minister of Home Affairs and Others (*supra*) the court upheld the right of certain asylum seekers to act in the public interest for other asylum seekers. In this regard, at para 12, the honourable van Reenen J relied particularly on the asylum seekers' "vulnerability because of a lack of means, support systems, family, friends or acquaintances; a likely lack of or limited understanding of the South African legal system and its values; and also a limited knowledge of any lawyers and non-governmental organisations that would be able to assist them." I respectfully agree with these remarks. The situation in the present matter is no different and there can be no doubt that the applicants have the requisite public interest standing to approach this court for the general relief sought.

THE LAWFULNESS OF THE RESPONDENTS' PROCEDURES

In the replying affidavit the respondents mentioned that it is in the process of devising a new procedure to overcome the practical difficulties which result from the vast number of applicants which approach the department's offices every day. Whatever this new process might entail, it is not something which affects the present adjudication of the respondents' current procedures.

The respondents persisted with the view that the current processes that they have put in place regarding the scheduling of appointments for asylum seekers with the refugee reception officers and the system of pre-screening, are lawful. I shall deal firstly with the process of appointments.

THE APPOINTMENT SYSTEM

On behalf of the respondents it was submitted that there is nothing in any law to suggest that an applicant for asylum is entitled to be processed through the whole system, including receiving a section 22 permit, on the very first day that he attends the refugee reception office. To do so would, in any event, often be physically impossible. Counsel for the applicants accepted that there is nothing inherently unlawful about the notion of scheduling appointments with a refugee reception officer, but submitted that a system which results in the appointments being up to six months to a year in the future, is fatally flawed and unlawful. The reason being that, in the interim, the applicant will not receive a section 22 permit but instead will only receive an "appointment slip" which is of no legal force or effect and affords no protection to the applicant at

all.

On behalf of the respondents it was submitted that the appointment system (also referred to as "the system of queue management") has the advantage that it eliminates uncertainty and that applicants for asylum know exactly when they will be attended to and receive section 22 permits. They could thus meaningfully plan their lives accordingly. Regarding the submission that an appointment slip does not give the holder thereof any protection against arrest and deportation, or afford him the right to work and study, it was submitted on behalf of the respondents that if these concerns can be adequately addressed in the appointments dispensation, there can be no principled objection to the system and furthermore that a proper consideration of the relevant provisions suggests that those concerns can be addressed. In this regard it was submitted that an applicant for asylum may not be expelled or returned to another country, including his or her own country, in circumstances prohibited by section 2 of the Refugees Act. Consequently, so it was argued, the fact that the person concerned has taken steps to apply to be granted refugee status, will be a bar to his being forced to leave and it will also be a bar to any attempt to arrest him. It was therefore submitted that the holder of an appointment slip is afforded the same protection as a person who has been granted a section 22 permit and that he is therefore adequately protected pending the final determination of his application.

In supplementary submissions on behalf or the respondents it was stated that

it may, however, be desirable to create a climate in which a person who has secured an appointment has some assurance that he will not be arrested or detained. It was submitted that to this end it may be desirable that such a person be given a written confirmation that he has been granted such an appointment and that such document contains further information such as the name and personal details of the person, his country of origin, the date on which he called at the refugee reception office, the date on which he must call back to be assisted with the filling in of the B1-1590 form so that he may be granted a section 22 permit and, lastly, a statement to the effect that until his application for asylum has been made and finalised, the provisions of sections 32 and 34 of the Immigration Act prevent such a person from being arrested, detained or deported for being illegally in the country.

Insofar as it was suggested that this court should make an order in respect of the contents of the appointment slip, I am of the view, however, that such an order should not be made. Neither the Refugees Act nor the Regulations make provision for the issuing of appointment slips. I consequently agree with the submission on behalf of the applicants that an appointment slip is of no legal force or effect and affords no protection to the applicant for asylum at all. According to the relevant legislation it is only a section 22 permit which affords an asylum seeker with the necessary protection against his arrest, detention and deportation. No amount of information on such an appointment slip can change the legal status thereof and the bearer thereof will remain an illegal foreigner.

In any event, the Refugees Act, the Immigration Act and the Regulations thereunder are not enforced by senior officials of the department but by thousands of officials employed by the department and the South African Police Services. Such officials will in all probability be guided by the explicit provisions of the aforesaid legislation and not by an appointment slip of which no reference is made in any such legislation and which is unknown to them. The appointment slip will consequently, in practice, not afford adequate protection to that bearer thereof.

