IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

CASE NO: 11681/2012

In the matter between:

SCALABRINO CENTRE CAPE TOWN	First Applicant
And	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
CHIEF DIRECTOR, ASYLUM SEEKER MANAGEMENT	Third Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fourth Respondent
THE MINISTER OF PUBLIC WORKS	Fifth Respondent

CORAM: **D M DAVIS J**
JUDGMENT BY: **D M DAVIS J**

FOR THE APPLICANTS: **ADV S BUDLENDER & ADV N MAYOSI**

INSTRUCTED BY: **LEGAL RESOURCE CENTRE**
MR W KERFOOT

FOR THE RESPONDENTS: **ADV M MOERANE SC,**
ADV T SIBEKO SC &
ADV G R PAPIER

INSTRUCTED BY: **STATE ATTORNEY**

DATE OF HEARINGS: **19 JULY 2012**

DATE OF JUDGMENT: **25 JULY 2012**

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 11681/2012

DATE: 25 JULY 2012

In the matter between:

SCALABRINI CENTRE CAPE TOWN	Applicant
and	
THE MINISTER OF HOME AFFAIRS	1st Respondent
THE DIRECTOR GENERAL, DEPARTMENT	
OF HOME AFFAIRS	2nd Respondent
CHIEF DIRECTOR. ASYLUM SEEKER	
MANAGEMENT	3rd Respondent
THE STANDING COMMITTEE FOR REFUGEE	
AFFAIRS	4th Respondent
THE MINISTER OF PUBLIC WORKS	5th Respondent

J U D G ME N T

DAVIS, J:

Introduction:

On 19 June 2012, applicant launched an application, which formed two parts, Part 1, of which

was initially set down to be heard on 28 June 2012 on an urgent basis. By mutual consent of the parties, the matter was then heard on 19 July 2012. In essence, applicant challenged the lawfulness of, and seeks, to have reviewed and set out second respondent's decision to close the Cape Town Refugee Reception Centre ("CTRRO") to new applicants for asylum. The relief, which is the subject matter of this application, can be summarised thus:

1. The first part, which is referred to as Part A, was brought on an urgent basis and sought an interim order, pending the determination of Part B of the application.

2. Part A is intended as an interim order to direct the first to third respondents to ensure that a refugee reception centre remains open and fully functional within the Cape Town Metropolitan Municipality, which services would include the receipt of the new applications for asylum and the issuing of the so-called section 22 permit.

3. In terms of Part B of the application, the applicant seeks an order reviewing and setting aside the decision of the first to third respondents to close the CTRRO without having in place an alternative refugee reception centre within the Cape Town Metropolitan Municipality.

4. It also seeks an order directing the first to third respondents to ensure that the refugee reception centre remains open and fully functional in the Cape Town Metropolitan Municipality, either at the existing premises or at other some suitable accommodation and which offices would provide a full range of services as contemplated within the Refugees Act 130 of 1998 ("the Refugees Act").

5. The applicants further seek an order directing that the refugee reception centre, to which I have already made reference, provides all the services contemplated in the Refugees Act, including the provision of services to existing asylum seekers and recognised refugees, and accepts and adjudicates upon new applications for asylum in terms of sections 21 and 22 of the Refugees Act 130 of 1998 (The Refugees Act').

The three grounds upon which the applicant seeks interim relief order Part A are as follows:

1. The decision to close down the CTRRO to new applicants, was taken without consulting the Standing Committee on Refugee Affairs ("SCRA").

2. The decision was taken without any form of proper public consultation.

3. The decision was unreasonable and irrational, accordingly unlawful.

Factual Background:

The CTRRO was established by the second respondent in 2000. It is the only place in the Western Cape at which asylum seekers may apply for asylum and it has fulfilled this function since its establishment, during which time there has been a significant demand for its services. Thus in the first four months of 2012, I was informed that the CTRRO has received 5 946 new applications for asylum, which in effect, amounts to approximately 1 500 per month and if this trend continues, to 18 000 for the calender year. Until its closure on 29 June 2012, the CTRRO operated from premises at 420 Voortrekker Road, Maitland in Cape Town.

