THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1107/2016

In the matter between:

SCALABRINI CENTRE, CAPE TOWN	**FIRST APPELLANT**
THE TRUSTEES FOR THE TIME BEING OF THE SCALABRINI CENTRE, CAPE TOWN	**SECOND APPELLANT**
SOMALI ASSOCIATION FOR SOUTH AFRICA	**THIRD APPELLANT**
NACIMO TAKOW HUSSEIN	**FOURTH APPELLANT**
NELSON KASONGO BAKAJIKA	**FIFTH APPELLANT**
DERICK NDWALA	**SIXTH APPELLANT**
NABUNANE REJINA	**SEVENTH APPELLANT**
YASIN HASSAN SHEIKH	**EIGHTH APPELLANT**

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**

Neutral citation: *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017)

Coram: Cachalia, Majiedt and Saldulker JJA and Lamont and Schippers AJJA

Heard: 4 September 2017

Delivered: 29 September 2017

Summary: Refugees Act 130 of 1998 : decision to close refugee reception office under s 8(1) : challenged for want of rationality : decision-maker not taking into account relevant considerations, not complying with the empowering provision, acting with ulterior and improper purpose and making error of law.

ORDER

On appeal from Western Cape Division of the High Court, Cape Town (Dlodlo J sitting as court of first instance):

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the court a quo is set aside and substituted as follows:

'(a) The decision of the second respondent, taken on or about 31 January 2014, to close the Cape Town Refugee Reception Office is declared to be unlawful and is reviewed and set aside.

(b) The first to third respondents are directed to reopen and maintain a fully functional refugee reception office in or around the Cape Town Metropolitan Municipality, by Friday 31 March 2018.

(c) The second respondent, the Director-General of the Department of Home Affairs, shall report in writing to the appellants by 31 October 2017 and thereafter, on or before the last working day of each succeeding month as to what steps have been taken and what progress has been made to ensure compliance with the aforesaid order.

(d) The parties are granted leave to apply on the same papers, supplemented insofar as they consider that to be necessary, for further relief.

(e) The costs of the application shall be paid jointly and severally by the first, second and third respondents.'

JUDGMENT

Schippers AJA (Cachalia, Majiedt and Saldulker JJA and Lamont AJA concurring):

[1] The issue in this appeal is whether the decision of the Director-General of the Department of Home Affairs (the Department) taken on 31 January 2014 to close the Cape Town Refugee Reception Office (the impugned decision), in terms of the Refugees Act 130 of 1998 (the Act), was unlawful and thus reviewable. The court a quo held that it was not. It dismissed the appellants' application for an order reviewing and setting aside the impugned decision and directing the first to third respondents to reopen and maintain a fully functional refugee reception office in the Cape Town municipal area. The appeal is with the leave of the court a quo.

Factual background

[2] The factual background to this matter has been set out in some detail in the judgment of the court a quo, and by Nugent JA in *Scalabrini 1*.[1] In summary, it is as follows. This is the second time that the Director-General has decided to close the Cape Town Refugee Reception Office. The first decision was taken in May 2012 when it was decided that the Office would be closed to all newcomers with effect from 30 June 2012. As at May 2011 there were six refugee reception offices in the country: in Cape Town, Port Elizabeth, Durban, Johannesburg, Pretoria and Musina. When the impugned decision was made, the number of refugee reception

[1] *Minister of Home Affairs & others v Scalabrini Centre, Cape Town & others [Scalabrini 1]* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) paras 5-31 (hereinafter referred to as *Scalabrini 1*).

offices available to asylum seekers was reduced to three: at Musina, Pretoria and Durban.

[3] The Cape Town Refugee Reception Office has had a difficult history since it was established in 2000. It was initially located at Customs House on the Cape Town Foreshore. Subsequently those premises proved to be unsuitable. It became too small as the number of asylum seekers increased, and there were constant objections from the general public and nearby businesses to the daily activities of asylum seekers and vendors. The Department was forced to find alternative premises.

[4] In February 2008 the Cape Town Refugee Reception Office was moved to Airport Industria. Some ten months later, in December 2008, neighbouring business owners instituted proceedings against the respondents in the Western Cape Division of the High Court for an order that the Cape Town Refugee Reception Office cease operations at the Airport Industria premises.[2] They complained, inter alia, that the large numbers of asylum seekers utilising the Refugee Reception Office were congregating and sleeping on the streets and sidewalks; that there were insufficient ablution facilities resulting in unhygienic conditions; and that illegal vendors had set up their stalls on pavements which gave rise to disturbances and violence. The court found that the operation of the Refugee Reception Office was a violation of the relevant zoning scheme regulations and an unlawful nuisance, and it was ordered to cease operating from the Airport Industria premises within three months.

[2] *Intercape Ferreira Mainliner (Pty) Ltd & others v Minister of Home Affairs & others* 2010 (5) SA 367 (WCC).

