# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case No: 735/12 & 360/13
Reportable

In the matter between:

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| **THE MINISTER OF HOME AFFAIRS** | **1st Appellant** |
| **THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS** | **2nd Appellant** |
| **CHIEF DIRECTOR: ASYLUM SEEKER MANAGEMENT** | **3rd Appellant** |
| **THE STANDING COMMITTEE FOR REFUGEE AFFAIRS** | **4th Appellant** |
| **THE MINISTER OF PUBLIC WORKS** | **5th Appellant** |

and

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| **SCALABRINI CENTRE, CAPE TOWN** | **1st Respondent** |
| **ALESSANDRO ALFREDO FESTORAZZI** | **2nd Respondent** |
| **FRANCO VIGNAZIA** | **3rd Respondent** |
| **GERARDO DE JESUS GARCIA PONCE** | **4th Respondent** |
| **GIOVANNI MENEGHETTI** | **5th Respondent** |
| **GUY ERIC JOSUE DIAZENZA** | **6th Respondent** |
| **MARIA DULCE RODRIGUES PEREIRA** | **7th Respondent** |
| **MARIA JUDITE GARCES VIRISSIMO** | **8th Respondent** |
| **MARIO TESSAROTTO** | **9th Respondent** |

**Neutral citation:** *Minister of Home Affairs v Scalabrini Centre, Cape Town* (735/12 & 360/13) [2013] ZASCA 134 (27 SEPTEMBER 2013)

**Coram:** NUGENT, LEWIS, THERON, WALLIS and WILLIS JJA

**Heard:** **3 SEPTEMBER 2013**

**Delivered:** **27 SEPTEMBER 2013**

**Summary:** **Refugee Reception Office – closure by the Director-General – review of the decision – whether 'administrative action' under Promotion of Administrative Justice Act 3 of 2000 – whether consistent with doctrine of legality.**

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## ORDER

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On appeal from the Western Cape High Court, Cape Town (Rogers J sitting as court of first instance).

Save for setting aside paragraphs (b) and (c) of the order of the court below, and substituting them with the order that follows, the appeal is dismissed with costs, to be paid by the first to third appellants jointly and severally, and to include the costs of two counsel. Paragraphs (b) and (c) are substituted with the following:

> 'In the event that a decision as to the future of the Cape Town Refugee Reception Office has not been made by 30 November 2013, the applicants are granted leave to apply upon the same papers, supplemented so far as they consider that to be necessary, for further relief'.

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## JUDGMENT

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**NUGENT JA (LEWIS, THERON and WALLIS JJA CONCURRING)**

[1] Many people stream into this country, generally through its northern borders, claiming refuge from oppression and turmoil in their own countries. The Refugees Act 130 of 1998 provides the framework within which South Africa carries out its international obligation to receive refugees.

[2] It provides in s 8(1) that the Director-General of the Department of Home Affairs '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'. Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer.

[3] Applications for refugee status – called asylum in the statute – must be made in person to a Refugee Reception Officer at any Refugee Reception Office. The Refugee Reception Officer must accept the application form, ensure it is properly completed, make such enquiries as he or she deems necessary, and then refer it to a Refugee Status Determination Officer. The Refugee Status Determination Officer must then consider the application, obtain such further information as might be relevant, and decide whether to grant or refuse asylum.

[4] Pending the outcome of an application for asylum the Refugee Reception Officer must issue to the applicant an asylum seeker permit – referred to in the papers as a s 22 permit – which allows the applicant to sojourn temporarily in the Republic, subject to any conditions that might be imposed. Once granted such a permit an asylum seeker is permitted to move freely in the country, and may be permitted to work or study.[1] The permit may be extended from time to time by a Refugee Reception Officer.

[5] This appeal concerns a Refugee Reception Office that was established in Cape Town. No later than 30 May 2012 the Director-General decided that applications for asylum would no longer be received

[1] *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

at the Cape Town office, which would thenceforth deal only with applications to extend s 22 permits that had already been issued. In effect, the decision amounted to closure of the Refugee Reception Office, which is how it has been characterised by the authorities.

[6] The decision was challenged on review in the Western Cape High by the Scalabrini Centre of Cape Town – a non-profit organisation founded by the Missionaries of St Charles to assist migrant communities and displaced people. The respondents were the Minister of Home Affairs, the Director-General of that department, the Chief Director for Asylum Seeker Management – the first to third respondents, who I will refer to collectively as the authorities – and the Standing Committee for Refugee Affairs.[2]

[7] Pending the outcome of the review an interim order was issued by Davis J compelling the authorities

‘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’.

[8] Leave to appeal that order was refused and the authorities petitioned the President of this court. Meanwhile, in anticipation of that occurring, Davis J ordered that the interim order should take immediate effect. The petition was referred under s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 for oral argument before this court, the parties being advised they must be prepared to address the merits of the appeal if called upon to do so.

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[2] The Minister of Public Works was also cited but has played no part in the proceedings and abides the decision of the court.

[9] The application to review the decision succeeded before Rogers J,[3] who made the following orders:

'(a) The [Director-General's] decision, taken by no later than 30 May 2012, to close the Cape Town Refugee Reception Office to new applicants for asylum after 29 June 2012 is declared unlawful and set aside.

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

He also ordered the Director-General to report to the Scalabrini Centre's attorneys from time to time on progress being made towards compliance. The authorities now appeal those orders with the leave of that court.

[10] Apart from the office at Cape Town, the Director-General also established Refugee Reception Offices at Crown Mines (Johannesburg), Marabastad (Tshwane), Port Elizabeth, Durban and Musina. The operation of those offices has confronted the authorities with considerable difficulty, arising from the large number of applicants who congregate there.

[11] In Port Elizabeth business proprietors and residents in the vicinity of the office brought proceedings in the Eastern Cape High Court in 2009, alleging that the presence of the office was causing a nuisance. Jones J issued an order compelling the Minister of Home Affairs to abate the nuisance, and directed various steps to be taken towards that end. That notwithstanding, the problem continued, and in October 2011 the Director-General decided to close the office when the department's lease expired the following month. That prompted proceedings in the Eastern

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[3] Reported as *Scalabrini Centre v Minister of Home Affairs* 2013 (3) SA 531 (WCC).