Its closure holds particular relevance for these proceedings. Upon an application by the owner of the adjacent erf 410 on Voortrekker Road, in the case of 410 Voortrekker Road, Property Holdings CC v Minister of Home Affairs & Others, this court, on 3 May 2012, declared the operation CTRRO at these premises to be unlawful by reason of its infringement of the relevant zoning scheme regulations of the City of Cape Town. First and second respondent were further interdicted from operating the CTRRO at these premises until, and unless, the land use restrictions applicable to the erven were amended so as to permit the lawful operation of its offices at the premises.

For reasons which were never made clear to me, neither on the papers nor in argument, it appears that the Department continued to operation the CTRRO from these premises until its closure on 29 June 2012. On 7 May 2012, the Department held a meeting with stakeholders to inform them of recent developments at the CTRRO, especially the notice of termination that the Department had received from the landlord from whom it leased the access road to the reception office.

When given an opportunity to do so during a question and answer series which took place at that meeting, a representative of applicant raised a concern about the Department's intention to relocate RRO's to the country's borders. The Department's Deputy Director, Civic Services, responded that respondents' intention in calling this particular meeting (7 May 2012) was to consult and inform stakeholders of the current challenges facing the respondents in respect of the CTRRO and, further, that the intention of the Department was to continue servicing clients at the CTRRO and to develop a strategy of how and where clients could be serviced in the event of a possible closure of the present premises.

In the minutes of the meeting, the following description appears:

> "Mr Ysusf Simons ... made a presentation on the infrastructural challenges experienced with the RRC management, by giving background information on previous eviction orders, current office accommodation and efforts made to relocate to an alternative premises after a court order was received in 2011. In closure, and the way forward, was indicated that the DHA will engage the landlord for a possible extension and in the event of a 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."

On 23 May 2012, stakeholders were invited to a further meeting with the third respondent, who informed them, *inter alia*, that new arrivals at the border would be told that they must present themselves for process to the RRO's in Messina, Gauteng or Durban and that the decision to remove the RRO's to the border areas had now been made. In an answering affidavit deposed to by second respondent, this averment has been admitted.

On 30 May 2012, second respondent convened a meeting with the SCRA, at which meeting that body was advised that the Department had taken the decision to close the CTRRO. The reason for the closure provided at that meeting concerned the termination of the lease at the premises and the further difficulties which the Department had encountered in securing an alternative site. This description is sourced in the minutes of the meeting, the importance of which necessitates a fairly extension quotation:

> "Closure of Cape Town Office:
>
> 4. The Department of Public Works and the Cape town Office Refugee Reception Office ... received a notice of cancellation of the lease from the landlord that owns the access road to the RRO. The Department of Public Works had negotiated a one year lease extension renewable on a monthly basis, subsequent to the granting of the court order to vacate the current premises; however, the landlord was no longer willing to continue with the lease and exercised its rights to cancel the lease.
>
> 5. Due to the previous experience in such matters, the Director General ordered that consultation take place with the various stakeholders regarding these developments. This meeting indeed took place on 7 May 2012 (that is the meeting to which I have already made reference), and a follow-up meeting is scheduled to take place in early June 2012 to advise stakeholders of the final decision.
>
> 6. Various measures are currently being put in place by a departmental task team, in

order to extend services to recognise refugees and asylum seekers that have already interacted with the CTRRO.

7. As a result of an earlier court order directing the Department to vacate its current premises, three other sites were identified and the feasibility of their use was assessed. However, they were all found to be unsuitable for purposes of opening a RRO.

8. 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. Measures must be put in place to timeously advise new entrance at ports of entries that there would be no longer an RRO in Cape Town from 29 June 2012."

On 8 June 2012, the Department convened a further meeting, to which reference has already been made, at which stakeholders were informed that the Department had concluded that the CTRRO should be closed on 29 June 2012 when the lease in respect of the existing premises expired.