Furthermore, it would appear that the proposed new appointment slips containing the aforesaid suggested additional information, would, on the respondents' own version, only serve to afford an applicant for asylum the same protection which a section 22 permit aims to provide. There should consequently be no reason why such an applicant could not be supplied with a section 22 permit when, or soon after, he has applied for asylum. In this regard it was submitted on behalf of the respondents that a section 22 permit cannot be granted at such an early stage since section 22 of the Refugees Act only allows for the granting of such a permit once an application in terms of section 22(1) had been made, and that such an application must be made in terms of the procedures prescribed by the Regulations. These procedures, *inter alia,* requiring the B1-1590 form to be filled in, are time consuming and result in the backlog and the long queues which are the cause of all the problems.

I understand cannot the logic of this argument on behalf of the respondents. If

an appointment slip which affords the same protection as a section 22 permit, can be given to an applicant, but not a section 22 permit itself, the suggested appointment slip will be nothing else than a method to bypass the provisions of the Refugees Act.

In my view, it would be a much less invasive interpretation of section 21 and 22 of the Refugees Act, if these sections are interpreted in a way which does not require that the whole form which is presently prescribed by the Regulations, be filled in on the first occasion. There is no reason why the filling in of a few relevant particulars would not suffice in order to constitute the "application" envisaged by these two sections. On such an interpretation the refugee reception officer would be entitled to validly provide the asylum seeker with a section 22 permit.

Despite the aforesaid interpretation of section 21 and 22, it is in any event within the jurisdiction of the third respondent to amend the Regulations to provide for a shorter form to be filled in on the first visit of an asylum seeker to the refugee reception office so as to "bring the applicant within the system", as it was put on behalf of the respondents. There is no provision in the Refugees Act which prevents a relatively short form to be filled in and which would nevertheless constitute an "application", and further forms to be filled in at a later stage to supply additional information which may be considered by the refugee status determination officer in deciding whether to finally grant asylum. Another possible answer might be to lengthen the period of validity of section 22 permits thus removing the need for frequent renewals and thereby alleviating staff shortages.

The issue of staff shortages should be considered on its own. Regarding the number of officials employed by the department to process applications for asylum, the respondents referred to the Rosettenville office as an example of the state of affairs in all five the refugee reception offices of the department across the country. In the Rosettenville office only 12 refugee reception officers are deployed. Each officer on average takes about an hour to process an application made under section 21 in terms of the existing form which has to be filed in according to the Regulations as they presently stand. This means that approximately 70 applications can be processed on a daily basis and, in a week, only a total of 420 applications can be processed. However, a total of approximately 900 new asylum seekers visit that office every week. The result is that approximately 500 new applicants per week cannot be processed and are being turned away and are added to the ever increasing backlog.

Why the department has not appointed more refugee reception officers remains a mystery. This issue was not addressed by the respondents in their affidavits in the present application. Having regard to the duties of a refugee reception officer it is clear that such a person need not be highly qualified and the department should have no difficulty in deploying other officials to such offices or to make new appointments. The number of new officials which would be required to prevent a backlog is very low, and considering the tremendous prejudice to asylum seekers which would be prevented by making available a sufficient number of officials, it is incomprehensible why the department has not yet appointed more officials.

Another consideration could be for the department to provide for refugee centres, possibly close to the borders of the country where the most asylum seekers enter, and to keep them there and properly care for them until their applications have been fully processed and a final decision has been taken. If a person does not qualify for any permit to be in the country, that person can be promptly returned to his country of origin. Such a system would prevent illegal foreigners roaming the streets of cities and towns waiting for the department to process them or simply because they have decided not to be processed at all but to remain in the country illegally. Such a system would surely give the social- and law enforcement agencies far better control over illegal foreigners than is presently the case.

Our country is in a crisis as a result of the hundreds of thousands of unemployed illegal or potentially illegal foreigners within our borders, a vast number of which are clearly applicants for asylum who have not yet been processed. I cannot imagine how these people can survive without turning to crime. The price to be paid in order to ensure that the high numbers of asylum seekers are processed without delay so that those who do qualify can obtain work legally and those who do not qualify can be returned to their countries of origin, would be a drop in the bucket compared to the price our country is paying in respect of crime and social- and other public services which result from having unprocessed foreigners within our borders which remain unemployable until they have been duly processed or which remain here illegally simply because they choose to do so.

In my view, it is, however, not for this court to make any finding or to make any order along the lines of what has been said in the previous few paragraphs. I have to make an order in respect of the lawfulness of the department's current procedures. I iterate that, in my view, the appointment slip has no legal status and no amount of information contained on it would change this fact or would afford an asylum seeker a status which it does not have. Only a section 22 permit would legalise an asylum seeker's presence in the country and afford him the necessary protection.