Cape High Court at the instance of the Somali Association of South Africa. In February 2012 Pickering J held the decision to be unlawful – because it had been taken without prior consultation with the Standing Committee – and set it aside. He also ordered the authorities 'forthwith to open and maintain a fully functional Refugee Reception Office … in the Nelson Mandela Bay Municipality'.[4]

[12] Similar problems were experienced at City Deep. In March 2011 Horwitz AJ, sitting in the South Gauteng High Court, interdicted the authorities from conducting a Refugee Reception Office from the premises then being occupied, but allowed the authorities sixty days to relocate. According to the Director-General alternative premises could not be found. The office was closed on 1 June 2011 and the files were transferred to Marabastad.

[13] The same problems were encountered in Cape Town. At first the Refugee Reception Office was located at Customs House on the foreshore – a building owned by the state but shared with others.[5] Complaints from other occupants and the local authority led to the office relocating to premises at Airport Industria in November 2006. Again there were complaints and occupants of properties in the vicinity applied to the Western Cape High Court for relief. On 24 June 2009 Rogers AJ (then an acting judge) declared the operation of the office to be unlawful – on the grounds that the use contravened the zoning regulations and was a common law nuisance – and ordered the authorities to terminate the

[4] Reported as *Somali Association for South Africa v Minister of Home Affairs* 2012 (5) SA 634 (EC).
[5] Said in the affidavits to be tenants, but described in *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (WCC) para 9 as 'other operational divisions of the Department'

operation of the Refugee Reception Office by no later than 30 September 2009.[6]

[14] The office was then relocated to Maitland. Once again the owner of an adjacent property brought proceedings in the Western Cape High Court. They culminated in Binns-Ward AJ declaring the operation of the office to be unlawful, because it infringed the zoning regulations, and created an actionable nuisance.[7] He interdicted the authorities from operating the office at the premises until the regulations were amended to permit it, and until measures had been put in place to abate the nuisance. The orders were suspended for some months on certain conditions. One of the conditions could not be met by the authorities and the orders became effective on 13 September 2010.

[15] Notwithstanding those orders the office continued functioning at the Maitland premises while the authorities sought alternative premises. According to the authorities various premises were identified but found to be unsuitable. In March 2011 offers of premises were received in response to a public invitation to tender but again the authorities considered none to be suitable. The nature of the premises that were being sought, the conditions upon which they wished to occupy them, and the reasons the premises were found to be unsuitable, are not disclosed in the affidavits.

[16] The Refugee Reception Office was still being operated from the Maitland premises at the time the present proceedings were brought in

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[6] Reported as *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs* 2010 (5) SA 367 (WCC)

[7] Reported as *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs* [2010] 4 All SA 414 (WCC).

June 2012. The affidavits are silent on whether anything was done in the fourteen months from March 2011 to secure alternative premises.

[17] The premises from which the office operated in Maitland were leased under three separate leases. One was for a road that was essential for access to the premises, and was terminable on one month's notice. On a date not disclosed in the affidavits the lessor gave notice that the lease would terminate on 31 May 2012.

[18] On 7 May 2012 the authorities convened a meeting – they called it a 'refugee stakeholder engagement meeting'. It was attended by officials of the Department of Home Affairs and the Department of Public Works, and by representatives of a large number of interested organisations, including the Scalabrini Centre.[8]

[19] The minute of the meeting records that those in attendance were told by the officials that the purpose of the meeting was

'to inform stakeholders of the recent developments at the Refugee Reception Centre specifically towards the notice of termination of lease (end May 2012) received from the Landlord of the access road'.

[20] One of the officials made a presentation that was described as follows in the minute:

'Mr. Yusuf Simons (PM: WC) made presentation on the infrastructural challenges experienced by the RRC Management by giving background information on previous eviction orders, current office accommodation and efforts made to [relocate to] alternative premises after a Court order was received in 2011. In closure and the way

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[8]The attendance list reflects attendance on behalf of the SA Red Cross, the United Nations High Commissioner for Refugees, the Legal Resources Centre, the University of Cape Town Refugee Law Clinic, the Somali Association of South Africa, the Somali Community Board, the Somali Bellville Business Association, the Adonis Musati Project, the Avenir Empowerment Centre, Friends from Abroad, Scalabrini Centre, the University of the Witwatersrand, and others.

forward it was indicated that the DHA will engage the landlord for a possible extension and in the event of refusal the DHA would 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'.

[21] Those in attendance were then given the opportunity to 'provide proposals, inputs and engage with the [Department of Home Affairs] and [Department of Public Works] management'. Various issues were raised, amongst which was the Scalabrini Centre's 'concern about the DHA intention to relocate RRC's to borders and missed [?] the DHA's intention to keep the Refugee Office in Cape Town open'. In response the Deputy Director-General: Civic Services

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

[22] On 10 May 2012 officials met with the lessor of the access road, who was adamant that the lease would terminate, but was willing to extend it to 30 June 2012, and to allow a further ten days for the premises to be vacated.

[23] The standing committee referred to earlier in this judgment is the Standing Committee for Refugee Affairs established by s 9(1) of the Act. It is enjoined to 'function without any bias and must be independent' and its functions include formulating and implementing procedures for the granting of asylum, regulating and supervising the work of Refugee Reception Offices, liaising with representatives of the United Nations High Commissioner for Refugees and non-governmental organisations,

and advising the Minister of Home Affairs and the Director-General on any matters they refer to it. At the time relevant to this appeal it comprised two members – the chairperson, Mr Sloth-Nielson, and Ms Mungwena.

[24] On 30 May 2012 the Director-General and three officials from his office met with the members of the standing committee. It is apparent from the minute of the meeting that its purpose was to inform the members of the standing committee of decisions the department had taken with regard to the Refugee Reception Offices at Port Elizabeth and Cape Town, and the establishment of a new Refugee Reception Office in Lebombo.

[25] The minute of the meeting records, amongst other things, that the standing committee was told the following with regard to the Port Elizabeth office:

'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 it operations in Metropolitan areas and is of the view that Refugee Offices are not 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.

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

[26] As for the Cape Town office, the standing committee was informed of the termination of the lease, and then told the following:

'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 and a follow-up meeting is scheduled to take place in early June 2012 to advise stakeholders of the final decision.
Various measures are currently being put in place by a Departmental task team in order to extend services to recognised refugees and asylum seekers that have already interacted with the Cape Town RRO.'