It is this decision which forms the basis of the challenge, both on procedural and substantive grounds as I have already mentioned. In order to understand the precise basis of this application, it is necessary briefly to examine the nature and role of a refugee reception centre as it is envisaged in terms of the Refugees Act.

The Function of a Refugee Reception Centre: The Refugees Act provides that every person who wishes to obtain asylum, must apply in person at the refugee reception office by virtue of the provisions of section 21(1) of the Refugees Act. Upon an application for asylum, the asylum seeker must receive an asylum seeker permit from the refugee reception office by virtue of section 22 of the Refugees Act

(this is the section 22 permit to which I have already made reference). This permit is essential if

the asylum seeker is to live, work and function in South Africa prior to him or her being awarded refugee status. It has to be renewed in person at a relevant refugee reception centre, which renewal takes place either every three to six months. Where a person is recognised as a refugee, his or her refugee status must be renewed every two years in terms of Regulation 15, which regulations are promulgated in terms of the Act. For this to occur, he or she must present himself or herself at the refugee reception office.

The importance of these provisions has been recognised in a range of different cases. In Kiliko & Others v Minister of Home Affairs & Others 2006 (4) SA 114 (C) Van Reenen J said at para 27:

> "[u]ntiI an asylum seeker permit has been issued to a foreigner who has entered the Republic of South Africa in conflict of the provisions of s9(4) of the Immigration Act, he or she is an illegal foreigner and subject to apprehension, detention and deportation in terms of ss32, 33 and 34 of the Immigration Act. He or she may furthermore not be employed by anyone (s38), may not be provided with training or instruction by any learning institution (s39) and is. save for necessary humanitarian assistance, severely restricted as regards a wide range of activities that human beings ordinarily participate in, and all persons are prohibited from aiding, abetting, assisting, enabling or in any manner helping him or her (s 42) under pain of criminal prosecution."

In Abdi & Another v Minister of Home Affairs & Others 2011 (3) SA 37 (SCA) at para 22, the Department's rule was described thus:

> "The Department's officials have a duty to ensure that intending applicants for refugee status, are given every reasonable opportunity to file an application with the relevant refugee reception centre."

These dicta clearly recognise both the vulnerable situation in terms of which the asylum seekers are placed and the duty on the respondents to assist applicants for asylum. This conclusion is reinforced in the Constitutional Court's judgment in Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC) at paras

28 to 30. It follows from the purpose of the Act that refugee reception offices are essential to the many asylum seekers and refugees, who are recognised as a particularly vulnerable group by our courts and who, therefore, require assistance. To this end, section 8 of the Refugees Act provides that the Director General may establish as many refugee reception offices in the Republic, as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act. With this background, I turn to applicant's grounds of review.

Grounds of Review:

The applicant's case is that the second respondent's decision falls to be declared unlawful and to be reviewed and set aside on one of three essential grounds:

1. The decision was made without consultation with the SCRA, which consultation is required in terms of section 8(1) of the Refugees Act. The decision accordingly falls to be set aside and reviewed in terms of section 2(2)(b) and 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), as well as in terms of a residual principle of legality.

2. No proper consultation or opportunity for representations was afforded to those who were affected by the decision of the respondents, and accordingly the decision falls to be reviewed and set aside in terms of section 6(2)(c) of PAJA, as well as in terms of the general principle of legality.

3. The decision taken by the second respondent was irrational and unreasonable and based on

irrelevant considerations and a failure to take into account relevant considerations. This decision stands to be reviewed, in applicant's view, and to be set aside in terms of section 6 (2) (d), 6(2)(e)(iii), 6(2)(h) and 6(2)(i) of PAJA, as well as the principle of legality to the extent that the decision was irrational.