[5] In October 2009 the Cape Town Refugee Reception Office commenced operations at new premises in Maitland. Similar problems to those experienced at Airport Industria arose and neighbouring business owners instituted legal proceedings in the Western Cape Division to close down the Office. The court concluded that the operation of the Refugee Reception Office was an actionable nuisance and a contravention of the relevant zoning scheme regulations.[3] The Department was interdicted from operating the Refugee Reception Office at the Maitland premises. The interdict was suspended for six months to enable the Department to apply for the amendment of the land use restrictions applicable to the property and to take steps to abate the nuisance. The Department did not take those steps as it was not the owner of the property, and it embarked on a process in cooperation with the Department of Public Works (DPW), the State Security Agency and the South African Police Service, to procure alternative premises in the Cape Town metropolitan area. The Department says it was unable to obtain suitable premises.

[6] On 8 June 2012 the Director-General announced that the Cape Town Refugee Reception Office would close permanently, and on 29 June 2012 it ceased operations at the Maitland premises. Since then the Cape Town Refugee Reception Office has been closed, except for transitional arrangements for existing asylum seekers. No new application for asylum could be lodged or processed at that Office since 29 June 2012.

[7] On 19 June 2012 the appellants sought an order reviewing and setting aside the decision to close the Cape Town Refugee Reception Office, in the Western Cape Division. Rogers J held that the Director-General's decision was reviewable

[3] *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs & others* [2010] 4 All SA 414 (WCC).

under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and set it aside on the ground that the Standing Committee on Refugee Affairs (the Standing Committee) and interested parties had not been consulted before the decision to close the Refugee Reception Office had been taken. The Department was ordered to ensure that a fully functional refugee reception office was opened within the Cape Town metropolitan area by 1 July 2013.[4] The government respondents appealed to this Court.

[8] On 27 September 2013 this Court dismissed the appeal, holding that the Director-General's failure to consult with organisations that have experience and special expertise in dealing with asylum seekers in Cape Town, rendered the decision to close the Cape Town Refugee Reception Office procedurally irrational and unlawful.[5] However, this Court held that the decision to close the Office constituted executive and not administrative action, and thus was not reviewable under PAJA.[6] The Western Cape Division's order that a fully functional refugee reception office be opened within the Cape Town metropolitan municipal area by 1 July 2013, was set aside. It was substituted with an order granting the appellants leave to apply on the same papers for further relief, in the event that a decision as to the future of the Cape Town Refugee Reception Office was not made by 30 November 2013.

[9] On 22 November 2013 the Director-General issued an invitation to interested parties to attend a meeting on 5 December 2013 on the possible closure

[4] *Scalabrini Centre & others v Minister of Home Affairs & others* 2013 (3) SA 531 (WCC) para 122 (hereinafter referred to as *Scalabrini (WCC*)).
[5] *Scalabrini 1* fn 1 paras 70-73.
[6] *Scalabrini 1* fn 1paras 57-58 and 97-98.

of the Cape Town Refugee Reception Office; and to submit comments and proposals on the following issues:

'1.1 the need for a fully-fledged refugee reception office ("RRO") in Cape Town, given the fact that the CTRRO has been *de facto* closed to new applicants since the 30 June 2012;

1.2 the general undesirability of operating a RRO in the Cape Town Metropolitan area given the fact that the CTRRO has historically generated various nuisance factors and the problems surrounding the need to comply with zoning regulations;

1.3 only a small number of new asylum seekers enter annually Cape Town through its ports of entry (Cape Town Harbour and Cape Town International Airport);

1.4 the bulk of new asylum seekers enter through the northern borders of South Africa which could make it more convenient and safer for them to be processed and documented at RROs situated closer to their points of entry;

1.5 whether there are viable alternatives to operating a fully-fledged RRO in the Cape Town Metropolitan area given the past difficulties faced by the Departments of Home Affairs and Public Works in procuring suitable premises.'

[10] Written submissions were made by, amongst others, the United Nations High Commission for Refugees (UNHCR), the Legal Resources Centre (LRC), Lawyers for Human Rights (LHR) and the UCT Refugees Rights Unit.

[11] A wide range of refugee advocacy organisations were represented at the meeting of 5 December 2013, including the first and second appellants, the UNHCR, LHR, the LRC, and the UCT Refugees Rights Unit. Not one supported the closure of the Cape Town Refugee Reception Office.

[12] On 31 January 2014 the Director-General announced his decision to close the Cape Town Refugee Reception Office permanently. The effect of this decision was that new applicants could no longer apply for asylum in Cape Town: they had to do so in Musina, Pretoria or Durban. Secondly, existing applicants for asylum who had applied at other refugee reception offices were now precluded from having their files transferred to the Cape Town Temporary Refugee Facility at Customs House, unless they could show that their circumstances were 'exceptional'.

The reasons for the impugned decision

[13] On 7 February 2014 the Director-General gave written reasons for the impugned decision. They may be summarised as follows. The Crown Mines and Port Elizabeth Refugee Reception Offices had also been closed. The proposals by interested parties that Customs House should be used as a fully functional refugee reception office, that satellite offices should be established or that a refugee reception office should be established outside of the Cape Town metropolitan area, posed legal and practical difficulties.