Although not expressly stated, I think it can be taken that the decision to close the Cape Town office was equally influenced by the 'policy shift' that influenced the decision to close the Port Elizabeth office.

[27] The members of the standing committee were also told of plans that were under way to establish a Refugee Reception Office in Lebombo. Government land had been identified for the establishment of the office, temporary premises were to be erected, and 'all the resources' from Cape Town were to be transferred to that office.

[28] No further meeting with interested parties had taken place by the time the Director-General met with the standing committee. So much for the assurance given to those who had attended the meeting on 7 May 2012 that they would be consulted if negotiations with the lessor were unsuccessful. So much, too, for the statement that the authorities did not intend closing the office. And so much for the response to the concern expressed by the Scalabrini Centre that the department might be intending to relocate Refugee Reception Offices to the borders.

[29] Barely three weeks after the meeting with interested organisations the Director-General had decided two offices would be closed, at least partly because of a 'policy shift' to move Refugee Reception Offices close to ports of entry on the northern borders. Lebombo had already been identified as the replacement for the Cape Town office. Measures

were already being put in place to continue dealing in Cape Town only with those asylum-seekers who were already in the pipeline.

[30] Far from the organisations being consulted should the lease of the Maitland premises not be extended, on 6 June 2012 they were invited instead to attend a meeting to be held two days later 'to share some light and insight into impending closure of the Cape Town Refugee Reception Centre with effect from the 30th June 2012', and advising them of the implications of the closure of the office.

[31] The meeting was duly held, attended once again by representatives of the organisations that had attended the earlier meeting and by others. Far from soliciting their views on the future of the office, they were informed that the lessor had declined to extend the lease, that Customs House would be used for the 'servicing of current asylum seekers', but that otherwise the Refugee Reception Office would close on 29 June 2012. That prompted the present proceedings, which were launched on 19 June 2012.

[32] I think it is plain that what was said at the meeting on 7 May 2010 was not altogether open and frank – indeed, going by the minute of the meeting it was positively misleading. The clear impression conveyed by the minute is that the sole concern of the authorities was to obtain suitable premises from which to continue operating the office. What would occur if the existing lease could not be extended – those in attendance were told – would be decided only after further consultation. Not a word was said about a policy to relocate Refugee Reception Offices to the borders. On the contrary, the query by the Scalibrini Centre on that issue was summarily brushed aside. Yet by 30 May 2012, without so much as notice

to the organisations, a decision to close the office had been made, and then at least partly because of a 'shift in policy' to relocate offices to the borders, which had clearly been long in the making.

[33] I cannot help being sceptical of the protestations in the affidavits that the closure of the office was unavoidably foisted upon the authorities by the unavailability of suitable premises. Quite apart from what was said at the meeting on 30 May 2012, the authorities have been at pains to explain at some length in the affidavits why an office in Cape Town is neither necessary nor desirable, and to justify confining Refugee Reception Offices to the northern borders, which is hardly consistent with an intention to keep the office open for any length of time. The termination of the lease for the Maitland premises may have been the trigger for the closure, but the closure appears to have been consistent with the on-going evolution of government policy for dealing with applications for asylum.

[34] In their affidavits the authorities make much of the fact that few people who claim asylum enter the country at Cape Town. They allege that since 2008 an annual average of only 110 entered the country at Cape Town. Some 90 per cent of those who attended at the Cape Town office from the beginning of 2012 entered across its northern borders. They say the vast majority of those claiming asylum are not truly refugees at all, but enter the country illegally across the northern borders in search of economic opportunities, and they point to the undesirability of allowing them to become lost to the authorities amongst the general population. Amongst other things, they say, it is more economical to deport those who do not qualify for asylum, if they are contained near the northern borders.

[35] They say that as far back as November 2009 the problem of illegal entry to the country from the north was considered by the cabinet, which approved the deployment of members of the defence force to control entry at its borders. It is apparent that this was only one element of a broader strategy discussed for regulating those who claim asylum. As the Director-General stated:

> ‘I also point out that in support of the Cabinet decision (to deploy members of the Defence Force to render border control and protection services at ports of entry), the Department is finalising policy to move existing Refugee Reception Office (those in Cape Town, Port Elizabeth and Durban) closer to the ports of entry.
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> Furthermore, in line with the Cabinet decision referred to above, the Department has also sought to reduce the time for the validity of the asylum transit permit in Section 23 of the Immigration Act from 14 days to 5 days. I must emphasise that this amendment has not yet come into operation. We believe that relocating Refugee Reception Office to the ports of entry will be in line with the policy direction of the Department and will ensure that legitimate asylum seekers will be able to be processed at the ports of entry before they get lost in the vastness of the country with the consequent difficulty of tracing them’.

And later:

> ‘[The] Department (being part of the Executive) is in the process of considering the efficacy to relocate the Refugee Reception Office to ports of entry … The full implementation of this view is, however, dependent on various factors including the inputs of interested parties’.

And yet later:

> ‘I must also point out that the decision of the Department to relocate existing Refugee Reception Office to ports of entry is still subject to feasibility scrutiny, the outcome of the O.R. Tambo Airport Pilot Programme and most importantly how that decision will be implemented (unless cogent information directs a re-assessment of the decision)’.

[36] It is difficult to determine from those conflicting allegations what stage the proposed policy has reached. At one time it is said to be ‘still subject to feasibility scrutiny’ – at another that the department is ‘in the

process of considering the efficacy' of relocating the offices – and at another that the policy is being finalised. Once again I think the authorities have not been altogether open and frank. But whether the policy is still in its infancy, or is close to finality but has yet to be formally adopted, it is perfectly clear that it was meanwhile given effect, at least as a material consideration, in the Director-General's decision.

[37] But it is not necessary for present purposes to probe further the extent to which the 'shift in policy' influenced the decision. I mention it only to demonstrate that confining the discussion at the meeting on 7 May 2012 to the future of the lease meant the meeting came nowhere near discussing the true intentions of the authorities. If consultation with the Scalabrini Centre and other interested parties was required, then the meeting of 7 May 2012 did not satisfy that requirement, because that meeting was not discussing the permanent closure of the Refugee Reception Office in the Cape Town metropolitan area.