I consequently agree with the submissions on behalf of the applicants that the issuing of a section 22 permit is of vital importance. Without this permit the asylum seeker has no legal right to remain in South Africa and suffers the dire consequences that have already been referred to above on a daily basis. (See Kiliko and Others v Minister of Home Affairs and Others (*supra*) *ibidem*).

Consequently, the consequences of a delay in obtaining a section 22 permit are extremely severe. The extent of the delay which is inherent in the appointment system currently employed at the Marabastad and Rosettenville offices, and which was not disputed by the respondents, impact extremely negatively on the statutory and constitutional rights of all asylum seekers. It is unacceptable that applicants should face the severe consequences referred to above over such an extraordinary lengthy period of time. The fact that a system of appointments is acceptable on principle does not mean that a system which has such results in practice, can be accepted as being lawful. A system which results in

applicants having to face, over a prolonged period of time, a real risk of arrest, detention, deportation and other violations of statutory and constitutional rights, in itself violates the applicants' constitutional rights and is unlawful. These risks and the other violations of statutory and constitutional rights is a direct consequence of the appointment system presently implemented by the department.

The answer by the respondents that it is not practically possible to deal with an asylum seeker when he first visits a refugee reception office or within a short period thereafter, cannot be sustained. Firstly, I have already referred to the fact that if the third respondent feels that her department cannot cope with the present procedures relating to the issuing of permits, it lies entirely in her hands to make regulations changing the system and making it easier to run and enforce or to appoint additional staff.

Secondly, and more fundamentally, the fact that the respondents might find it administratively difficult to deal with applications promptly, is no reason to act unlawfully and to place the rights and interests of asylum seekers in grave danger. No amount of administrative inconvenience can absolve the respondents of their legal and constitutional responsibility to the countless asylum seekers who are faced with the real and perpetual threat that they may be arrested and deported to the countries in which they face persecution, simply because the respondents have been unable to process their section 22 permits in less than six months to a year. The Supreme Court of Canada has recognized in a matter concerning asylum seekers and refugees that

administrative convenience is no excuse for unlawful conduct. In Singh *et al* v Minister of Employment and Immigration *et al* [1985] 1 SCR 177, [1985] 14 CRR 13 at 57, the honourable Wilson J stated the following:

"The guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles."

In S v Jaipal 2005 (4) SA 581 (CC) (see paragraphs [55] and [56]) the Constitutional Court also recognized that resources to respect, protect, promote and fulfill the rights in the Bill of Rights, would always be limited but that,

"as far as upholding fundamental rights and other imperatives of the Constitution is concerned, we must guard against popularizing a lame acceptance that things do not work as they ought to, and that one should simply get used to it. . . . Responsible, careful and creative measures, borne out of a consciousness of the values and requirements of our Constitution could go a long way to avoid undesirable situations."

The Constitutional Court has similarly recognized that with regard to lawfulness of conduct, the State should lead by example. In Mohamed and Another v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC), the court stated at paragraph [68] that it is important that the State lead by example. This principle, so the Constitutional Court stated, cannot be put better than in the following words of the honourable Justice Brandeis in Olmstead et

al v United States:

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously ... Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

I respectfully agree with the endorsement in Kiliko and Others v Minister of Home Affairs and Others (*supra*) at paragraph [29] of the approaches in the Singh, Jaipal and Mohamed matters in the context of the State's obligations to provide proper facilities for applications for asylum.

The applicants also attacked the appointment system on the basis that an asylum seeker cannot work or study at all for as long as it takes to get an interview to complete the forms and receive a section 22 permit. I have mentioned this aspect in passing above. On behalf of the respondents it was submitted in this regard that where in a particular case there is a cogent reason to be granted permission to work or study, pending the section 21 process, there is no reason why an approach may not be made to be sixth respondent for such leave. In supplementary submissions it was submitted that, to remove all doubt about the issue, a clause may be added to the appointment slip to the effect that the bearer is entitled to approach the sixth respondent, the Standing Committee for Refugee Affairs, for permission to work for the period between the date on which the committee grants such permission and the finalisation of the bearer's application for refugee status.

I do not agree with these submissions. The powers of the Standing Committee to allow applicants for asylum to study or work are set out in section 11(h) of the Refugees Act. It provides that the Standing Committee "must determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued". The Standing Committee thus has no power to grant persons waiting for an appointment permission to work or study. It is only when a person has applied for asylum and a section 22 permit has been granted or is about to be granted, that such permission can be given.