Failure to consult with the Standing Committee: Section 8(1) of the Refugees Act, makes it clear that the second respondent may establish as many refugee reception centres as he or she regards as necessary, after consultation with the SCRA. It follows that the legislation recognised that the SCRA an important role to play in this process. The SCRA is constituted in terms of sections 9 to 11 of the Refugees Act and its members must be appointed with:

> "due regard to the experience, qualifications, expertise, as well as the ability to perform the functions of their office properly."

While second respondent is not bound to follow the views of, or reach agreement with the SCRA, applicant contends that he is required to consult with them before making a decision to consider their views carelfully and in good faith. Mr Budlender, who appeared together with Ms Mayosi, on behalf of the applicant, made two related submissions in this regard:

1. Second respondent made a decision before he consulted with the SCRA.

2. The SCRA not given the full picture to consider, which would have enabled it to make recommendations to the second respondent before the actual decision was taken.

By contrast, second respondent contends that he consulted with the SCRA on 30 May 2012, where he received that body's inputs and submissions, that they were duly considered and he

then concluded that the CTRRO should be closed. Mr Budlender submitted however, that this submission could not be supported on the evidence which, to date, had been made available to the court. On the contrary, from the minutes of the second respondent's meeting with the members of the

SCRA on 30 May 2012, it was clear that the decision to close the reception centre had been made by the time the meeting took place with the SCRA and that the latter had merely been notified of the decision.

Mr Budlender further submitted that the information and considerations that were relevant to the second respondent's decision, were not placed before the SCRA. The implementation of a policy to relocate all new applicants at ports of entry (the borders), did not feature in any of the reasons given by the second respondent at the meeting for the decision to close the CTRRO, as is evident of the minutes of the meeting of 30 May 2012.

In the answering affidavit of second respondent, reasons were given in this particular regard. However, the question remains whether respondents' answer provides a clear indication that a process of consultation had taken place prior to the decision having been made.

Mr Moerane, who appeared together with Mr Sebeko and Mr Papier, on behalf of the respondents, referred to certain paragraphs of the relevant minute in support of the argument that the required process of consultation had indeed taken place.

These refer to issues which, in the relevant minute, fall under the heading 'Closure of the PE refugee reception office':

> "1. The closure of the Port Elizabeth office was necessitated by the lease agreement that was lapsing, which had been preceded by a court order that had been granted in favour

of the landlord directing the Department to take measures to abate the nuisance created by asylum seekers. The landlord indicated that he was no longer willing to renew the lease.

2. Due to various challenges that were received by the Department all over the country in relation to the nuisance factor, the Department noted a trend of many court challenges against its operations in metropolitan areas and is of the view that refugee offices are no longer suitable for such metropolitan areas. Furthermore, the procuring of alternative accommodation for another RRO in Port Elizabeth will not take less than 18 months, if not longer.

3. Due to the above, as well as a policy shift that was discussed at cabinet level to move RRO's closer to ports of entry, it has been decided that the Port Elizabeth office must be closed."

The question is whether, on this evidence, there was compliance with the provisions of section 8 and the role which the legislature manifestly envisaged for the SCRA. The answer is, in part, dependent on the meaning of the words 'consultation' and 'consult' which has been explored in a number of cases. In Haves & Another v Minister of Housing, Planning & Administration, Western Cape, & Others 1999 (4) SA 1 229 (C) at 1 240, the court made use of a number of dictionary definitions:

"Shorter Oxford English Dictionary, *inter alia*, to take counsel together, deliberate, confer, while 'consultation' is said to mean, *inter alia,* the action of consulting or taking counsel together, deliberation or conference... In the Reader's Digest Universal Dictionary, consult is rendered...as [t]o exchange views, confer, and 'consultation' as (1) The Act of procedure of consulting. (2) A conference at which advice is given or views are exchanged."

See also Mogoma v Sebe N.O. & Another 1987 (1) SA 483

(CK) 490C. In England the Queen's Bench, in R v Secretary of State v Social Services ex *parte* Association of Metropolitan Authorities [1986] 1 WLR 1 (QB) at 4F-H, said:

> "No general principle can be extracted from the case law as to what kind or amount of consultations is required for delegated legislation of which consultation is a precondition, can be validly be made. But in context, the essence of consultation is the communication of a genuine invitation to give advice and genuine receipt of the advice. In my view, it must go without saying that to achieve consultation, sufficient information must be supplied by the consulting to the consulted party, to enable it to tender helpful advice."