[38] Turning to the issues that now arise the Scalabrini Centre advanced its case on three bases, all of which found favour with the court below, and I deal with each seriatim.

[39] It is not disputed that, just as s 8(1) of the Act authorises the Director-General to establish Refugee Reception Offices, so, too, does it authorise him or her to close them. In either case he or she is authorised to do so only 'after consultation with the Standing Committee'. It was submitted – successfully in the court below – that the Director-General failed to consult with the standing court before making the decision, in consequence of which the decision was unlawful. What occurred instead – so it was submitted and held – is that the Director-General presented the

decision to the standing committee as a fait accompli, and the standing committee merely endorsed it.

[40] That the decision had already been made by the time the Director-General met with the standing committee is certainly supported by the minute of the meeting. It records that after being told by the Director-General of the decisions that had been made

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

The chairperson later placed that on record – as if to avoid what had happened at Port Elizabeth – in a letter to the Director-General on 12 June 2012:

> 'The Standing Committee for Refugee Affairs, after consultation with you on 30 May 2012 and consideration of the reasons advanced by the Department, approves the decision to close the Port Elizabeth and Cape Town Refugee Reception Offices and approves the decision to establish a Refugee Reception Office at Lebombo'.

[41] It is alleged by the authorities that consultation with the standing committee was not confined to what occurred at the meeting, but had also occurred in earlier informal engagements, which seems to me to be inconsistent with what was said in the letter. Be that as it may, I will assume, in favour of the Scalibrini Centre, that the standing committee was indeed told of the decision only once it had been made.

[42] The learned judge said, with support from various cases decided mainly in the English courts, that seeking approval for a decision already made is not consultation. He said that consultation entails 'a genuine invitation to give advice and a genuine receipt of that advice',[9] it is 'not to

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[9] *R v Secretary of State for Social Services: Ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164 (QB); *Hayes v Minister of Housing, Planning & Administration, Western Cape* 1999 (4) SA

be treated perfunctorily or as a mere formality',[10] and that engagement after the decision-maker has already reached his decision, or once his mind has already become 'unduly fixed', is not compatible with true consultation.[11]

[43] While all that is true, and there is no reason not to apply the principles in those decisions to similar effect in this country,[12] it does not follow that the decision is impeachable by the Scalabini Centre on the ground that consultation with the standing committee did not occur. What also appears from those cases is that an obligation to consult demands only that the person who is entitled to be consulted be afforded an adequate opportunity to exercise that right. Only if that right is denied is the obligation to consult breached.

[44] The cases relied upon from the English courts all concerned complaints that the right to be consulted had been denied – which is not the present case. The right to be consulted was conferred upon the standing committee alone, and so far as it was not consulted in the true sense, it is quite apparent from the stance it has taken that it has chosen not to assert that right. It may have been supine, or made little contribution to the decision, but it says it was aware of the situation and agreed with the Director-General. That being so, the Director-General can hardly be said to have denied it its right, and his decision is not impeachable on that ground. As Lord Morris of Borth-y-Gest said in *Port Louis Corporation v Attorney-General of Mauritius*:[13]

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1229 (C) at 1242 C-F.

[10] *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 (PC) 1124 d-e.

[11] *Sinfield v London Transport Executive* [1970] 2 All ER 264 (AC) 269 c-e.

[12] *S v Smit* 2008 (1) SA 135 (T) at 149A – 153H.

[13] *Port Louis Corporation v Attorney-General of Mauritius*, above, at 1124 D-E.

‘The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because the local authority had no views or did not wish to express or declined to express any views’.

[45] The remaining issues are more fundamental to the decision of the Director-General. The Scalibrini Centre contends that the decision constituted administrative action for purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and that the Director-General failed to meet the requirements of the Act. In the alternative it contends that the decision was in conflict with what has been called the doctrine of legality.

[46] Notwithstanding his conclusion on the first point the learned judge considered all those submissions – saying he was doing so in case the matter went on appeal – and found in favour of the Scalabrini Centre on them all.

[47] He found the decision of the Director-General indeed constituted administrative action for purposes of PAJA,[14] that the failure to consult the standing committee was contrary to ss 6(2)(f)(i) and 6(2)(i),[15] that the manner in which the decision was taken was procedurally unfair in conflict with s 6(2)(c),[16] that it was not rationally connected to the purpose of the empowering provision in conflict with s 6(2)(f)(ii),[17] and that it was so unreasonable that no reasonable person could have made it, as envisaged by s 6(2)(h).[18]

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[14] Para 69.
[15] Para 79.
[16] Para 90.
[17] Para 109.
[18] Para 111.

[48] I do not find it necessary to recite the cumbersome definition in PAJA of ‘administrative action’. It is sufficient to say that it is defined to mean a ‘decision of an administrative nature’ that has various features, amongst which are that it ‘adversely affects the rights of any person’.

[49] This court had occasion in *Grey's Marine*,[19] to comment on the incongruity of that feature as a defining element of ‘administrative action’. It is difficult to see how a clerk who is called upon to say ‘yes’ or ‘no’ to applications for bicycle licences is performing an administrative act when he or she says ‘no’, but is not performing an administrative act by saying ‘yes’. It is true that only a person who is refused a licence will have reason to complain, but that goes to the actionability of the decision, and not to its nature.

[50] The learned judge nonetheless considered that whether rights were adversely affected by the decision was determinative of whether it constituted administrative action, and dealt only with that question. He found that rights were indeed adversely affected by the decision, and on that basis concluded it constituted administrative action. A fortiori, he said, if that was not a necessary feature of administrative action.[20]

[51] On the view I take of the matter it is not material to decide whether that finding was correct because not every exercise of public power having that feature – if it is required at all – constitutes administrative action. The prior question – which was not dealt with by the court below – is whether the decision is ‘of an administrative nature’, which is an

[19] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.
[20] Para 69.

element of the definition of a 'decision'. As this court said in *Grey's Marine*:[21]

'At the core of the definition of administrative action is the idea of action (a decision) 'of an administrative nature' taken by a public body or functionary.'