In any event, there are certainly practical issues to be considered as well. It seems to be common cause that the vast majority of asylum seekers do not have financial resources to maintain themselves and would desperately require an opportunity to receive an income. Consequently, most if not all of the asylum seekers would, on the respondent's suggestion, apply to the Standing Committee for permission to work. There are five refugee reception offices in the country and none of them can cope with the numbers of asylum seekers. There is but one Standing Committee in the country. I cannot imagine that they would be able to cope with the suggested procedure.

In conclusion, whatever the legality would be of any future appointments policy to be adopted by the respondents, the appointment system currently in use at the Marabastad and Rosettenville offices is clearly unconstitutional and unlawful.

THE PRE-SCREENING PROCEDURES

Section 21 of the Refugees Act provides that an application for asylum must be made to a refugee reception officer at a refugee reception office. The refugee reception officer takes no decision in respect of such an application. All he does is to submit the application received by him, together with relevant information, to a refugee status determination officer. Only the refugee status determination officer has the authority to deal with an application in terms of section 24 and to take decisions in that regard.

As was indicated above, officials, probably refugee reception officers, at the Rosettenville office, took decisions on the basis of pre-screening forms and rejected applications on the basis thereof. The respondents conceded the unlawfulness of these actions and no more needs to be said about that.

The second form of pre-screening which the department then adopted, mainly at the Marabastad office, was, according to the respondents, not to take decisions but to merely advise an applicant for asylum whether he should rather attend another section of the department and/or whether he could qualify for asylum on the strength of the reason he gave for requesting asylum. It was stated by the respondents that no applicant was precluded from continuing with the application for asylum despite the advice from the department.

On behalf of the respondents it was submitted that it often happens that a person would attend the refugee reception office who in actual fact was requiring a work permit or a study permit. It was submitted that if, in such an event, the person is informed that he is at the wrong office and should attend

another office in another building, nothing unlawful has occurred. It was further submitted that such advice to the person does not constitute a decision and as such cannot be challenged. This is so, according to the argument, because the advice rendered does not constitute administrative action and does not affect the person's rights as the person is not precluded from continuing with the application for a section 22 permit.

In order to fully appreciate the department's actions, it is necessary to refer to the document containing the "advice" given to an applicant who, according to the particular official, actually wants a different type of permit or who could not qualify for asylum having regard to the reason given for such application. This document, which I shall refer to as the "letter of advice", is on an official letterhead of the department of Home Affairs which also depicts the national coat of arms. After stating the name, surname, date of birth and country of origin of the applicant, the letter of advice further reads as follows:

"APPLICATION FOR ASYLUM: YOURSELF (place and date)
After a pre-screening and assessment of your claim contained in the pre-screening form you are advised to approach the Permitting Section of the Department of Home Affairs for your request of work permit / study permit or any permit relevant to your claim.

YOUR CLAIM
You left your country on the ..... . You entered RSA on a visitor's visa / illegal on the ..... . You decided to abandon your country of origin in order to seek employment / further your studies / seek medical attention / or any other reason which is not accommodated in the Act.

THE LAW

In order to qualify a claim should fall in either one of the following definitions in terms of the Refugees Act of 1998:

1. Section 3(a) “a person qualifies for refugee status for the purposes of this Act if that person owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or”

2. Section 3(b) “owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of his habitual residence in order to seek refuge elsewhere”

CONCLUSION

Also, be aware that any subsequent claim made at a later stage may be dealt with in terms of section 1(1) of the Refugee Act 130 of 1998. The aforestated section read thus,

(1) “abusive application for asylum” means an application for asylum made
(a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or
(b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant’s personal circumstances or in the situation in his or her country of origin.

Yours sincerely

Refugee Status Determination Officers
Pretoria Refugee Reception Office

ACKNOWLEDGEMENT OF RECEIPT

Surname & Initials: .....
Signature: .....
Date: ....." (Sic)

The alternatives in the first two paragraphs which are not applicable to the particular applicant, are deleted. In the letter to the second applicant which was attached to the papers, the words "Study Permit" in the first paragraph, were deleted. In the second paragraph the words "further your studies / seek medical attention" were deleted. The second applicant was consequently, *inter alia*, "advised" that his "request of Work Permit or any permit relevant to your claim" should be made at another office, *i.e.*, the Permitting Section of the department. It is common cause, as also appears from the heading of the letter, that the second applicant applied for asylum and not for a work permit. In the second paragraph the second applicant was, *inter alia*, told that he "decided to abandon (his) country of origin in order to seek employment or any other reason which is not accommodated in the Act".

The events leading up to an applicant receiving the aforesaid letter of advice have been stated above. This entails, *inter alia*, hundreds of the applicants being handed pre-screening forms in the car park of the building to complete in a limited period of time without any assistance and without any interpreters available to assist them. After a while the applicants to whom the official has decided to give the aforesaid "advice", are then handed this form and are

required to leave the premises.