It appears, therefore, that the words 'consult' and 'consultation' within the context of the present dispute are clear: was their a genuine request from second respondent to SCRA to provide advice as to closure or a genuine receipt of this prior to a decision having beenmade. The question which arises is whether this kind of process of exchange took place in the present case. In my view, the purported consultation with SCRA does not appear, on these papers, to have taken the form set out in these dicta. My attention was also drawn to the judgement of Pickering, J in Somali Association & Another v Minister of Home Affairs & 4 Others (unreported judgment of the ECD, 16 February 2012), where the learned judge made it clear as to what was required in the present case:

> "It is disquieting that the second respondent did not see fit to consult with the Standing Committee before taking the decision to close the reception centre. As set out above, the chairperson and members of the Standing Committee are appointed in terms of section 10 of the Act, with due regard to the experience, qualifications and expertise. They must, in terms of section 11(d), advise the second respondent on any matter he may refer to. As was submitted ... although the second respondent is not bound to

follow the views or advice of the Standing Committee, he is obliged to consider their views seriously and in good faith before taking a decision. The legislature requires the second respondent to consult with the Standing Committee as to how many reception centres were necessarily in the Republic and where they would be situated. Equally, second respondent is required to consult with the Standing Committee, should he be contemplating the closure of one of the reception offices, with all the negative and prejudicial consequences to vulnerable asylum seekers which would ensue therefrom."

In the present dispute, there is no evidence, on these papers, to suggest that the decision of the second respondent took place after the SCRA had considered proposals which had been placed before it by the second respondent and other relevant parties, and any other relevant information which may have been necessary to perform the consultative function. Therefore, it does not appear on these papers that a decision was taken after consultation. It appears from these papers, that the SCRA acted as a rubberstamp and, therefore, was not required, nor did it perform the functions which were mandated to it in terms of the Act.

On its own, the finding provides a basis for the prima facie rights which is required for interim relief. For a series of reasons which will become apparent, however, it is important to consider the express purpose of interim relief and certain other aspects of applicant's challenge, in order to determine whether the relief, as sought, should now be granted.

Rationality

Applicant has further submitted that the decision was irrational and unreasonable. It contends that the reasons offered by the respondents for the decision, indicate that it was materially influenced by irrelevant considerations and the failure to take into account relevant considerations. For this, it relies on certain provisions of PAJA.

Thus, applicants rely on s6(e) of PAJA:

(iii) because irrelevant considerations were taken into account, or relevant considerations were not considered,

(f) The action itself:

(ii) Is not rationally connected to:

(aa) The purpose for which it was taken, (

bb) The purpose of the empowering provision,

(cc) The information before the administrator,

(dd) The reasons given for it by the administrator...

(h) The exercise of power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power to perform the function, or;

(i) The action is otherwise unconstitutional or unlawful."

Mr Moerane contended that these provisions of PAJA did not apply to the present proceedings. In short, the decision, which was impugned by the applicant, was not administrative action, because:

1. It did not materially and adversely affect the rights of refugees and asylum seekers, whose claim awaited finalisation, because an alternative, whether in Cape Town or elsewhere, had been provided to deal with and finalise their claims.

2. Prospective asylum seekers do not have a right, interest or legitimate expectation to seek asylum from a specific refugee reception centre of their choice.

For these reasons he submitted, the impugned decision, to the extent that it was limited to new applications, did not fall under PAJA. In any event, a refugee could go to any other refugee reception centre. Those applications which were already on the system, would be processed

until finality. Hence the decision did not adversely affect the rights of anyone and for this reason was not administrative action as defined under PAJA. Accordingly applicants had no legal basis for a review as prayed.