[52] That was expounded upon more fully by my colleague Wallis – then sitting in the KwaZulu-Natal High Court – in *Sokhela v MEC for Agriculture and Environmental Affairs*:[22]

'[The requirement that the decision be of an administrative nature] precludes the determination of what constitutes administrative action from becoming a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed, and then considers whether it falls within one or other of the exceptions [in subparas (aa) – (ii) of the definition of 'administrative action']. The inclusion, of the requirement that the decision be of an administrative nature, demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character. This serves in turn to demonstrate that the exceptions contained in the definition of administrative action are not a closed list, nor are cases falling outside those exceptions to be looked at on the basis that, if they are not *eiusdem generis* with the exceptions, they are automatically to be treated as constituting administrative action. There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.'

[53] PAJA is the legislative measure that gives effect to the right to fair administrative action afforded by s 33 of the Constitution, and should be construed consistently with that section to avoid constitutional invalidity. A review of the cases on the subject demonstrate that a universal test for what constitutes 'administrative action' under s 33 of the Constitution –

[21] Para 22.
[22] *Sokhela v MEC for Agriculture and Environmental Affairs* 2010 (5) SA 574 (KZN) para 61.

and by extension a decision 'of an administrative nature' under PAJA – is destined to remain elusive. In *SARFU* [23] it was said by the Constitutional Court – referring to whether an action should be characterised as the implementation of legislation or the formulation of policy in the context of s 33 of the Constitution – that

'[a] series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33'.

It said that what matters when drawing the distinction 'is not so much the functionary as the function' and that

'[d]ifficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis'.

[54] I do not think it is helpful to refer to other fact-specific cases in which the question what constitutes administrative action has been considered. But I think some guidance is to be had from recent cases enjoining courts to recognise the concept of the separation of powers that is inherent in the Constitution. While much of that has been said outside the context of PAJA it is nonetheless foundational for the distinction between administrative and other forms of governmental action. As

[23] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 143.

pointed out in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa,*[24]

'administrative law, which forms the core of public law, … is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them'.

[55] In *International Trade Administration Commission v Scaw South Africa (Pty) Ltd (ITAC)*[25] the Constitutional Court said the following of the separation of powers:

'The Constitution makes no express provision for separation of powers. In the *First Certification* judgment,[26] the court was satisfied that the new Constitution did comply with the requirement for separation of powers envisaged in Constitutional Principle VI. It reasoned as follows:

"The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."'

[56] In *National Treasury v Opposition to Urban Tolling Alliance*,[27] the court affirmed *ITAC*, and also repeated what had been said to the same effect in *Doctors for Life International v Speaker of the National Assembly*:[28]

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[24] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45.
[25] *International Trade Administration Commission v Scaw South Africa (Pty) Ltd (ITAC* 2012 (4) SA 618 (CC) para 90.
[26] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).
[27] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 63.
[28] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

"(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'

[57] I think it is clear from those and other cases that decisions heavily influenced by policy generally belong in the domain of the executive. It seems to me that if decisions of that kind are to be deferred to by the courts then that must necessarily be a strong guide to what falls outside 'administrative action' and the review powers given to the courts by PAJA. The more a decision is to be driven by considerations of executive policy the further it moves from being reviewable under PAJA and vice versa. That seems to me to be consistent with *SARFU*, in which it was said that one of the considerations to be taken into account in determining what constitutes administrative action is 'how closely it is related … to policy matters, which are not administrative'.

[58] While that is not necessarily the only factor that is relevant to whether conduct is administrative action, I think it is sufficient for our decision in this case. The question whether a Refugee Reception Office is necessary for achieving the purpose of the Act is quintessentially one of policy. Where, and how many, offices should be established, will necessarily be determined by matters like administrative effectiveness and efficiency, budgetary constraints, availability of human and other resources, policies of the department, the broader political framework within which it must function, and the like. I do not think courts, not in

possession of all that information, and not accountable to the electorate, are properly equipped or permitted to make those decisions.

[59] In her seminal work on administrative law,[29] Professor Hoexter cites two extracts to that effect, the first written by Jeffrey Jowell:[30]

'[It] is not the province of courts, when judging the administration, to make their own evaluation of the public good, or to substitute their personal assessment of the social and economic advantage of a decision. We should not expect judges therefore to decide whether the country should join a common currency, or to set a level of taxation. These are matters of policy and the preserve of other branches of government and courts are not constitutionally competent to engage in them.'

And the second by Sachs J in *Du Plessis v De Klerk*:[31]

'The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/ enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic, and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realisation of the values articulated by the Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of the Courts.'

[60] But that does not mean the decision of the Director-General is immune from scrutiny by the courts. 'It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law'.[32]

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[29] Cora Hoexter: *Administrative Law in South Africa* 2 ed p 148.

[30] Jeffrey Jowell 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' 1999 *Public Law* 448 at 451.

[31] 1996 (3) SA 850 (CC) para 180.

[32] Per Ngcobo CJ in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49.

[61] Professor Hoexter has observed that the doctrine is in the process of evolution, and will continue to evolve,

'quite possibly to the extent that it eventually encompasses all the grounds of review associated with "regular" administrative law. Meanwhile, the principle fairly easily covers all the grounds ordinarily associated with authority, jurisdiction and abuse of discretion: …. Here at least, the principle of legality is a mirror image of administrative law. It is administrative law "under another name".'[33]

[62] In this case the learned judge found that even if the decision of the Director-General was not administrative action under PAJA, it was nonetheless unlawful for want of legality on two grounds.

[63] The first was that there was said to be no ‘objectively rational relationship between the closure decision and the purpose of s 8(1)’ and that the decision was also ‘vitiated by the [Director-General’s] failure to apply his mind properly to the matter.’

[64] It is well-established that legality calls for rational decision-making. As it was expressed in *Pharmaceutical Manufacturer’s Association*:

‘It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.’[34]

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[33]Above at 254.
[34]Above, para 85.

[65] But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare.[35]

[66] Whether a decision is rationally related to its purpose is a factual enquiry blended with a measure of judgment. It is here that courts are enjoined not to stray into executive territory. I do not think it can be found, on the brief and incomplete information provided in the affidavits alone, which were directed in the main towards explaining the history of the department's attempts to find premises, that the decision was irrational. Although the information concerning the search for and alleged unavailability of alternative premises is scanty and incomplete, it is not rebutted and there is no evidence that such premises are indeed available. Then as I have already pointed out it is quite apparent that the decision was at least influenced by an evolving policy to relocate offices to the borders. Myriad factors would go towards determining such a policy. On the facts assessed by the court below one might indeed find it unreasonable to close the Cape Town office, but I think they fall far short of showing the decision was irrational, in the sense of being arbitrary.[36]

[67] The second ground upon which it was found the decision fell short of constitutional legality was for want of consultation with interested parties. There was some suggestion in the submission on behalf of the Scalibrini Centre of a general obligation on those who exercise public

[35] *Pharmaceutical Manufacturers Association*, above, para 90.
[36] *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 81.

power to afford a hearing to interested parties but I think that takes it too far. The very nature of representative government is that matters of government policy are properly to be ventilated in the appropriate representative forums.