I agree with the submission on behalf of the applicants that this letter of advice to an applicant does not constitute advice of the kind intimated by the respondents. That is not a letter which an applicant for asylum would understand as being merely informal and friendly advice which he may decide to follow or not. The sentence in the first paragraph stating that "... you are advised to approach the Permitting Section of the Department of Home Affairs for your request of Work Permit / Study Permit or any permit relevant to your claim", would clearly create to the reader thereof the understanding that the department is informing him that it had considered his application for asylum and had came to the conclusion that his application had been unsuccessful and that he should attend the permitting section of the department where he can apply for a work or study permit (depending on which one had not been deleted) or any other permit. There is nothing in these two paragraphs which creates the impression that the applicant is merely being given informal advice which he need not follow and that he can persist with his application for asylum. The words "...you are advised.." are used in the context of "you are being told" or "you are hereby informed" and not in the context of "I am giving you a helpful hint" or "I am merely giving you advice which you may decide to follow or not follow and you may continue with your application for asylum should you wish to do so". The fact that the letter also states as a fact that the applicant requested a work permit or a study permit (Cf "...for your request of

Work Permit / Study Permit..."), is a further clear indication to the applicant for asylum that the department has decided not to entertain his application for asylum as one for asylum but as one for either a work permit or a study permit. The department is thus telling the applicant that it is only prepared to entertain an application for such other permit and, furthermore, that it would do so at another office than the refugee reception office where the applicant found himself at that moment.

If any doubt still existed in the mind of the applicant for asylum after having read the first few paragraphs of this letter, the last paragraph under the heading "CONCLUSION" would remove all such doubt. This paragraph clearly contains a warning, if not a threat, that the applicant should not dare to come back to re-apply for asylum. There can be no doubt that such a letter of advice effectively precludes an applicant from continuing with his application for asylum. In fact, on the respondents' own version, it would be impossible for an applicant to get an interview with a refugee reception officer to complete the necessary B1-1590 form without successfully going through the pre-screening process.

Consequently, although the words "... you are advised ...", may, on its own and on a literal interpretation thereof, be interpreted in the manner contended for by the respondents, it cannot bear this meaning if regard is had to the manner and context in which these words are used and if regard is had to the rest of the letter. Considering, furthermore, that the vast majority of the applicants for asylum are not necessarily well educated, nor well versed in the English language, I am of the view that the department's "advice" to them has exactly

the same result as the "decision" earlier taken at the Rosettenville office which the department admitted to being unlawful. The "letter of advice" consequently constitutes unconstitutional and unlawful conduct.

As far as the respondents' contention is concerned that the pre-screening process was not intended to assess the merits of an application for asylum, but merely to determine whether an applicant "could qualify for asylum on the strength of the reason he or she gave for requesting asylum", the following may be added to what has already been stated above. By determining whether a person could qualify for asylum on the strength of the reason given on the pre-screening form, the official was inevitably assessing, and effectively reaching a decision on, the merits of the application. The pre-screening procedure, however, does not allow for a proper assessment. This is so mainly because the two bald questions posed in the pre-screening form are hardly sufficient to prompt a sufficient and relevant response. Furthermore, whatever information the applicant supplied on the pre-screening form, had been supplied in a limited time, without any assistance and without any knowledge as to what the relevant factors are which would be considered with reference to the provisions of the Refugees Act. The pre-screening form was also read and filled in without the assistance of an interpreter, and, lastly, this was all done in circumstances which are hardly conducive to the applicant applying his mind properly and on and informed basis to the issue at hand. A study of the pre-screening forms annexed to the papers before the court clearly shows that the majority of applicants for asylum did in fact not understand the meaning and import of the

questions they had to answer and certainly did not possess the ability to articulate their thoughts properly in written English. There can be no doubt that no proper assessment can be made on an applicant's response obtained in the circumstances referred to above and to use the results of such an assessment in any manner, especially to draft the aforesaid letter of advice, having regard to the consequences of such a letter, would be unconstitutional and unlawful.

In principle a pre-screening procedure is not unlawful. If a type of pre-screening is used to genuinely assist a person to quickly arrive at the correct office of the department instead of wasting unnecessary time in the wrong queue or at the wrong building, and if the necessary assistance and interpretation facilities are afforded so that there are can be no misunderstanding and the rights of the applicant are properly protected, and if it is made clear to the applicant that he may proceed with an application for asylum regardless of any views to the contrary, there should not be any objection. What the department's officials cannot do after such a pre-screening, however, is to decide for themselves that a particular person actually wants some other permit or decide that it would be better for the person to seek some other permit. The pre-screening process presently in use prevents, or, at least, impedes an applicant for asylum from exercising his rights in terms of the Refugees Act and the Regulations and, as such, is violating the constitutional rights of such a person.