These submissions require an examination of the phrase "adversely affects rights", as it appears in the definition of administrative action in section 1 of PAJA. This phrase stands to be interpreted in one of two ways:

1. Action which determines rights, or

2. which takes away or deprives a person of rights.

> See Hoexter, Administrative Law in South Africa (2nd ed at 221). Prof Hoexter suggests that the phrase can be parsed either through the prism of a determination or a deprivation theory of administrative law.

Mr Moerane advocated the adoption of a deprivation theory of administrative law. To the extent that asylum seekers have no right which could sustain a cause of action which was brought by the applicant, PAJA was inapplicable. Prof Hoexter concedes that the phrase as employed in the Act is not entirely clear and that, therefore, this provision must be read in terms of the Act as whole, that is purposively. She suggests that the Act embraces a determination theory and, therefore, eschews the more limited deprivation theory which dominated pre-constitutional jurisprudence. She argues however that, on its own, an adoption of an unqualified determination theory may run the risk of extending the reach of administrative action beyond clearly defined limits, thus creating significant problems for courts to determine which matters which should be subject to judicial review and those matters should not be so heard. Hence, she suggests at 222, a measure of flexibility be imported into the theory:

> "I would argue that in accordance with the wording of s33(1) of the Constitution, the question for the courts to ask ought to be a positive rather than a negative one. The right question is not "when and on what basis may we withhold fairness from an aggrieved

individual?", but what does fairness require in this particular case; in this way the courts are able to limit the content of fairness, instead of limiting its application, with the result that as promised by s33(1), everyone has the right 9to administrative action that is procedurally fair and everyone receives fairness in the appropriate dose."

This approach finds favour, at least by clear implication, in Joseph v The City of Johannesburg 2010 (4) SA 55 (CC), where Skweyia, J said, on behalf of the court:

> "In my view, proper regard to the import of the rights to administrative justice in our constitutional democracy, confirms the need for an interpretation of rights under s3(1) of PAJA, that makes clear that the notion of rights includes not only vested private law rights, but also legal entitlements that have their basis in the constitutional and statutory obligations of government... It is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decisions which affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness." See paras 43 and 45.

On the basis of this approach, a decision to cease providing services to new asylum seekers and to close a CTRRO permanently, would materially and adversely affect the rights of a section of the public. In other words, a certain section of "everyone", that is asylum seekers and refugees who wish to make use of a reception centre in the City of Cape Town will be adversely affected.

On the papers placed before this court for the specific purposes of Part A of the application, this constituency must now contend with the difficulties of gaining access to other RRO's in view of the large number of asylum seekers and refugees dealt with in those offices. If they are fortunate to gain a section 22 permit, and then, having travelled a considerable distance to reach Cape Town, they would then be required to travel approximately 2 000 kilometres to Messina

or 1 312 kilometres to Pretoria, in order to apply for a renewal of the permit at the expiry of the period of between three to six months.

When these facts are examined in the light of the test that Professor Hoexter advocates, as to the theory which should animate PAJA, it is clear that fairness to this constituency of people comes into play. A flexible application of the determination theory of administrative law, would apply to this case. In my view, on these papers, the decision to relocate reception centres is a form of administrative action taken by the executive and, therefore, stands to be reviewed in terms of the scope of the Act.

That having been said, it is possible return to the question of the rationality of respondents' decision. On the respondents' papers it appears that the following factors informed the decision to close the CTRRO permanently and to cease providing services to new asylum seekers:

1. The lease of the premises was due to expire.

2. The reception centre, was the subject of litigation instituted by business owners in the nearby vicinity for failure to comply with zoning scheme regulations and common law form of nuisance caused at the premises. I leave aside any comment about possible mean spiritedness of those who seek to have reception centres closed and, therefore, exacerbate the perilous conditions of asylum seekers. If there is proved to be such mean spiritedness, it has nothing to do with the conduct of the respondents present in court today.