[68] Nonetheless, there are indeed circumstances in which rational decision-making calls for interested persons to be heard. That was recognised in *Albutt v Centre for the Study of Violence and Reconciliation*,[37] which concerned the exercise by the President of the power to pardon offenders whose offences were committed with a political motive. One of the questions for decision in that case was whether the President was required, before exercising that power, to afford a hearing to victims of the offences. It was held that the decision to undertake the special dispensation process under which pardons were granted, without affording the victims an opportunity to be heard, must be rationally related to the achievement of the objectives of the process. Ngcobo CJ said:[38]

'All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.

The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means

[37] *Albutt v Centre for the Study of Violence and Reconciliation* 2013 (1) SA 248 (CC).
[38] Paras 50-51.

selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'

[69] That the process by which a decision is taken – in contra-distinction to a decision on the merits of the matter under consideration – might itself be impeached for want of rationality – was affirmed in *Democratic Alliance v President of the Republic of South Africa*,[39] in which one of the issues was 'whether the process as well as the ultimate decision must be rational'.[40] After referring to a passage from *Minister of Justice and Constitutional Development v Chonco*,[41] Yacoob ADCJ said:

'It follows that both the process by which the decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition….'

And later:[42]

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

[70] In this case the Director-General was pertinently aware that there were a number of organisations – including the Scalibrini Centre – with long experience and special expertise in dealing with asylum-seekers in

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[39] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).
[40] Para 12.
[41] *Minister of Justice and Constutional Development v Chonco* 2010 (4) SA 82 (CC).
[42] Para 36.

Cape Town. His representative, Mr Yusuf, had specifically undertaken to consult with those organisations on any proposal to close the Cape Town office. In the absence of any explanation for not having done so, I am left to infer that the Director-General's failure to hear what they might have to say when deciding whether that office was necessary for fulfilling the purpose of the Act, was not founded on reason and was arbitrary. Even more so to stage what was in truth a charade that could only have misled interested parties as to the intentions of the authorities, which was inconsistent with the responsiveness, participation and transparency that must govern public administration.

[71] On this issue I agree with what was said by the court below:

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

In assessing the rationality of the process followed by the DG, it is important to remind oneself that consultation with the NGOs would not have been a new or alien process for the DG. He recognised them as stakeholders and apparently did in

general consult with them on important developments. At the meeting of 7 May 2012 the [DHA] said that there would be further consultation with stakeholders if efforts to remain at the Maitland premises failed. This renders all the more inexplicable the DG's failure to do so.'[43]

[72] That conclusion in this case does not have as a consequence that there is a general duty on decision makers to consult organisations or individuals having an interest in their decisions. Such a duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware. Here the irrationality arises because the Director-General, through his representatives, at the meeting on 7 May 2012, acknowledged the necessity for such consultation. That he did so is not surprising bearing in mind that the organisations represented at that meeting included not only the Scalabrini Centre, with its close links to the refugee community, but also the United Nations High Commissioner for Refugees, and organisations close to the challenges relating to alleged refugees.

[73] On that ground I agree with the court below that the decision of the Director-General was unlawful, and fell to be set aside, as the court did in para (a) of its order. I have difficulty, however, with the remaining orders.

[74] Once having found the decision to be unlawful for want of consultation with the standing committee, I can see no basis for having decided the office should be re-opened, and compelling the authorities to do so, without such consultation. The fate of the office is for the Director-General to decide, and there were no grounds for a court to supplant that function, least of all without itself hearing what the standing committee might have to say. That is even more the case where the basis for holding

[43] Paras 95 and 96.

the decision to have been unlawful was the irrationality of the process by which that decision was taken.

[75] We were informed from the bar, however, that the order was intended only to maintain the status quo while the Director-General made a fresh decision. If that is so there are two further difficulties. First, once having found, as the court did, that closing the office would be irrational, it is difficult to see what scope would be left for the Director-General to reach any other conclusion, which means, effectively, the order is not temporary at all. Secondly, the order does not correctly reflect the status quo. At the time the application was brought the status quo was that the office was operating from premises that would cease to be available within ten days, and alternative premises had not been identified. The status quo was that the authorities were faced with taking steps, within their means, and subject to administrative and budgetary constraints, to locate alternative premises for the continuation of the office. If an order maintaining the status quo was to be made, it ought to have been confined to compelling the authorities to proceed on that course.

[76] Courts ought not to compel the impossible. Contrary to the protestations of the authorities, the learned judge was of the view that the order was capable of being complied with, but I do not think the information in the papers was sufficient for that conclusion. There is no indication that premises are readily available, and the authorities pointed out that they are obliged to function within the framework of government procurement constraints, which a court has no authority to override.

[77] Moreover, litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with

clarity what is required of them. An order that a ‘fully functional’ office must be established seems to me to fall far short of that clarity.

[78] I have no difficulty endorsing the order declaring unlawful, and setting aside, the decision of the Director-General, but in my view it was premature for the remaining orders to have been made. Before us counsel for the Scalabrini Centre proposed alternative orders referring the matter back to the Director-General for a fresh decision to be made within three weeks, and directing the authorities meanwhile to allow new applicants for asylum to apply for the relevant permits. That seems to me to be little more than a reformulation of the order of the court below.

[79] No doubt the Director-General will be compelled by circumstances to consider afresh the future of the Cape Town Refugee Reception Office, and we cannot say the outcome is a foregone conclusion. In those circumstances it would be unreasonable to order the re-establishment of the office if it turns out that a lawful decision will not end in that result, and if it turns out that the Director-General decides otherwise, no such order will be called for. In my view an equitable order would be one that allows the Director-General an opportunity to consider afresh, after consulting with the interested parties, what is to become of the Cape Town office. If no decision is made within the stipulated time the Scalabrini Centre should be given leave to approach the court below for further relief – the parties having leave to place before the court the factual position at that time.