EFFECTIVE RELIEF

The relief in respect of the individual applicants has already been dealt with. I

have also already dealt with the applicants' entitlement to apply for the relief in the public interest. On, *inter alia*, the grounds set out above I am of the view that the applicants are entitled to declaratory orders making clear that the use of the appointment system and the pre-screening processes at the Marabastad and Rosettenville offices are unconstitutional and unlawful.

Prayer 6 to 13 of the amended notice of motion constitute what may be termed a mandatory or structural order. It appeared that the respondents were initially opposed to any such order but in their supplementary submissions a number of submissions were, however, made regarding the type of order I should make. I have referred to some of these submissions above and need not repeat them. Another was that the respondents could be put on terms to devise and implement, with the assistance of the office of the United Nations High Commissioner for Refugees, mechanisms and procedures to speed up the process whereby applications for asylum are processed. Principally I am of the view that once this court has declared the existing procedures to be unlawful, it is for the department to devise systems, processes and procedures that will accord with that declaration. I consequently do not agree with these submissions on behalf of the respondents that I should make orders amending the existing procedures or to instruct the respondents as to how they should go about devising systems and procedures to improve the present state of affairs. That, in my view, would be a futile and inappropriate exercise for the reasons referred to above, (at least as far as the present is concerned).

However, that does not mean that, having regard to the circumstances of this

case, the matter should be left at that. Regarding the relevant circumstances of the case the applicants extensively referred to earlier actions by and attitudes of the respondents in similar matters which, according to the applicants, is proof of a history of unlawful and unconstitutional conduct and a reluctance to themselves remedying the unlawful consequences of their conduct. I do not deem it necessary to enter into that debate or even to refer to those issues.

What I regard as of particular relevance in deciding on the appropriate orders, are the following: Firstly, many applicants for asylum were prejudiced as a result of unlawful procedures adopted at the Rosettenville and Marabastad offices. Many of these persons are probably roaming the streets of our cities wondering what to do next. An attempt should be made to inform them that their applications would be re-assessed and those in possession of appointment slips should be informed that they should report back to the relevant refugee reception office as soon as possible. Secondly, by the very nature of things, the present applicants will, regardless of the outcome of their applications, for all practical purposes soon disappear from the scene. They will either be in the Republic legally and may not be interested in other asylum seekers entering the country, or they will have been deported. Consequently, if the department again fails to institute valid procedures, it would require a fresh group of litigants and the same or another group of public-spirited attorneys before the matter can again be ventilated. Such a delay would be potentially disastrous to those affected.

In my view an effective remedy should be forged which would effectively protect the rights of future applicants for asylum. In Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para 69, the Constitutional Court stressed that the proper enforcement of constitutional rights might require courts to "forge new tools" or "fashion new remedies". (Cf also Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) at paragraphs 106 and 113; Kiliko and Others v Minister of Home Affairs and Others (*supra*) at paragraph 31). As was indicated above, prayer 13 of the amended notice of motion is aimed at the appointment of a curator *ad litem* on behalf of the persons seeking asylum under the Refugees Act at the aforesaid two offices and prayer 14 was for an order directing the respondents to provide this court, the applicants' attorneys of record and the curator *ad litem*, by not later than one month after the date of this order, with a report in the form of an affidavit by the fourth respondent, which affidavit shall deal with, *inter alia*, the steps that have been taken to ensure compliance with the order, and matters ancillary thereto, and the right of the curator *ad litem* to re-enroll this matter for the purpose of considering the report and the responses thereto and to consider the further conduct of the matter.

For, *inter alia,* the reasons alluded to above, or am of the view that it would be appropriate to appoint a curator *ad litem* as contended for on behalf of the applicants and to order that the aforesaid report be delivered to the curator *ad litem*. Merely ordering that the respondents should report to this court on their