[14] At Customs House, the Cape Town Temporary Refugee Facility provided limited services to asylum seekers. The Department had been threatened with litigation similar to that brought against it previously. The space at Customs House was inadequate: it could not accommodate large numbers of people or disabled clients needing the services of a fully functional refugee reception office; and there were occupational health and safety, and security concerns. It is not 'legally permissible' to establish satellite offices under the Act. This, according to the

Director-General, 'is clear from the judgment of Rogers J'.[7] The grant of s 22 permits (which enable asylum seekers to remain and work in the country pending determination of their applications) and the determination of status at different locations would lead to logistical difficulties, and require the DPW to identify suitable premises, which would be a time-consuming process.

[15] As to the possible location of the Refugee Reception Office outside the Cape Town metropolitan area, the Department was largely dependent on the DPW to procure suitable premises in a lengthy process. This would probably reduce but not eliminate the risk of future litigation, and was not a sufficiently compelling reason to reopen a fully functional refugee reception office. Regarding the operation of the office within the Cape Town metropolitan area, the Department faced expensive litigation involving nuisance and breaches of zoning regulations. The large number of applicants gave rise to logistical difficulties and would require substantial additional resources. The Department, together with the DPW, unsuccessfully conducted extensive searches for alternative premises.

[16] An audit of files prior to the decision of 30 May 2012 to close the refugee reception office, revealed that the majority of persons who had applied for asylum were economic migrants who came to Cape Town in search of work. The government was entitled to take steps to control the asylum application process and access to refugee reception offices. The vast majority of asylum seekers who utilised the services of the Cape Town Refugee Reception Office, entered the country through its northern borders. Few of them entered South Africa through ports of entry in Cape Town.

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[7] *Scalabrini (WCC)* fn 4.

[17] The three remaining Refugee Reception Offices at Musina, Pretoria and Durban were sufficient to serve the needs of asylum seekers and refugees. Additional resources would be deployed to meet any increased flow of asylum seekers at those offices. The number of asylum seekers had decreased over the last few years. The measures to wind down services at the Cape Town Temporary Refugee Facility were sufficient to serve the needs of existing asylum seekers and refugees.

The relevant statutory provisions

[18] The long title of the Act sets out its main purposes as follows:

'To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.'

[19] Section 6 requires that the Act be interpreted and applied with reference to international instruments relating to the status and rights of refugees, which includes the United Nations Convention and Protocol Relating to the Status of Refugees, 1951 (the Convention). Article 26 of the Convention provides that each contracting State shall grant to refugees lawfully in its territory, the right to choose their place of residence and move freely within its territory.

[20] Section 8(1) of the Act reads:

'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.'

[21] Section 21(1) provides that an application for asylum must be made in person to a refugee reception officer at any refugee reception office. In terms of s 21(2), the officer must see to it that the application form is properly completed and where necessary assist the applicant in that regard. The officer may conduct an enquiry in order to verify the information in the application and is required to submit the application to a refugee status determination officer.

[22] Section 22(1) requires the refugee reception officer to issue to the applicant an asylum seeker permit which allows him or her to sojourn in the country temporarily, pending the outcome of an application for asylum in terms of s 21(1). The s 22 permit enables the asylum seeker to live and work in the country, pending the determination of his or her application for asylum.

[23] An application for asylum must be considered by a refugee status determination officer, who may request any information or clarification from an applicant (s 24(1)(*a*)); must ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented (s 24(2)); and at the conclusion of the hearing, must decide whether to grant or reject the application for asylum (s 23(3)). If an application is rejected, written reasons must be furnished to the applicant, and the record of proceedings and a copy of those reasons must be submitted to the Standing Committee (s 23(4)).

[24] The Standing Committee must review any decision taken by a refugee status determination officer (s 25(1)), and may request the applicant to appear before it and provide additional information (s 25(2)(*b*)). The Standing Committee may confirm or set aside a decision rejecting an application for asylum found to be manifestly unfounded, abusive or fraudulent (s 25(3)(a)).

[25] Any asylum seeker may lodge an appeal with the Refugee Appeal Board if a refugee status determination officer has rejected an application for asylum because it is unfounded (s 26(1)). In terms of s 26(2), the Board may confirm, set aside or substitute any decision taken by a refugee status determination officer under s 24(3); and may request the applicant to appear before it and provide additional information.

[26] The above provisions of the Act point to the need to establish and maintain a functional refugee reception office. They also show that an asylum seeker must repeatedly report to the refugee reception office to exercise his or her rights under the Act. Indeed, it is common ground that an asylum seeker must report to a refugee reception office to obtain and renew a s 22 permit; to be interviewed by a refugee status determination officer; to collect the decision on his or her application for refugee status; to lodge an appeal to the Refugee Appeal Board; and to attend the hearing and collect the decision of the Board.