3. The respondents have identified metropolitan areas as an undesirable location and a problem area for the processing of asylum seekers.

4. The respondents are in the process of considering the efficacy of relocating the reception centres to the ports of entry, that is to the border of the country.

5. The Cape Town reception centre was not so strategically located.

The fact that the lease to the access road terminated, would not appear to be a sufficient reason for closing down any reception centre within the Western Cape, particularly as it appears, from the various minutes, that attempts were made to procure alternative accommodation. Furthermore, the Department intends providing premises at Customs House for services other than those required by new applicants.

The question must, therefore, arise, certainly in so far as interim arrangements are concerned, to whether this site or an alternative site could not be used to assist new applicants, until such time as the full record is available, so that Part B of the application can properly be determined on a full conspectus of the evidence.

In other words, on these papers, second respondent has not demonstrated a reason as to why Customs House cannot be used on an interim basis.

Significantly, in this connection, further questions arise as to the rationality of an immediate closure. There was some suggestion that Customs House was, itself, not suitable, in that it could not cope with the pressure of new entries being processed through the offices so located there. As noted previously, if the figure of 5 946 new applicants in the first four months of 2012 is extrapolated to a calendar year, this would amount to approximately 18 000 a year. There was evidence to suggest that, between January to December 2006, the offices located at Customs House processed 24 322 asylums during the calendar year, which indicates that Customs House has dealt with more asylum seekers than would apparently presently be the case.

Furthermore, allegations were raised with regard to the decision immediately to close the Cape

Town reception centre and to demand that every asylum seeker should immediately be processed to the border centres. The applicants aver that there are considerable backlogs, which would make conditions extremely difficult for these asylum seekers. In answer, second respondent says:

> "I wish to point out that where backlogs exist at the various refugee reception offices, the Department is currently in the process of addressing such backlogs. Furthermore, the Department is planning to open a new office at Lebombo, which is expected to occur before the end of December 2012. There are also plans on the way to extend the operations at Messina."

The question which arises from this particular admission is the following: why would a reception centre be closed immediately when it is recognised that there are problems with regard to backlogs, and before the extensions, which would enable the Department to cater for these , had not itself been put into operation.

Mr Budlender cautioned that I should not resstrict the interim relief simply to the end of December, for it could not be known whether the reception centre at Lebombo would be able to cater for the additional asylum seekers, who would be required to use these offices, pursuant to the decision to close the reception centre in Cape Town. There is, at yet, no evidence as to how this office would function. For the purposes of interim relief, the key question to be asked is how rational was the decision was to close a critical centre before any alternative facility was in operation and sufficient to deal with the backlogs admitted by the Department in its answering affidavit?

In summary, the applicants have made out a case, on these papers, that the decision to close the reception centre in Cape Town had not been taken pursuant to the requirements of the Act, that

is to engage in a proper consultation process with the SCRA prior to it having made its decision. Furthermore, to close the centre in the circumstances in which the decision was taken, without more, on the argument that Customs House is not suitable, and that somehow admitted backlogs will be resolved, falls clearly within the framework of irrational as envisaged by PAJA.

On this basis, I do not need to deal with the additional ground raised by applicants concerning public consultation.

Much was made of the fact that these are refugees who have no rights. I find this submission to be disturbing. Our history reflects that neighbouring states gave great assistance to those who bravely fought for the kind of constitutional democracy which this country enjoys today. It appears to me that this history should infuse the way we approach the relevant jurisprudence. Furthermore, if the oft made refrain that we are part of Africa is true, as obviously is the case, then a level of hospitality to our fellow Africans is surely imperative and the principle should be taken extremely seriously. Those who seek our hospitality should not be dealt with either in a parsimonious or xenophobic fashion.

I have not been required to amply these insights in order to interpret the Act, although I consider that these are important considerations in the event that there is any ambiguity in the legislative scheme applicable to this dispute. It may also be relevant in the overall exercise of a discretion in an urgent applicadtion for interim relief within this context. I must emphasise that I have only been asked to deal with interim relief. It may be that, on the basis of a complete Rule 53 record, a range of further facts, not available to me at present, may be placed before a court considering Part B of the application, which would result in a final decision different to the interim one that I propose.