future actions, will, in my view, not have the required effect. *In casu* there will not be an applicant who will survive the present application and there will be no one to carry the flag on behalf of future potential applicants. This court cannot, as an institution of first instance, be saddled with the responsibility of keeping an eye on administrative procedures put in place by a government department and to act in the interest of affected or potentially affected persons. In my view, it is essential to appoint a curator *ad litem* to ensure that legally unrepresented and vulnerable asylum seekers are properly protected and are not prejudiced by any future changes, or lack thereof, to the policies and procedures of the department. The curator *ad litem* should be adequately empowered so as to be able to form an informed decision on the relevant procedures to be adopted, the effect thereof on asylum seekers, and to ensure that the manner in which the respondents process applications for asylum in the future does not, as far as asylum seekers are concerned, offend against the State's obligations under international law, the Constitution and the legislation applicable to refugees. The curator *ad litem* should also be able to approach this court in this regard if the need arises. In my view it is not necessary for the curator *ad litem* to report to this court on a regular basis. If the needs arises the curator *ad litem* will approach this court with all the relevant information and the court can then address the issues between the parties. The appointment of a curator *ad litem* is envisaged for a fixed period only but should the need arise, such appointment could be extended by this court on application to it. Lastly, I may mention that I am satisfied that the person of the curator *ad litem* proposed by the applicants are eminently qualified to hold such a position.

To avoid any misconception I wish to iterate that the decision to appoint a curator *ad litem* in the present matter is, firstly, based on the particular facts of this case and on the particular nature of the issues under debate. Secondly, this appointment should not be regarded as being aimed at a policing of the actions of government by this court but rather as being aimed at the protection of a group of unknown people who cannot act for themselves and who are desperately in need of protection and legal assistance. This is particularly so since the respondents have indicated, and it was confirmed in supplementary submissions on their behalf, that the respondents intend to institute new procedures and policies regarding applications for asylum. The curator *ad litem* shall furthermore not be entitled to interfere in any manner in the respondents' business but is merely empowered to investigate and to litigate on behalf of applicants or potential applicants for asylum.

The order sought in prayer 6 of the amended notice of motion is to direct the respondents to receive and process applications for asylum at the aforesaid two offices in a non-discriminatory and fair manner. The justification for this relief arises from the allegations by the applicants regarding, *inter alia*, the manner in which the applicants for asylum are being treated when they visit the refugee reception offices. One of these aspects pertains to the allegation that applicants from one country are often treated differently to applicants from another country and are often treated as a group instead of as individuals. Another pertained to the refusal to allow an applicant for asylum to proceed with the process if the application is deemed, on the basis of the two questions in the pre-screening form, to be hopeless, and also the inability of such an

applicant to lodge any form of appeal against such a decision. It is not necessary to address these issues in any particular detail and an order in this regard will not cause any prejudice to the respondents.

Prayer 11 of the amended notice of motion should also be mentioned. This is a prayer for an order that the fifth respondent, in her capacity as the head of the Refugees Directorate, be declared to be the accountable official for ensuring that the procedures used to process asylum applications in the Marbastad and Rosettenville offices, are lawful. It would appear that such an order would merely confirm the *de facto* position and would not prejudice the fifth respondent or any of the other respondents. Such an order would facilitate matters in future and should, in my view, be made.

Prayer 12 of the amended notice of motion is for an order directing the sixth respondent to fulfil its obligations under section 11(g) of the Refugees Act by monitoring the decisions of the refugee status determination officers at the aforesaid offices. It was submitted on behalf of the applicants that this order is necessary since it is clear that the refugee status determination officers were not carrying out their duties and that it would clarify the responsibilities of the sixth respondent in this regard. In was further submitted that section 11(g) of the Refugees Act require the sixth respondent to monitor the decisions of the refugee status determination officers but that, according to the answer of the respondents on page 304 to 305 of the record, the attitude of the respondents seems to be that the sixth respondent only has the obligation to review rejections of applications in terms of section 25(1) of the Refugees Act.

Consequently, so it was argued, this court should make an order to make it clear to the sixth respondent as to what its duties are in terms of the Refugees Act.

In my view an order in these terms should not be granted. The issue sought to be addressed by this prayer was merely a side-issue to the main dispute between the parties and, although ventilated during argument, I am not satisfied that it had been properly and sufficiently addressed in the papers before the court to merit an order.

In regard to costs I am satisfied that the applicants have been substantially successful and there is no reason for costs not to follow the event. The third respondent, as the responsible Minister, should be responsible for the payment of such costs.

In the result the following order is made:

1. The decisions taken by officials in the Department of Home Affairs rejecting the third to seventh applicants' applications for asylum, are hereby reviewed and set aside.

2. The fourth respondent and his subordinates are directed to forthwith issue permits in terms of section 22 of the Refugees Act, Act 130 of 1998 ("the Refugees Act"), to the third to seventh applicants and to process their applications for asylum in accordance with the provisions of the Refugees Act.

3. The first and second applicants are entitled to approach a refugee reception office and to apply for asylum in terms of the provisions of the Refugees Act.

4. It is declared that the current practice and policy of receiving applications for asylum at the Marabastad and Rosettenville Refugee Reception Offices are unconstitutional and unlawful in respect of the manner of scheduling appointments and in respect of the pre-screening method adopted.