The standard of review

[27] The appellants accept, as they must, that the question whether a refugee reception office is necessary for achieving the purposes of the Act is quintessentially one of policy.[8] It concerns the manner in which the State determines how it will discharge its international law obligations contained in the Act. The number and locality of refugee reception offices involve an assessment of the need for such facilities; the number of refugee reception officers, refugee status determination officers and other staff required; and issues relating to administrative

[8] The appellants reserved the right to argue in any further appeal, should it become necessary, that the impugned decision constituted administrative action under PAJA. Nothing however turns on this.

effectiveness and efficiency, budgetary constraints, and policies of the Department.[9]

[28] Thus, a decision to close a refugee reception office in terms of s 8(1) of the Act constitutes executive rather than administrative action, and is not subject to PAJA.[10]

[29] In exercising his s 8(1) power, the Director-General is nevertheless constrained by the constitutional principle of legality, namely that 'the exercise of public power is only legitimate where lawful'.[11] Consequently, the impugned decision falls to be reviewed and set aside on the basis of the legality principle if it is not rationally related to the purpose for which the power was given;[12] if the decision-maker failed to act in accordance with the empowering provision;[13] if the decision-maker's failure to consider a relevant factor 'had an impact on the rationality of the entire process;[14] or if the decision breaches the Constitution.[15]

Review grounds

[30] There are two main grounds of review. The first is that the impugned decision was irrational and unlawful because it did not comply with s 8(1) of the Refugees Act, the decision-maker ignored relevant considerations and made a

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[9] *Scalabrini 1* fn 1 paras 58 and 97-98.
[10] *Scalabrini 1* fn 1 para 58; *Minister of Home Affairs & others v Somali Association of South Africa & another* [2015] ZASCA 35; 2015 (3) SA 545 (SCA) para 14.
[11] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 59.
[12] *Pharmaceutical Manufacturers Association of South Africa & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) paras 85 and 90.
[13] *National Director of Public Prosecutions & others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA) para 29.
[14] *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC 24; 2013 (1) SA 248 (CC) para 39.
[15] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) paras 132 and 148.

material error of law. The second is that the decision was unconstitutional because it violates fundamental rights of those affected and the respondents' constitutional obligations towards them.

[31] As to rationality, the first question is whether the Cape Town Refugee Reception Office was necessary when the Director-General decided to close it. Section 8(1) of the Act requires the Director-General to establish as many refugee reception offices as are 'necessary for the purposes of [the] Act'. This implies the power to disestablish a refugee reception office, as long as the Director-General acts rationally in determining that the relevant office is no longer necessary for purposes of the Act.

[32] Rationality concerns the relationship between the exercise of a power and the purpose for which the power was granted. The Constitutional Court in *Pharmaceutical Manufacturers* put it thus:

'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.'[16]

[33] The main purposes of the Act, as is evidenced by its long title, are to give effect to international legal instruments, principles and standards relating to refugees; and to provide for the reception of asylum seekers in this country. Article 26 of the Convention enjoins a contracting State to grant refugees the right to choose their place of residence and move freely within its territory. A reading of

[16] *Pharmaceutical Manufacturers* fn 12 para 85.

the Act reveals a clear, general orientation towards the protection of the rights of asylum seekers and refugees and their integration into South African society.

[34] Thus, in *Somali Association*, this Court said that the Act represents

'[A] significant break with a past characterised by measures designed to control the entry and presence of what were described as 'aliens' in this country and proclaims instead a more progressive commitment to refugee protection in accordance with international standards.'[17]

[35] So, the main objects of the Act are to provide for the reception of asylum seekers into South Africa; and once they are in this country, to ensure the immediate protection of their rights and the determination of their status in accordance with international standards. The conferral of asylum seeker status has a targeted aim: it regularises the status of applicants pending the determination of their applications, and ensures their freedom and security in the interim. The Act is also aimed at facilitating the integration of refugees - those who have been granted asylum - into South African society. The narrower purpose of the power to establish refugee reception offices is simply to provide the facility at which applicants for asylum have their status determined, and are given the right to live, work and function freely, pending that determination.

[36] Whether a decision to close a refugee reception office is rationally related to these purposes, this Court has held, 'is a factual enquiry blended with a measure of judgment'.[18]

[37] To begin with, on the facts, the closure of the Crown Mines and Port Elizabeth Refugee Reception Offices could never be put up as a reason for closing

[17] *Somali Association* fn 10 para 2.
[18] *Scalabrini 1* fn 1 para 66.

the Cape Town Refugee Reception Office. Rationality entails that the impugned decision is founded on reason.[19] This 'reason' is inexplicable and irrational: in December 2011 the decision to close down the Crown Mines Refugee Reception Office was reviewed and set aside by the North Gauteng High Court and remitted to the Director-General for reconsideration. The Director-General has still not complied with that order. Similarly, in mid-2012 the Eastern Cape High Court reviewed and set aside the decision to close down the Port Elizabeth Refugee Reception Office. An appeal to this Court was dismissed with costs, and in March 2015 the first to third respondents were ordered to restore the refugee reception services to the Port Elizabeth Office by 1 July 2015. A further appeal to the Constitutional Court was also dismissed.[20] The respondents have not complied with this order either. I revert to these aspects below.