[80] Finally there is the matter of costs. The authorities have succeeded in setting aside part of the order that was made, but persisted in defending the lawfulness of the decision, which was the foundation for the claim.

My finding that the decision was unlawful constitutes substantial success for the Scalibrini Centre and the first to third appellants ought to pay their costs. The interim order by Davis J lapsed upon the grant of the order on review, with the consequence that there is no order now subject to appeal. The first to third appellants brought that application at that risk and it ought to pay those costs.

[81] Save for setting aside paragraphs (b) and (c) of the order of the court below, and substituting them with the order that follows, the appeal is dismissed with costs, to be paid by the first to third appellants jointly and severally, and to include the costs of two counsel. Paragraphs (b) and (c) are substituted with the following:

> 'In the event that a decision as to the future of the Cape Town Refugee Reception Office has not been made by 30 November 2013, the applicants are granted leave to apply upon the same papers, supplemented so far as they consider that to be necessary, for further relief'.

R W NUGENT
JUDGE OF APPEAL

**WILLIS JA:**

[82] It has been edifying to read the judgment of Nugent JA. I concur with much of what that he has said. I regret that I disagree with his conclusions. *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others*[44] provides the lodestar by which to navigate one's way

[44] *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).

through this case. *Bato Star* makes it clear that the decision by the Director-General of Home Affairs, which has been the subject of judicial scrutiny both in the High Court and this Court constitutes 'administrative action' in terms of section 1 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[83] If the decision of the Chief Director in the Department of Environmental Affairs and Tourism relating to the allocation of fishing quotas was held by the Constitutional Court to have been reviewable as administrative action in terms of PAJA in *Bato Star* then, by parity of reasoning, so must this decision of the Director-General. Both *Bato Star* and this case have involved questions of policy and, ultimately, of 'politics' as well as the 'exercising of a public power'[45] and the 'performing of a public power in terms of an empowering provision,'[46] as provided for in PAJA. Fishing quotas in South Africa are about sustainable development and economic transformation (an issue which loomed large in *Bato Star*). No less than asylum for refugees, both sustainable development and economic transformation demand wisdom and compassion if we are to have a future on this planet. Both sustainable development and the tragedy that there should even be refugees require that we develop a deepening awareness, among all people, of our shared humanity.

[84] As the judgement of Nugent JA makes plain, the obligations of the government to refugees are neither unrestrained nor unconfined. The material resources of governments are limited. That is why they often have to make difficult decisions, an example of which is whether or not to continue with the operation of a Refugee Reception Office in Cape Town.

[45] Section 1 of PAJA.
[46] *Ibid.*

There cannot be, inherently, a 'legitimate expectation', as provided for in s 3(1) of PAJA, on the part of anyone to have a Refugee Reception Office in any specific geographic location in the country, including Cape Town. So, too, there can no inherent ‘right’ on the part of the public, as envisaged by s 4(1) of PAJA, to have a Refugee Reception Office specifically in Cape Town, or at any other particular place, for that matter. Nugent JA and I agree on these substantive issues.

[85] In the court below much attention was focused on the provisions of s 6(2) of PAJA, in particular, ss 6(2)(*f*)(ii), which relates to the rationality of the decision and 6(2) (h) which relates to reasonableness of the decision.

[86] The decision of the Director-General was not an irrational one. It does not fall foul of any of the tests in PAJA and, more particularly cannot be found, in the formulation of *Bato Star*, to have been one that a reasonable decision-maker could not reach.[47]

[87] In any event, as was made clear in *Pharmaceutical Manufacturers Association of South Africa and Another: in Re Ex Parte President of the Republic of South Africa and Others*[48] the exercise of all public power is, under our constitutional order, subject to judicial scrutiny. I agree with Nugent JA in this regard.

[88] As I consider that there was no legal obligation whatsoever on the part of the Director-General to have consulted with the Scalabrini Centre before making its final decision in the matter – even though this may

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[47] *Ibid* para 44.
[48] *Pharmaceutical Manufacturers Association of South Africa and Another: in Re Ex Parte President of the Republic of South Africa and Others*2000 (2) SA 674 (CC).

have been desirable – I disagree with Nugent JA when he says, in paragraph 70 above, that the 'Director-General's failure to hear what they (the Scalabrini Centre and others) might have to say when deciding whether that office was necessary for the fulfilment of the purposes of the Act was not founded on reason and was arbitrary'.

[89] Besides, even if I am wrong with regard to the right of the public to be consulted on the question of the closure of Refugee Reception Office in Cape Town, the context in which the decision was made to close the office justifies the procedures that were adopted in the final stages of that decision-making process. As Lord Steyn said in *R v Secretary of the State for the Home Department, ex parte Daly,*[49] '[i]n law, context is everything'. This dictum was approved by this court in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd*.[50] As the decision approached finality, the Director-General's patience may have worn thin but I do not consider that he was the architect of a charade. The history of the matter shows that the Director-General and the Department of Home affairs did not act impulsively but took a decision after careful deliberation on what had been a protracted and difficult matter.

[90] More than 2000 years ago, the Roman playwright Roman comic playwright, Publius Terentius Afer (Terence) wrote in *Phormio*: "*Quot homines, tot sententiae*: *suo quoique mos*'. – 'There are as many opinions as there are people (men in the original): each has his own correct way'. This aphorism is apposite in this case. There is an extensive range of legitimate opinions which may be formed as what should be done about this Refugee Reception Office. Opinions among reasonable men and women may differ. That is why we have politics. That is why, when it

[49]*R v Secretary of the State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at 447a.
[50]*Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1.

comes to political matters in a constitutional state such as ours, the courts will, as a general rule, hold their swords behind their backs. Ordinarily, moreover, the courts will, in such matters, hold the sword in their left hands and their shields in the right: the courts hold up the shield in preference to the sword when it comes to political matters of policy.

[91] I should have upheld the appeal and dismissed the application in its entirety with costs, including the costs of two counsel.

N P WILLIS
JUDGE OF APPEAL

**WALLIS JA: (NUGENT, LEWIS and THERON CONCURRING)**

[92] I concur in the judgment of Nugent JA. This judgment serves only to explain why I am unable to agree with my colleague, Willis JA, that *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs & others*[51] disposes of the question whether the Director-General's decision to stop processing fresh applications for asylum at the Cape Town RRO, with its ultimate consequence that the RRO will be closed, constitutes administrative action in terms of PAJA.