Interim Relief

Mr Budlender submitted that the applicant had established that the requisite *prima facie* right to the interim relief sought in Part A had been made. He contended further that the applicant had established a very strong right in this regard, in his view sufficient to obtain relief under Part A. He suggested further that the case for review of the applicant will only improve in the Rule 53 record as furnished. I have no way in knowing whether this latter submission is correct.

Thus, there is the question, as Mr Moerane framed it, which relates to the balance of convenience and which comes into play in granting of interim relief.

In order to deal with this submission, reference can be made to Erickson Motors Limited v Protea Motors & Another 1973 (3) SA 685 (A) at 691C-D.

> "The granting of an interim interdict pending an action, is an extraordinary remedy within the discretion of the court... In exercising its discretion, the court weighs, *inter alia,* the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated. For example the stronger the applicant's prospect of success, the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him."

This point has been amplified in a number of other decisions, captured in paragraph 406 of LAWSA, Volume 11, where the learned author, Mr Justice Harms, writes as follows, particularly in respect of the balance of convenience:

> "The court must weight the prejudice that the applicant will suffer if the interim

interdict is not granted against the prejudice that the respondent will suffer if it is. The exercise of discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience. The stronger the prospects of success, the less the need for such balance to favour the applicant. The weaker the prospects of success, the greater the need for it to favour it."

In this connection, the learned judge of appeal cites a judgment of Holmes, J (as he then was) in Olympic Passenger Services (Ptv) Ltd v Ramlagan 1957 (2) SA 382 (D):

"It thus appears that where the applicant's right is clear and the other requisites are present, no difficulty presents itself against granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between these two extremes fall the intermediate cases, in which on the papers, as a whole, the applicant's prospects of ultimate success, may range all the way, from strong to weak. The expression *'prima facie'* established though open to some doubt, seems to me a brilliant classification of these cases. In such cases, upon proof of a well granted apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict. This is a discretion to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience. The stronger the prospects of success, the less the need for such balance to favour the applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondents if it be granted."

In summary: on these papers, I have found that there is a strong prospect of success. I hasten to add that 'strong' on these papers, does not necessarily mean 'strong' on any other papers. The

asylum seekers in this particular case, on the papers that have been placed before me, are a vulnerable group. The requirement that they would have to travel back to renew their permits, would require significant resources, which they hardly posses. It would impose an untenable burden on many asylum seekers, who are amongst the most vulnerable in society and unable to face financial burdens that an application to a distant reception centre would entail. The decision does oppose to take into account the vulnerable, the infirm, the elderly or the unaccompanied minors who would be exposed to any further hardship.

Persons who arrive in Cape Town, ignorant of the change, will now be unable to access s22 asylum seeker permits, would be subject to arrest and detention, even deportation to a country where they would seriously be endangered. In my view, based on all of these facts, there is a sufficient apprehension that if interim relief is not granted, significant prejudice would be encountered by a group who, as I have found, are entitled to relief under PAJA.

As I indicated, to the extent that Mr Moerane developed an argument regarding balance of convenience, even if I were to engage with this argument on the basis that the scales were not tilted as I have indicated, interim relief so granted would cause far less damage to respondents than it would to those for whom applicant seeks protection. In itself, this means that the relief should be granted, pending a final review.

In the result, the applicant has made out a sufficient case for the purposes of this court granting urgent and interim relief.

On the basis of this reasoning, the following order is made:

1. Pending the final determination of the relief sought in Part B of the notice of motion, respondents are directed to ensure that a refugee reception office remains open and fully functional within the Cape Town Metropolitan Municipality, at which new applicants for asylum can make applications for asylum and be issued with section 22 permits.

2. The costs of Part A of this application be paid by respondents, including the costs of two counsel.

DAVIS, J