[38] The facts also show that the Cape Town Refugee Reception Office was established in 2000, not only because it was regarded as necessary for purposes of the Act, but also because its location in Cape Town was necessary, as contemplated in s 8(1). Since then, no other refugee reception office has been established in or near Cape Town.

[39] Prior to its closure, the Cape Town Refugee Reception Office was the second busiest in the country, after Pretoria. This too, is common ground. The Department's own statistics show that in the first four months of 2012, there were 5 946 new applications for asylum at the Cape Town Refugee Reception Office - about 1 500 per month. In the same period, there were 52 666 applications for extensions of s 22 permits. In his reasons for the impugned decision, the Director-

[19] *Scalabrini 1* fn 1 para 65.
[20] *Somali Association* fn 10 para 40.

General himself says that the facilities at Customs House are inadequate 'to service the number of clients who would need to be serviced if a fully functional RRO were to be opened' in Cape Town. This, of course, shows that a refugee reception office is necessary in Cape Town and why, the Director-General says, it was necessary to move that office to Airport Industria in Cape Town. And if a refugee reception office is necessary, it can never be a rational response to close down the existing office, and then do nothing to find alternative premises.

[40] The need for the Cape Town Refugee Reception Office was a central theme running through all the written and oral representations by interested parties. They also addressed the inadequacy of the offices at Musina, Pretoria and Durban, and the Department's inertia in securing alternative premises.

[41] In its written submissions, the LRC stated that despite its closure, new asylum seekers continued to approach the Cape Town Refugee Reception Office (the temporary facility at Customs House) to obtain s 22 permits. Conservatively, and only since July 2012, there were well over 4000 asylum seekers in the Western Cape and many more would have arrived, had it not become known that the Cape Town Refugee Reception Office had been closed to new applicants. The LRC also said that the Department's own numbers show that the Cape Town area attracted thousands of asylum seekers and refugees, where essential family and support networks have been created. New asylum seekers depend on these support structures to survive and live with dignity while they await the determination of their applications. The majority of asylum applications take years to process at the initial stage of decision-making. For example, there are scores of Angolan asylum seekers who applied before 2002 and whose cases had still not been adjudicated by

2013. There are further delays when applications are referred to the Standing Committee or appeals heard by the Refugee Appeal Board.

[42] As to the location of a refugee reception office outside Cape Town, the LRC in its written and oral submissions stated that there was no reason why a refugee reception office could not be established a short distance beyond the city boundary in an area accessible by public transport. The LRC said that people did not need to come to the centre of Cape Town, the location of an office in Stellenbosch, Worcester or Saldanha Bay would resolve many difficulties relating to the need for a refugee reception office.

[43] LHR, in its written and oral submissions, stated that closing the Cape Town Refugee Reception Office and forcing asylum seekers to utilise offices at the northern border of the country would infringe the rights of a vulnerable community who would be forced to travel thousands of kilometres, repeatedly, to have their applications for asylum processed to finality. The costs of and practical difficulties in travelling to Durban, Pretoria and Musina Refugee Reception Offices are substantial, and would create an untenable burden on many asylum seekers and refugees, most of whom are extremely poor. There is no direct bus line to Musina and it is at least an eight-hour drive by taxi from Pretoria to Musina. For a large family this is very expensive as all dependents must be present when s 22 permits are renewed. Travelling lengthy distances also poses dangers to the elderly, the infirm, small children and unaccompanied minors. Inevitably, many asylum seekers would not be able to obtain or renew their permits on time and would then be at risk of arrest and detention if intercepted by the police or immigration enforcement officials.

[44] There is little or no accommodation in Musina. Often the Department is unable to renew permits on time and the applicants and their dependents are forced to remain in Musina until the following week when their nationality is called again. In that event, some asylum seekers and their families might stay in local shelters while others are forced to sleep in the open. They also risk losing their jobs. Further, Musina is considered very dangerous for newly arrived asylum seekers who are subjected to crime and violence, due to their particularly vulnerable situation. On top of all this, the management at Musina has refused to transfer any files to another refugee reception office. This has forced asylum seekers to either remain in that area, or live in another part of the country and travel back and forth to Musina.

[45] LHR also stated that the closure of the Cape Town Refugee Reception Office not only prevented new applicants from applying for asylum and supporting themselves during the process, but also had a knock-on effect on all other refugee reception offices. They are insufficient to deal with the workload, there is a lack of capacity, files get lost and there seems to be no communication between those offices, the Standing Committee and the Refugee Appeal Board. In the answering affidavit, the Director-General says that if there are backlogs at the remaining refugee reception offices, additional resources and measures would be deployed to meet any increased flow of asylum seekers. He also says that the remaining refugee reception offices are sufficient for the purposes of the Act.

[46] The remaining offices however are inadequate. The Director-General seems to have forgotten what he said under oath in *Somali Association*:[21]

[21] *Somali Association* fn 10 para 25.

'The inadequacy of staff in the busier RROs, the long queues that result in applications not being attended to on the day that an applicant presents him or herself at an RRO, the high number of files that the SCRA returns to the RSDO due to the incompleteness of the file or interview with the RSDO - all of these are matters that have been regular items of discussion between the Deputy Minister, the members of [the] SCRA and me.'