5. The respondents are directed to receive and process applications for asylum at the Marabastad and Rosettenville Refugee Reception Offices in a non-discriminatory and fair manner in terms of the provisions of sections 21 and 22 of the Refugees Act.

6. The respondents are directed to:

    6.1 advertise on a conspicuous place which would be visible to members of the public at both the Marabastad and Rosettenville Refugee Reception Offices, that the procedures employed to process applications for asylum at the Marabastad and Rosettenville Refugee Reception Offices since November 2005, were unlawful and that any person who was subject to such processes is entitled to have his or her application for asylum re-assessed as a matter of urgency;

    6.2 re-assess the applications of the persons referred to in paragraph 6.2 above on an urgent basis.

7. The respondents are directed to:

    7.1 advertise on a conspicuous place which would be visible to members of the public

at both the Marabastad and Rosettenville Refugee Reception Offices, that those applicants for asylum who have appointments with the Marabastad and Rosettenville Refugee Reception Offices but have not been issued with section 22 permits, are entitled to be issued with such permits as a matter of urgency.

7.2 issue permits in terms of section 22 of the Refugees Act on an urgent basis to the persons mentioned in paragraph 7.1 above who present themselves to any of the aforesaid offices.

8. It is declared that the fifth respondent, in her capacity as the head of the Refugees Directorate, is the accountable official for ensuring that the procedures used to process applications for asylum at the Marabastad and Rosettenville Refugee Reception Offices are lawful.

9. Advocate Nadine Fourie is appointed as curator *ad litem* on behalf of the class of persons seeking asylum under the Refugees Act at the Marabastad and Rosettenville Refugee Reception Offices, including those applicants who have had their applications refused since 1 November 2005 (“the class of asylum seekers”).

9.1 The curator *ad litem* is empowered and required to:

9.1.1 investigate the circumstances of the persons falling within the class of asylum seekers;

9.1.2 investigate the implementation of the orders made in this matter;

9.1.3 investigate the implementation of policies of the Department of Home Affairs regarding access to Refugee Reception Offices;

9.1.4 institute legal proceedings on behalf of the class of asylum seekers.

9.2 The respondents are directed to:

9.2.1 allow the curator *ad litem* unfettered access to the Marabastad and Rosettenville Refugee Reception Offices;

9.2.2 allow the curator *ad litem* to speak to applicants for asylum and the officials at the aforesaid offices;

9.2.3 allow the curator *ad litem* access to the files of applicants for asylum via the aforesaid offices;

9.2.4 provide any information that the curator *ad litem* might reasonably require in order to fulfil her duties in terms of this order;

9.2.5 provide the curator *ad litem* and the applicants' attorneys of record with copies of the lists of applicants for asylum attending the Marabastad and Rosettenville Refugee Reception Offices since November 2005 and copies of the pre-screening forms received from such applicants for asylum.

9.3 The costs of the curator *ad litem* are to be paid by the third respondent on an attorney and client scale.

9.4 The appointment of the curator *ad litem* will expire on a date six months from this order, unless an application is made by the applicants or the curator *ad litem* showing good cause as to why the appointment should be extended. The respondents will be entitled to oppose such application.

10. The respondents are directed to provide this court, by not later than two months after the date of this order, with a report in the form of an affidavit by the fifth respondent.

10.1 The report shall deal with the following issues in respect of the Marabastad and Rosettenville Refugee Reception Offices:

10.1.1 The steps that have been taken to ensure compliance with paragraphs 5, 6, 7 and 9 of this order;

10.1.2 Whether any screening and/or appointment procedures are being used in processing applicants for asylum, and if so, what such procedures entail;

10.1.3 A step-by-step description of the processes that any applicant for asylum via the Marabastad and Rosettenville Refugee Reception Offices would undergo.

10.2 The respondents are directed to deliver a copy of the report to the applicants' attorneys of record and to the curator *ad litem*.

10.3 After receipt of the report the parties or the curator *ad litem* may re-enroll this

matter for hearing for the purpose of considering the further conduct of the matter and the parties and the curator *ad litem* are given leave to amplify the present application for such purpose.

11. The third respondent is ordered to pay the applicants' costs of the application.

CASE NO:	12960/06
HEARD ON:	26 and 27 OCTOBER and 17 NOVEMBER 2006
FOR THE APPLICANT:	ADV S. BUDLENDER
INSTRUCTED BY:	WITS LAW CLINIC
FOR THE RESPONDENTS:	ADV V. SONI SC
INSTRUCTED BY:	STATE ATTORNEY
DATE OF JUDGEMENT:	12 DECEMBER 2006