[93] The fundamental ground for my disagreement with my colleague lies with his approach that we can determine whether the Director-General's decision in this case under the Refugees Act was administrative action, by referring to another case, dealing with a different decision taken in terms of a different statute about a different subject matter. That is not how the Constitutional Court has enjoined courts to undertake the enquiry whether particular conduct is administrative action. The enquiry we must undertake is into the nature of the very power under consideration in the particular case. The power being exercised in *Bato Star* was fundamentally different from the power being exercised here by the Director-General, as is demonstrated by the following analysis.

[94] *Bato Star* dealt with the allocation of fishing quotas in the deep sea trawl sector of the hake fishing industry. The process by which those quotas were allocated initially involved a screening process in accordance with a detailed scoring system. The scores determined by this system formed the basis for the Chief Director's allocation of quotas. His

[51]*Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs & other*s 2004 (4) SA 490 (CC).

approach was to start from the existing quota held by applicants and to deduct 5% from those quotas and place the tonnages of permissible catch in a redistribution pool. That pool was then redistributed among existing rights holders in direct proportion to the scores they had achieved in the screening process. The process involved 'each application [being] carefully considered and rated according to a range of criteria identified as relevant by the Department.'[52]

[95] In those circumstances it was common cause that the determination of the quota to be allocated to each applicant involved administrative action. The only issue in that regard was whether the decision fell to be reviewed under the common law as set out in *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another*,[53] or under PAJA. There is no analysis of the nature of the power being exercised by the Chief Director, but no doubt that was because a power of that nature has always been regarded as administrative in nature and subject to review. It was nothing more, nor less, than a decision to grant a licence and such decisions are quintessentially administrative decisions that have always been subject to judicial review.[54]

[96] If one examines the power being exercised in *Bato Star* one sees that the Chief Director had to exercise it in order to allocate fishing quotas in the light of a detailed screening process that had allocated scores to every applicant for a quota. In turn the Chief Director took as the starting point existing quotas, which recognised existing rights, removed a portion of such quota to create the redistribution pool and then

[52] Para 56.

[53] *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another* 1988 (3) SA 132 (A) at 152A – D.

[54] See, for example, *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 dealing with liquor licences and *Bangtoo Bros v National Transport Commission* 1973 (4) SA 667 (N) involving a review of the refusal to grant a motor carrier certificate under the Motor Carrier Transportation Act 30 of 1939.

re-allocated quotas in accordance with the results of the initial screening. The determination of the factors that would be taken into account in terms of the screening process flowed from the terms of the governing statute. The Chief Director did not have any discretion in that regard, nor was he determining policy. The policy was clearly embodied in the statute. The power being exercised by the Chief Director, whilst of great importance to participants in the industry, involved little discretion. He was granting a licence in accordance with a policy prescribed in legislation. It is not surprising that this was regarded as administrative action. The implementation of policy by way of the grant or refusal of rights in accordance with clearly defined processes of evaluation is administrative in nature.

[97] The present is an entirely different situation. It concerns the manner in which the state determines how it will discharge its international law obligations as enshrined in the Refugees Act. This requires the establishment of Refugee Reception Offices and the appointment of appropriate persons to perform the functions required by that Act. The responsibility for doing this on behalf of the executive is that of the Director-General. As Nugent JA has explained in para 58 of his judgment, that involves an assessment of the need for such facilities. The Director-General has to determine the locality in which the offices will be situated and the number of Refugee Reception Officers and Refugee Status Determination Officers needed to meet anticipated demand for their services. In turn that requires the Director-General to determine what else will be necessary to enable the offices to function, including the needs of the Department to maintain central records of its dealings with asylum seekers. An adequate budget will need to be prepared as well as a system for monitoring whether the operations of such offices is

appropriate in the light of the overall need for them. This, as the Director-General explained in his affidavit, can fluctuate depending on political events beyond our borders, which affect the flow of refugees and the ability of refugees to return to their home countries. It is accordingly necessary for the Director-General on an ongoing basis to evaluate whether the facilities that have been put in place to deal with asylum seekers are appropriately situated, staffed and funded.

[98] None of this involves the determination of any asylum seeker's rights, which is what is involved in the administration of the Refugees Act. It requires the Director-General to decide how the Act is to be implemented. That is something to be determined as a matter of policy, subject to budgetary constraints, the availability of suitable facilities and suitable staff. That this is a policy question is apparent from the fact that the Director-General was influenced in making his decision by a possible shift in governmental policy in dealing with asylum seekers to one where it is regarded as preferable for them to be dealt with at places that are close to our borders and their points of entry into this country. Whether that is indeed preferable to the original decision to have Refugee Reception Offices located both at the principal point of entry (Musina) and in our five largest cities, is a debatable question. It will undoubtedly make it more difficult for refugees to settle in some areas until after they have been granted asylum. But the important point is that the debate is one that takes place within the executive where the decision falls to be taken. That demonstrates that the decision does not constitute administrative action.

[99] I cannot therefore accept that *Bato Star* is determinative of the question whether the Director-General's decision constituted

administrative action. It is therefore unnecessary to explore the implications of that conclusion. However, a contrary finding would necessarily mean that the decision materially and adversely affected the rights or legitimate expectations of any person or the rights of the public. In turn that conclusion would direct us to the provisions of sections 3 and 4 of PAJA and the obligation either to afford affected persons a hearing or, more probably, given the nature of the decision, to undertake a notice and comment exercise in terms of s 4. Those obligations cannot be escaped, although the manner in which decision makers comply with these obligations may vary. They certainly cannot be avoided where there has been an undertaking to consult with interested parties, including Scalabrini Centre, over the issue. One cannot, as my colleague Willis does, simply assert that the Director-General was under no obligation to engage in such consultation. Nor can it be suggested, as he also does, that a complete failure to engage in consultation on an issue may constitute a permissible departure[55] from the procedures prescribed in sections 3 and 4 of PAJA.

M J D WALLIS
JUDGE OF APPEAL

[55] Under s 3(4)*(a)* or 4(4)*(a)* of PAJA.

APPEARANCES

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