[47] In its oral submissions, the representative of the UCT Refugee Rights Clinic said that the Department was tearing families apart: spouses and children of asylum seekers (who come to this country after the other spouse has initially been documented and is living in Cape Town) are forced to utilise the refugee reception office, for example, at Musina. This results in a single family having two refugee files: one in Cape Town and the other in Musina. This, when the office at Musina cannot transfer their files because there is no refugee reception office in Cape Town. Families are then forced to make repeated trips to the refugee reception office where their files are kept.

[48] The written submissions by the UNHCR state:

'The RROs therefore serve as the main interface between the refugees and their host government. It has been submitted that the purpose for establishing the RROs in the urban centres was to serve asylum seekers and refugees at the urban locations where they reside thus lessening the burden to travel to a distant location to access the services.

. . .

The Refugees Act accords refugees basic rights including freedom of movement, right to work, access to education, health and other basic services, the choice of a residence for many of the refugees and asylum seekers is often linked to access to basic services, access to livelihood opportunities and established social networks. Many asylum seekers and refugees reside in the main urban centres where these opportunities are more easily accessible. While UNHCR cannot confirm the actual statistics, it is a known fact that Cape Town and the Western Cape Province in

general attract a significant number of asylum seekers and refugees being a capital city and commercial hub. The closure of the CTRRO has therefore become a source of anxiety and distress amongst the refugees and asylum seekers.'

[49] The Director-General's answer to all of this can be summed up in the following statement in his affidavit:

'[T]he reasons furnished by me for my decision, explicitly, alternatively, implicitly, state that the position regarding the CTRRO had changed since its establishment and an RRO in Cape Town, was no longer necessary for the purposes of the Refugees Act.'

[50] But that is not so. What is conspicuously absent from the Director General's reasons is any conclusion that the Cape Town Refugee Reception Office has become redundant or no longer necessary for purposes of the Act. Still less does he provide reasons for such a conclusion. In the light of what is stated above, the omission is hardly surprising. The facts point precisely the other way. And those facts, which relate directly to the level of demand and the need for the Cape Town Refugee Reception Office, both before and after its closure on 30 June 2012, are highly relevant considerations.

[51] As the Constitutional Court has explained, a failure to take into account relevant considerations in the process of making a decision can render it irrational where: (1) the factors ignored are relevant; (2) the failure to consider the material concerned is rationally related to the purpose for which the power was conferred; and; (3) ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.[22]

[22] *Democratic Alliance* fn 14 para 39.

[52] This is such a case. The Director-General ignored relevant considerations, rendering his decision irrational. He also failed to properly consider whether the Cape Town Refugee Reception Office was necessary for the purposes of the Act as contemplated in s 8(1), and thus failed to comply with the empowering provision.

[53] The remaining reasons for the impugned decision likewise do not withstand scrutiny. The Director-General concedes that 'the location of RROs, particularly their proximity to places of work and existing asylum seeker communities, are relevant considerations'. However, he denies that 'it is necessary or essential for a RRO to be present in Cape Town or indeed the Western Cape'. He also concedes that the closure of the Cape Town Refugee Reception Office will result in an increase in the number of applicants at the remaining offices, but says that the overall number of asylum seekers has significantly decreased over the past few years and the turnaround time in determining status at the extant refugee reception offices has substantially improved.

[54] The facts outlined above show that a refugee reception office continues to be necessary in Cape Town. As regards the decrease in the number of asylum seekers and the alleged improved efficiency in dealing with asylum applications, the Department overlooks the fact that according to its own records as at May 2015, there was a backlog of some 100 000 files which had not yet been decided by a refugee status determination officer; and a backlog of more than 100 000 cases which had not been decided by the Refugee Appeal Board. Save for a bald allegation that they are being addressed, the answering affidavit is silent on any progress made with these backlogs or whether they have increased since May 2015. Apart from this, the alleged improved efficiency is questionable. In its oral representations the UCT Refugee Rights Clinic stated that it was dealing with

asylum seekers who had been in Cape Town for 8-12 years and had their permits extended 16 times.

[55] Then there is the Department's failure to even consider alternative premises whether in or outside of Cape Town since March 2011. On this score the answering affidavit contains the most perfunctory assertions. It states that after the *Voortrekker Road* case in 2010, a task team of the Department and the DPW inspected and assessed ten buildings, of which three were identified as provisionally complying with the relevant criteria to house the refugee reception office. One of these buildings was chosen but there were three objections to its use as a refugee reception office. Nothing is said about the other two buildings. Thereafter the Department issued a public invitation to tender to accommodate the Cape Town Refugee Reception Office. In March 2011 it received ten proposals from various businesses and landlords. The Director-General says that none of the proposals complied with the relevant criteria, but no details are given. Since March 2011 the Department has done nothing to find suitable premises.

[56] The Director-General cannot credibly contend that the difficulty of obtaining premises is a relevant consideration and then fail to investigate whether any premises might be available. This is demonstrated by the Deputy Director-General's explanation to interested parties at the meeting on 5 December 2013, that the Department took no steps to look for premises because it was 'awaiting the outcome of court processes', but now tells the court that there cannot be a refugee reception office in Cape Town because there are no suitable premises.

[57] This brings me to the failure to consider satellite offices. During the consultation process, interested parties specifically proposed that the Director-

General consider locating the Cape Town Refugee Reception Office at numerous satellite offices. This was likely to reduce the nuisance and disturbance complaints while the Department looked for premises. Indeed, as the LRC pointed out, the Department itself suggested satellite offices in previous court proceedings.

[58] The Director-General however reasoned that satellite offices were not permissible under the Act, which he said was clear from the judgment in *Scalabrini (WCC)*. The Director-General could hardly be more mistaken. The court said exactly the opposite. It held:

'The DHA might choose to operate from several locations within a city. These locations could properly be regarded as part of the single RRO in that city.'[23]

[59] This Court has said that in order to be rational, a decision must be based on accurate findings of fact and a correct application of the law.[24] The Director-General wrongly took the position that satellite offices were impermissible under the Act, and thus made an error of law.

[60] I turn now to consider whether the impugned decision should be set aside because it is tainted by an ulterior purpose. It is a settled principle that a decision-maker who uses a power given by statute for a purpose other than that for which it has been given, acts contrary to the law.[25] This Court has said that acting with an ulterior purpose has been subsumed under the principle of legality.[26]

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[23] *Scalabrini (WCC)* fn 4 para 43.
[24] *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd* [2011] ZASCA 202; 2012 (2) SA 16 (SCA) para 40.
[25] *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 998.
[26] *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* [2013] ZASCA 67; 2013 (5) SA 24 (SCA) para 47, Gauteng 2013 (5) SA 24 (SCA) para 47.

[61] One of the reasons for closing the Cape Town Refugee Reception Office was that the government is entitled to control the asylum application process because the legislative framework and refugee services were being abused by economic migrants: about 77% of applications for asylum to the Cape Town Office were rejected as unfounded or manifestly unfounded. The Director-General acknowledged that control of the asylum process would result in hardship to some 23% of genuine asylum seekers, but he says, 'this hardship must be considered in light of Government's legitimate need to regulate the asylum application process and access to RROs'.

[62] The Director-General plainly exercised the s 8(1) power for a purpose contrary to that for which it has been given. The touchstone for the exercise of the power to establish or disestablish a refugee reception office is whether it is necessary for purposes of the Act. First, the disestablishment of the Cape Town Refugee Reception Office - which was and is necessary - in order 'to restrict access to RROs in urban areas' constitutes the exercise of a power for an impermissible purpose. In so doing the Director-General misconstrued the s 8(1) power and for this reason also, his decision is reviewable.[27] Second, the denial of access to a refugee reception office to 23% of genuine asylum seekers (and consequently, denying them economic opportunities in Cape Town), is not only the exercise of a power for an ulterior purpose, but simply arbitrary.[28] And third, the Director-General cannot cut across the provisions of the Act relating to the determination of refugee status, and restrict benefits which the lawgiver has conferred on asylum seekers, by closing the Cape Town Office. Regardless of the merits of their application, all asylum seekers are entitled to a s 22 permit which

[27] *President of the RSA v SARFU* fn 15 para 148.
[28] *Pharmaceutical Manufacturers Association* fn 12 para 85.

entitles them to live, work, study and receive public healthcare in this country, while their claim for refugee status is being determined. This is subject only to the power of the Standing Committee to set conditions relating to study or work of asylum seekers.[29] No such conditions have been set in this case.

[63] The reason that very few asylum seekers enter South Africa in Cape Town rather than through the northern borders of the country, which, the Director-General says, 'militates against reopening/maintaining a fully functional RRO in Cape Town', is likewise unsustainable. It is inconsistent with the statutory scheme. Section 23(1) of the Immigration Act 13 of 2002 expressly acknowledges that a refugee reception office may not be located at a port of entry. It authorises the Director-General to issue an asylum transit visa to asylum seekers at a port of entry, to enable them to report to the nearest refugee reception office within five days.[30] The statutory scheme envisages that even those without transit visas might find their way to refugee reception offices which are not located at the border. And, as was held in *Scalabrini (WCC)*, ports of entry are not even the most likely place where asylum seekers would need the facilities of a refugee reception office. The borders are not where work opportunities, accommodation and public facilities exist at sufficient scale.[31]

[64] For these reasons also, the impugned decision is irrational and falls to be set aside.

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[29] Section 11(h) of the Refugees Act 130 of 1998.
[30] Section 23(1) of the Immigration Act reads:
'The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.'
[31] *Scalabrini (WCC)* fn 4 para 107.

[65] By reason of the conclusion to which I have come, it is unnecessary to deal with the review ground that the decision is unconstitutional.

Remedy

[66] The answering affidavit states that the decision to reopen a refugee reception office is polycentric in that it involves the Department, the DPW and the Treasury, and requires the acquisition of property and the allocation of public resources. Then it is said that the decision lies within the domain of the executive and that the court does not have all the relevant information to order that the refugee reception office be reopened.

[67] It is true that courts should afford appropriate deference to executive and administrative decisions, which involves a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative (and executive) agencies.[32] However, judicial deference within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution: courts are responsible for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated and effective remedies are provided for violations of the Constitution.[33]

[68] In my view, this case does not give rise to any constitutional tension between the different arms of government. Neither does it involve any intrusion into the domain of the executive. As was the position in *Somali Association*,[34] this case is not about compelling the Director-General to establish a refugee reception

[32] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 44.
[33] *Trencon* para 45.
[34] *Somali Association* fn 10 para 30.

office where none has existed before. Instead, an order directing the first to third respondents to reopen and maintain the Cape Town Refugee Reception Office is merely the consequence of setting aside an unlawful decision to close it.

[69] At the close of argument, the respondents were requested to advise this Court in writing whether a fully-functional refugee reception office in or around the Cape Town metropolitan area could be reopened within a period of six months, if such an order were to be granted. The respondents' reply is unhelpful. They contend that it is impossible to reopen the refugee reception office for the following reasons. The Department previously experienced difficulties in attempting to secure premises. It has taken time to secure a site and obtain approval from the Treasury for the establishment of a refugee reception office in Lebombo, Mpumalanga. Substantial additional resources are required and the government is currently experiencing funding pressures.

[70] These contentions are no different from those advanced in the answering papers, save for the one relating to funding pressures which is not explained. They have no merit. The alleged difficulties in obtaining premises and the fact that the respondents did nothing to find alternative premises since March 2011, have been dealt with above. Apart from the Director-General's say-so, there is not a shred of evidence to show what additional resources are required and why. As to the alleged funding pressures, no such case has been made out in the answering affidavit. The establishment of a refugee reception office at Lebombo, Mpumalanga, cannot be relevant in the light of the Director-General's statement in the answering affidavit. He said:

'Because of the uncertainty as to when exactly the RRO at Lebombo would be established, I did not consider that this was a factor that I should take into account and accordingly left it out of consideration.'

[71] In my opinion, given that the impugned decision is substantively irrational and unlawful, the only effective remedy is an order directing the first to third respondents to maintain a fully functional refugee reception office in or around Cape Town for the following reasons. First, asylum seekers and refugees have been prejudiced by the closure of the Cape Town Refugee Reception Office since June 2012 - more than five years. Second, the impugned decision is substantively irrational and unlawful, as opposed to *Scalabrini 1* where the decision was procedurally irrational. Third, an order remitting the impugned decision to the Director-General for reconsideration is likely to be ignored, as happened in the case of the Crown Mines Refugee Reception Office, where, six years later, there has been no compliance with the order to reconsider the decision to close that Office. Finally, the order is identical to that granted in *Somali Association*, save that the respondents have been given more time to reopen the Cape Town Refugee Reception Office, and the office may be located outside of Cape Town in an area accessible by public transport. This should go a long way to reducing any complaints relating to nuisance or violations of zoning regulations, as the Director-General himself has recognised.

[72] We were informed from the bar that the order in *Somali Association*, issued in March 2015, has also not been implemented. Once again, it is necessary to say that the State should lead by example and be a model of compliance. In *Somali Association*,[35] this Court said that it is a most dangerous thing for a State

[35] Somali Association fn 10 para 35.

department and senior officials in its employ to wilfully ignore an order of court. These warnings, it seems, have fallen on deaf ears. The warning sounded by the Constitutional Court in *Economic Freedom Fighters*,[36] bears repetition:

'One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era. To achieve this goal we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason public-office bearers ignore their constitutional obligations at their peril . . . .'

[73] The following order is made:

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the court a quo is set aside and substituted as follows:

'(a) The decision of the second respondent, taken on or about 31 January 2014, to close the Cape Town Refugee Reception Office is declared to be unlawful and is reviewed and set aside.

(b) The first to third respondents are directed to reopen and maintain a fully functional refugee reception office in or around the Cape Town Metropolitan Municipality, by Friday 31 March 2018.

(c) The second respondent, the Director-General of the Department of Home Affairs, shall report in writing to the appellants by 31 October 2017 and thereafter, on or before the last working day of each succeeding month as to what steps have been taken and what progress has been made to ensure compliance with the aforesaid order.

(d) The parties are granted leave to apply on the same papers, supplemented insofar as they consider that to be necessary, for further relief.

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[36] *Economic Freedom Fighters v Speaker, National Assembly & others* [2016] ZACC 11; 2016 (3) SA 580 (CC) para 1.

(e) The costs of the application shall be paid jointly and severally by the first, second and third respondents.'

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A Schippers
Acting Judge of Appeal

Appearances

For Appellants:	S Budlender (with N Mayosi) Instructed by: Legal Resources Centre, Cape Town Webbers, Bloemfontein
For Respondent:	MA Albertus SC (with G R Papier and G G M Quixley) Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein