KILIKO AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2006 (4) SA 114 (C)

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Citation 2006 (4) SA 114 (C)

Case No 2730/05

Court Cape Provincial Division

Judge Van Reenen J

Heard May 30, 2005

Judgment January 16, 2006

Counsel A Katz for the applicants.

M A Albertus SC (with T Masuku) for the respondents.

Annotations Link to Case Annotations

B

[zFNz]Flynote : Sleutelwoorde

Immigration - Aliens - Asylum seekers - Duties of State - Protection of fundamental rights of asylum seekers - Duty to provide adequate facilities to receive, consider and issue asylum seeker permits - Consequences of asylum seeker's status as 'illegal foreigner', and bureaucratic procedures adopted by C Department of Home Affairs, violating asylum seeker's fundamental rights - Department directed to accept applications for asylum permits within reasonable time to furnish report on issues mentioned by Court in order to allow final determination of matter. D

Immigration - Aliens - Asylum seekers - Duties of State - Foreigners entitled to fundamental rights entrenched in Constitution - International conventions, Refugees Act 130 of 1998, and ss 7(2) and 195 of Constitution all obliging State to provide adequate facilities to receive, expeditiously consider and issue asylum seeker permits.

Constitutional law - Human E rights - Application of - Foreigners - Foreigners entitled to same rights under Constitution as citizens, provided contrary intention not emerging from Constitution.

[zHNz]Headnote : Kopnota

The applicants were Congolese citizens who had entered South Africa as asylum seekers. They alleged that, at the Western Cape refugee reception centre, the respondents had adopted a procedure for F dealing with asylum seekers that had the effect of unreasonably and unlawfully denying them the necessary facilities and proper opportunities to submit applications for asylum and refugee status in South Africa. The practice alleged entailed, inter alia, accepting only 20 applications for asylum per day. The respondents' conduct, the allegation continued, was in breach of G the respondents' duties in terms of ss 2 and 22 of the Refugees Act 130 of 1998, in conflict with the provisions of ss 9, 10, 12 and 33 of the Constitution of the Republic of South Africa Act, 1996, and in violation of international law. The applicants brought the application in their own interest, the interest of asylum seekers as a class, as well as in the public interest. They sought an order: (1) declaring as invalid and unconstitutional the practice and policy of H the respondents regarding the manner in which they accepted applications for asylum and issued permits in terms of s 22 of the Refugees Act; and (2) directing the respondents to accept applications by asylum seekers upon, or within a reasonable time of, such applications being made. The respondents contended, inter alia, that, in light of the steps taken by the I Department, since institution of the proceedings, to alleviate delays in the processing and issuing of permits, the relief sought was unjustified and the application ought to be dismissed. It transpired that, subsequent to the institution of the proceedings, the applicants had been issued with asylum-seeker permits.

Held, that notwithstanding the fact that the applicants had been issued with asylum-seeker permits subsequent to the launching of the application, they J

were entitled to have pursued the application, acting in the public interest, in terms of the provisions of A s 38(d) of the Constitution. (Paragraph [12] at 119G - H.)

Held, further, that foreigners were entitled to all the fundamental rights entrenched in the Bill of Rights, save those specifically reserved for South African citizens. Until an asylum seeker was granted an asylum-seeker permit in terms of s 22 of the B Refugees Act, he or she remained an 'illegal foreigner' within the meaning of the Immigration Act 13 of 2002, and, as such, was liable to detention and deportation in terms of ss 32, 33 and 34 of the Immigration Act, which impacted, or threatened to impact on his or her right to human dignity and the freedom and security of his or her person. (Paragraphs [27] - [28] at 125E - I.) C

Held, further, that the State was obliged, in terms of the international instruments to which it was a party, the Refugees Act and the provisions of ss 7(2) and 195 of the Constitution, to provide adequate facilities to receive, expeditiously consider and issue asylum-seeker permits. (Paragraph [28] at 125J - 126B.)

Held, further, that the Department had failed to discharge those obligations, with resultant delays and violation of the D fundamental rights of asylum seekers under the Constitution and the Refugees Act. (Paragraph [28] at 126C - D.)

Held, further, that the applicants were thus entitled to an order in terms of prayer 1 that the conduct of the respondents in introducing a practice and policy in the Western Cape refugee reception office in terms of which they were obliged to process only 20 asylum-seeker permits per day was inconsistent with the fundamental E rights of illegal foreigners, as embodied in ss 10 and 12 of the Constitution. (Paragraph [31] at 127B - C.)

Held, further, that despite the steps already taken by the Department, it was clear that the 'asylum problem' had not yet been adequately addressed and the applicants were, accordingly, entitled to an order in terms of prayer 2, both in their own interest and in the F public interest. (Paragraph [30] at 126J - 127A.)

Held, further, that since the Department's conduct deleteriously affected the freedom and dignity of a number of disadvantaged people and failed to adhere to the values enshrined in the Constitution, it was appropriate that the Court grant a structural interdict under the prayer for 'further and/or alternative relief' in G order to ensure that the manner in which the respondents received and processed applications for asylum in the future did not offend against any of the State's obligations under international law or the Constitution, or the Refugees Act. To that end, it was appropriate that the respondents be ordered to furnish the Court with a report in which they set out the information to be requested by the Court. (Paragraph [32] at 127F - 128A.) H

Held, accordingly, that (1) the conduct of the respondents in introducing a practice and policy in the refugee reception office in terms of which they were obliged to process only 20 asylum-seeker permits per day was inconsistent with the fundamental rights of illegal foreigners, as embodied in ss 10 and 12 of the Constitution; (2) the respondents had to furnish the Court with a I report which dealt with the aspects enumerated by the Court; (3) the applicants were entitled to respond to the respondents' report and the respondents to reply to the applicants' response; and (4) the matter had to be postponed for consideration of the report and the responses thereto and for consideration of the further conduct of the matter. (Paragraph [35] at 129D - 130A.) J

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[zCAz]Cases Considered

Annotations

Reported cases A

Southern African cases

Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) (2002 (9) BCLR 891): dictum in para [170] applied B

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (1) SA 997 (C): dictum at 1043I - 1044E applied

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR C 1): dictum in para [234] applied

Juta & Co Ltd and Others v De Koker and Others 1994 (3) SA 499 (T): dictum at 510F - 511F applied

Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC) (2004 (7) BCLR 775): dictum in para [18] applied D

Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) (2001 (7) BCLR 685): dictum in para [68] applied E

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): dictum at 634E - 635C applied

Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C): dictum at 112D - E applied F

Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 1) 2003 (5) SA 518 (C): dictum at 590F - I applied

S v Jaipal 2005 (4) SA 581 (CC) (2005 (1) SACR 215; 2005 (5) BCLR 423): dictum in para [56] applied

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC) (2001 (1) BCLR 77): compared.

Foreign cases

Singh v Canada (Minister of Employment and Immigration) [1985] 14 CRR 13: referred to. G

[zSTz]Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, ss 7(2), 9, 10, 12, 33, 38(d) and 195: see Juta's Statutes of South Africa 2004/5 vol 5 at 1-137 to 1-140 and 1-164

The Immigration Act 13 of 2002, ss 32, 33 and 34: see Juta's Statutes of South Africa 2004/5 vol 5 at 2-40 H

The Refugees Act 130 of 1998, ss 1, 2 and 22: see Juta's Statutes of South Africa 2004/5 vol 5 at 2-22 and 2-24.

[zCIz]Case Information

Application for a declaratory order. The facts appear from the judgment of Van Reenen J. I

A Katz for the applicants.

M A Albertus SC (with T Masuku) for the respondents.

Cur adv vult.

Postea (January 16). J

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[zJDz]Judgment

Van Reenen J:

[1] The first to seventh applicants are adult male citizens of and resided in the Democratic A Republic of Congo prior to their entering the Republic of South Africa individually on different dates during the period 16 December 2004 to 28 February 2005. As such, they are 'foreigners' as defined in s 1 of the Immigration Act 13 of 2002 (the Immigration Act). In terms of s 9(4) of that Act, a foreigner may B enter the Republic of South Africa only if he or she produces to an immigration officer a passport valid for not less than 30 days after the expiry of his or her intended stay and has been issued with a valid temporary residence permit. C

[2] The Immigration Act, under the heading 'Temporary residence', provided in ss 10 to 23 for the issuing of different categories of permit granting foreigners the right of temporary residence in the Republic of South Africa. One such category is an 'asylum seeker permit'. D

[3] Section 28 of the Immigration Act provides that, subject to the Refugees Act 130 of 1998 (the Refugees Act), the Department of Home Affairs (the Department) may issue a permit to an asylum seeker on terms and conditions that are prescribed by regulation.

[4] An 'asylum seeker' is, in s 1 of the Refugees Act, defined as a person who is seeking refugee status in the Republic of E South Africa. As is apparent from the rather sparse averments in the affidavits deposed to by the applicants in support of the application, each one of them is an asylum seeker. Such averments have not been placed in issue by any of the respondents. F

[5] Section 21 of the Refugees Act provides that an application for asylum must be made to a refugee reception officer in person in accordance with the prescribed

procedures, and at any refugee reception office. Section 22 of the Refugees Act provides that a refugee reception officer must, pending the outcome of such an application, issue an applicant with an asylum seeker permit in the G prescribed form. That section further provides that such a permit allows the holder thereof to sojourn in the Republic of South Africa, temporarily, subject to the conditions determined by the Standing Committee for Refugee Affairs (the Standing Committee) and not in conflict with the Constitution of the Republic of South Africa, 1996 H (the Constitution) or international law as endorsed thereon by the refugee reception officer. In terms of s 22(3) of the Refugees Act, such an officer is empowered to extend, from time to time, the period for which such a permit has been issued and also to amend the conditions subject to which it has been issued. I

[6] Section 21(4) of the Refugees Act provides that, until a decision has been made on an application for asylum and, where applicable, an applicant has exhausted his or her rights of review or appeal under ch 4 of that Act, no proceedings may be instituted or continued against a person in respect of his or her unlawful entry into or presence within the Republic of South Africa. J

[7] As, prior to the issuing of an asylum-seeker permit, any foreigner who has entered the Republic of South Africa in conflict with A the provisions of s 9(4) of the Immigration Act, is an 'illegal foreigner' as defined in s 1 thereof, and is, accordingly, subject to arrest, detention and deportation, it is self-evident that the issuing of an asylum-seeker permit is an important step in the process of being recognised as a refugee in the Republic of South Africa, as well as the B granting of asylum.

[8] Section 8 of the Refugees Act imposes a duty on the Director-General of the Department to establish as many refugee reception offices in the Republic of South Africa as he may deem necessary, after consultation with the Standing Committee, and to appoint at least one adequately trained refugee reception officer and C at least one similarly trained status-determination officer in each such office. Whilst the first subsection of s 8 of the Refugees Act and reg 2(1)(a) of the Refugee Regulations - Regulation 6779 published in Government Gazette 21075 of 6 April 2000 (the Refugee Regulations) - in imperative terms oblige an asylum D seeker, in person, to submit an application for asylum to a refugee reception officer at a refugee reception office without delay, the second subsection thereof, in equally imperative terms, imposes an obligation on the refugee reception officer concerned to accept from the applicant an application in the form prescribed by the Refugee Regulations (ss 2(a)); to ensure that the said form is E properly completed and, if necessary, to assist the applicant in that regard (ss 2(b)); and to submit the application, together with any information obtained from and relating to an applicant, to a status-determination officer for the purpose of arriving at a decision regarding the application (ss 2(d)).

The refugee reception F officer may, in addition, conduct such enquiries as he or she deems necessary in order to verify the information furnished in an application for asylum (ss 2(c)).

[9] The Director-General of the Department has established five refugee reception offices in the Republic of South Africa. The refugee reception office for the Western Cape is located in Cape Town, in a building complex occupied by other operational divisions of the G Department. On 18 April 2005, the date on which Mr Arthur Frazer, the Deputy Director-General: National Immigration Branch in the Department (Mr Frazer) deposed to the respondents' answering affidavit, there were nine officials of the Department who were assigned to the refugee reception office in Cape Town. Of those officials, six were assigned to deal with the issuing and the extending H of asylum-seeker permits under s 22 of the Refugees Act, and three with status determinations under s 24.

[10] Each of the applicants who, on 22 March 2005, deposed to affidavits in support of the application chronicled their unsuccessful attempts at gaining access to the refugee reception I offices in Cape Town in order to apply for asylum. Their attempts were futile, despite the fact that a number of them slept outside the said offices throughout the night, on different occasions, or arrived there during the early hours of the morning. Each one of them, without fail, on a daily basis, except on or about 9 March 2005, observed that only a limited number of individuals J

were allowed to enter the refugee reception offices. On that date the 26 persons who succeeded in being A admitted were arrested and taken to Pollsmoor prison but later released. The Cape Times of 2 March 2005 carried a report of an incident that had taken place the previous day when frustrated asylum seekers inexcusably, but, in the light of the facts recited above, perhaps understandably, forced their way into the Cape B Town refugee reception office and had to be physically restrained by officials of the Department. Their actions resulted in injuries that necessitated hospital treatment, having been sustained by a number of those who had forced their way into the building.

[11] The applicants, asserting that the first, second and third respondents, by having unreasonably and unlawfully failed to C provide them with the necessary facilities and proper opportunities to submit applications to obtain refugee status in the Republic of South Africa, were acting in breach of the duties imposed by ss 2 and 22 of the Refugees Act; in conflict with the provisions of ss 9, 10, 12 and 33 of the Constitution; and in violation of the canons of international D law, in their own interest, in the interest of asylum seekers as a class, as well as the interest of the public, instituted proceedings in this Court in which they, on an urgent basis, asked for an order against the respondents:

'11.1 Declaring as invalid and inconsistent with the Constitution, the practice and policy of the respondents concerning E the manner in which they accept applications for asylum and issue permits in terms of s 22 of the Refugees Act, 1998;

11.2 directing them to accept applications for asylum by asylum seekers on or within a reasonable time of such application being made; F and

11.3 an order for costs, jointly and severally, the one paying the other to be absolved.'

[12] The applicants' locus standi to have brought the instant application was not assailed. To the extent that, despite G the fact that the applicants reserved their rights thereanent, the relief sought by them may have been rendered moot by reason of the fact that, since the institution of the application, asylum-seeker permits have been issued to them, they, in my view, were, in any event, entitled to have brought the application, acting in the public interest in terms of the provisions of s 38(d) of the Constitution. H I say so as, in my view, most, if not all, of the criteria required for standing under that subsection that were enumerated by O'Regan J in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) in para [234], and Yacoob J in Lawyers for Human Rights and Another v Minister I of Home Affairs and Another 2004 (4) SA 125 (CC) (2004 (7) BCLR 775) in para [18], are present, in particular, their vulnerability because of a lack of means, support systems, family, friends or acquaintances; a likely lack of or limited understanding of the South African legal system and its values; and also a limited knowledge of any lawyers and non-governmental organisations that would be able to assist them. J

[13] The respondents opposed the application and delivered and filed an answering affidavit deposed to by Mr Frazer, as well as a A confirmatory affidavit by Mr Jurie de Wet, the Chief Immigration Services Officer in the Department in the Western Cape (Mr De Wet) whom, it was foreshadowed, would deal with the institutional and operational problems facing the refugee reception office in Cape Town, but failed to do so. The respondents, subsequently and B unilaterally, also introduced a supplementary affidavit by Mr Frazer, jurat 30 May 2005. The applicants, in response to the respondents' answering affidavits, delivered and filed a replying affidavit to which were annexed the affidavits of nine further asylum seekers, deposed to on 20 April 2005, in which they set out their C own abortive attempts, until 18 April 2005, to gain access to the refugee reception offices in Cape Town. The respondents, to their credit, did not object to the admission of such supporting affidavits: neither did they seek to have them struck out on the basis that they dealt with matters that should have been embodied in the founding papers. They also did not seek an opportunity to respond thereto. Even D in the absence of such complaisance on the part of the

respondents, I would have allowed the admission of such affidavits, in the exercise of the discretion deposed in me, on the basis that they served to negate certain allegations regarding the introduction by the Department of certain remedial measures in order to address the applicants' complaints. (See Juta & Co Ltd and Others v De Koker and E Others 1994 (3) SA 499 (T) at 510F - 511F.)

[14] Mr Frazer's original and supplementary affidavits exhibit three notable features. The first is that he is at pains to point out that the applicants have been issued with asylum-seeker permits, but does not make any mention thereof that the understanding between the F attorneys concerned was that their issuing would not render the matter moot. The second is that the respondents, save for not having admitted the applicants' identities and nationalities, the reasons why they left their countries of origin and that they are entitled to refugee status, failed to join issue with any of the factual averments G made in the applicants' affidavits. The third is an implied recognition that the existing system of dealing with refugees has fallen short, in that details were provided of short, medium and long-term policies and strategies with a view to dealing with 'the refugee problem' on a local as well as national level. H

[15] The following have been identified as constituting such policies and strategies:

(a) That, as it is recognised that the premises in which refugee reception centres are housed are not large enough to meet current requirements, the Department is engaged in efforts to extricate itself from existing lease agreements and is engaged in discussions I with the Department of Public Works to find alternative appropriate premises;

(b) as the Department is aware of the backlogs at the refugee reception centres throughout South Africa, it is developing a strategic plan of a general nature to transform refugee affairs in South Africa in terms J

of short, medium and long term objectives, with a view to transforming the Department into an 'efficient and caring A organ of state' and circumscribing the manner in which its officials are to fulfil their constitutional and statutory obligations thereanent;

(c) in order to give effect to such plans:

(i) an immigration turnaround task team was created during 2004 in B order to deal with specific issues concerning immigration and refugee affairs and resulted in the establishment of a national immigration board on 12 April 2005;

(ii) refugee affairs was, during 2004, upgraded to a directorate, the post advertised, candidates short-listed and interviewed, and an appointment about to be made; C

(iii) with a view to improving service delivery, the information-technology systems in the department were being improved by the establishment of link-ups between the computers in the different refugee reception centres and the bringing into use of computers donated by the United Nations High Commissioner for Refugees; D

(iv) an investigation with a view to providing the department with a proposed organisational programme for refugee affairs was commissioned and a draft report produced during February 2005; E

(v) as no standard operating procedures existed nationally, the compilation of such a document was commissioned and finalised in February 2005;

(vi) the deputy director-general: national immigration branch, during February 2005 made unannounced visits to refugee reception F offices, including Cape Town, during which he 'was able to verify some of the complaints made by the applicants and other asylum seekers' and the 'challenges' facing the officials working at such centres. As a result, it was directed that 70 contract posts be created nationally, 14 whereof were allocated to the refugee reception offices in Cape Town for the purpose of, inter alia, the proper management of G queues. The persons who have been appointed to those posts have been undergoing training and ten of them were to assume duty as refugee status determination officers on 30 May 2005.

[16] Mr Frazer in his founding affidavit attributed the ever-escalating backlog of asylum-seeker applications at refugee H reception centres to a global phenomenon, as well as an inability to predict the magnitude of the exodus of citizens from their countries of origin which has increased exponentially each year and his department's limited capacity to deal therewith. Although the gloomy picture sketched in his founding affidavit was that the backlog in the I processing of asylum-seeker permits, extensions thereof, as well as status determinations in terms of s 24 as at January 2005 had grown to 34 042, in a supplementary affidavit, jurat 30 May 2005 - introduced without any demur on the part of the applicants' counsel - on the basis of alleged significant progress and changes in the operational systems of the department since he had J

deposed to his founding affidavit, he adopted a significantly more optimistic tone. The changes and progress alluded to by him are A the following:

(a) Pursuant to meetings held with Mr Fred Johnson of the department of public works during May 2005, agreement has been reached to expand the office space of the refugee reception office in Cape Town; B

(b) since the inception, on 23 April 2005, of an overtime project in the Cape Town refugee office, 129 interviews have been held with asylum seekers on Saturdays, despite the fact that a number of them had not turned up for interviews. This is proclaimed by Mr Frazer as 'a remarkable improvement' and a demonstration of his C department's commitment to improve its operational systems to process applications by asylum seekers more expeditiously; and

(c) that, during April and May 2005, respectively, 420 and 314 asylum seekers were interviewed and issued with asylum seeker permits. D

[17] Mr Frazer, on the basis of the aforegoing, submitted that the steps taken by his department to alleviate the delays in the processing and issuing of permits 'are being institutionalised and thus becoming a permanent feature of the respondents' operational capacity'. Presumably, carried away by his own nebulous grandiloquence, he contended that the relief sought by the applicants was unjustified and should be dismissed. E

[18] The applicants sought to introduce as evidentiary material the report of the Public Protector of the Republic of South Africa into certain allegations that the Braamfontein refugee reception office (now the Rosettenville premises) applied practices whereby refugees were F denied access to the building in which it was located and thereby denied access to the asylum system and procedures as required by international and South African law. As the allegations that formed the factual basis for that report have not been placed before this Court in an acceptable evidentiary manner, it will be disregarded in arriving at a decision herein, despite the fact that the complaint with which it G dealt appears to be in pari materia.

[19] The respondents, in turn, referred to an application brought by the Pretoria Law Clinic on behalf of the Somali Refugee Forum and Another against the Minister of Home Affairs and Others in the Transvaal Provincial Division, on 23 February 2005, for relief H 'not dissimilar' to that requested by the applicants, in which an order had been granted by agreement, in terms whereof the respondents therein had to file, by 30 April 2005, a uniform policy and procedure with the Court, showing ways in which the respondents intended giving effect over the short, medium and long I term to the provisions of ss 21, 22 and 23 of the Immigration Act, as well as regs 2 and 4 promulgated thereunder. That Court postponed the application pending compliance with the order made by it. The stance adopted by the respondents in their opposing affidavit in the instant matter was that, as the relief sought was substantially similar to that sought in those proceedings, it had to be J

postponed until that Court has made an order. The applicants resisted that proposal and A adopted the attitude that the instant application needs to be decided on its own facts. The respondents' counsel, in their heads of argument, as well as in argument before this Court, did not persist with the request that the matter be postponed, but asked that the application be dismissed and that the respondents be ordered to pay B the applicants' costs up to the stage when the respondents' answering affidavits were filed, alternatively, that an order be made 'endorsing' para 5 of the order made by the Transvaal Provincial Division which provides for an appropriate modus operandi to be followed by the respondents at the refugee reception offices in C Cape Town. I accept that the reference should have been to para 5 of the document annexed to the respondents' counsel's heads of argument marked B and styled 'plan for facilitating reception of asylum seekers at refugee reception offices'.

[20] The applicants' counsel, in turn, persisted with the relief sought in the notice of motion. D

[21] As the applicants are seeking relief by means of notice of motion that is final in form, the approach to be followed where there are disputes of fact is that the relief claimed may, as a general rule, be granted only if the facts averred in the applicants' papers and admitted by the respondents, together with the facts alleged by the respondents, justify such an order. Where, however, denials do not E raise real, genuine or bona fide disputes of fact and, in the absence of an application in terms of Rule 6(5)(g), a Court is satisfied as regards an applicant's inherent credibility, it may proceed on the basis that the denied facts are correct, and include them among the facts to be used in determining whether the relief sought should be granted or not (see Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 635C). F The respondents did not specifically admit or deny the applicants' factual averments. The closest it came to placing any averments in issue was to have recorded that their failure to have done so should not be construed as an admission of their identities, nationalities and the reasons why they left their countries of origin or that they G qualify for refugee status in terms of s 24 of the Refugees Act.

[22] The gravamen of the applicants' complaint is that the respondents have failed to provide them and other similarly circumstanced individuals with a proper opportunity to submit applications for asylum and refugee status. That complaint is H articulated as follows in the founding affidavit:

'The practice and procedure they [the respondents] have adopted for dealing with newly arrived asylum-seekers is unreasonable in the extreme and is unlawful. It is also inefficient.' I

(Record para 31.) And:

'The practice adopted, as well as the policy apparently adopted as described in the affidavit of the seventh applicant, breaches both the duties of the respondents' servants in terms of ss 21 and 22 of the Refugees Act and is inconsistent with the provisions of ss 9, 10, 12 and 33 of the Constitution. It also violates international law.' J

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(Record para 32.) A

[23] The practice and policy to which the applicants are alluding is that a predetermined number of applications for asylum are accepted, extension of asylum seeker permits granted and status determinations at the Cape Town refugee reception offices considered every day. That such a policy is, in fact, in place is supported by, B firstly, first applicant's statement to the effect that his attorney was advised by an official in the Department's employ, namely, a Mrs Kolia, that a policy decision had been taken in terms whereof only 20 new arrivals were seen every day - a statement which has not been denied; and, secondly, the following statement of Mr Frazer in para 16 of his answering affidavit: C

'In terms of present capacity, four of the six RR officers dealing with s 22 permits and extensions thereof, are required to process in total, 20 s 22 applications per day, the remaining two officers are required to process in total 12 s 22 extensions per day. The three RR officers dealing with status determinations in terms of s 24 of the Act are required to process in total 32 status determinations per day.' D

[24] As, on my reading of the provisions of s 21 of the Refugees Act, those factual averments in the applicants' affidavits that the respondents, in para 7 of Mr Frazer's answering affidavit, requested not to be construed as having been admitted by their failure to have admitted or denied them explicitly, do not constitute prerequisites for the acceptance and consideration of an application for asylum, the application, in my view, is capable of being considered and decided solely on the applicants' papers. E

[25] It is abundantly clear from the founding and supporting affidavits filed on behalf of the applicants that at least 16 refugees had individually, and on different occasions during the period mid-December 2004 to mid-April 2005 (except on 9 March 2005), F unsuccessfully attempted to gain access to the refugee reception offices in Cape Town for the purpose of making application for asylum seeker permits. The respondents were not in a position to refute those averments. The best they could do was to attribute the Department's inability to provide the required facilities to an inordinate influx of refugees into the Republic of South Africa, and G its lack of capacity to deal with the volume of applications expeditiously and efficiently. So dire and persistent has been the problem that the backlog of applications for asylum, extensions of asylum-seeker permits and the finalisation of status determinations has

increased from 4 864 in April 2000 to 34 042 in January 2005. This untenable situation was allowed to develop despite the fact that the H Republic of South Africa, in 1995, became a party to the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the 1969 Organisation of African Unity Convention Concerning the Specific Aspects of Refugee Problems in Africa and, furthermore, promulgated and brought into I operation, on 1 April 2000, the Refugees Act 130 of 1998 in order to give effect to the international legal instruments, principles and standards relating to refugees and to provide for the reception into South Africa of asylum seekers. In the light thereof it is somewhat surprising - I cannot put it more euphemistically - that the rudimentary remedial steps alluded to by Mr Frazer in his J

answering and supplementary affidavits were devised and/or implemented only as from 2005 and only after the A instant, as well as another, application for substantially similar relief had been launched. What is even more stupefying is that, in the face of backlogs of the stated magnitude, it has been resolved to introduce, as from 1 March 2005, an interview as part of applications for asylum, when it is not specifically required by s 21 B of the Refugee Act. Not only is the legality thereof justifiably questioned by the applicants but, as is to be expected, its introduction adversely affects the expeditiousness with which such applications are capable of being processed.

[26] The applicants, on the basis of the aforestated facts, contend that the practice and procedure adopted by the Department in C dealing with asylum seekers is not only inefficient, unlawful and unreasonable, but also in breach of its officials' duties and obligations under ss 21 and 22 of the Refugees Act and is furthermore inconsistent with the provisions of ss 9, 10, 12 and 33 of the Constitution. It is also alleged that it violates international law. As D prayer 2 of the notice of motion is limited to the invalidity and inconsistency of the said policy and practice with the stated sections of the Constitution, I shall similarly restrict the ambit of this judgment.

[27] As has already been stated, until an asylum-seeker permit E has been issued to a foreigner who has entered the Republic of South Africa in conflict with the provisions of s 9(4) of the Immigration Act, he or she is an illegal foreigner and subject to apprehension, detention and deportation in terms of ss 32, 33 and 34 of the Immigration Act. He or she may furthermore not be employed by anyone (s 38), may not be provided with training or instruction by any learning institution (s 39) and is, save for necessary humanitarian F assistance, severely restricted as regards a wide range of activities that human beings ordinarily participate in, and all persons are prohibited from aiding, abetting, assisting, enabling or in any manner helping him or her (s 42), under pain of criminal prosecution.

[28] The State, under international law, is obliged to respect G the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens (see Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of H Home Affairs and Others 2000 (1) SA 997 (C) at 1043I - 1044E). Until an asylum seeker obtains an asylum-seeker permit in terms of s 22 of the Refugees Act, he or she remains an illegal foreigner and, as such, subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which, self-evidently, impact I deleteriously upon or threaten to so impact upon, at least, his or her human dignity and the freedom and security of his or her person. In that context, the availability of adequate facilities to receive, expeditiously consider and issue asylum-seeker permits would not only be consistent with the State's obligations in terms of the J

international instruments to which it has become a party and the A legislation enacted by it in order to give effect thereto, but would also comply with the obligation under s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. Also, the provisions of s 195 of the Constitution, to the effect that the public administration must be governed by the democratic values and principles that are enshrined in the Constitution and, inter B alia, include the promotion of efficient, economical and effective use of resources (ss (1)(b)) and responsiveness to people's needs (ss (1)(e)), would be served thereby. The Department, by having failed since 2000 to introduce adequate and effective measures to address a gradually C worsening situation, is primarily and materially responsible for the lack of reasonably adequate facilities essential for an expeditious handling of applications for asylum-seeker permits. The delays caused by such lack of facilities have, in my view, undoubtedly resulted in the violation of the fundamental rights of asylum seekers under the Constitution and also under the Refugees Act. D

[29] It is, at least, implicit in the nature of the remedial steps already implemented or envisaged, as well as in Mr Frazer's responses to the applicants' averments, that the policies and practices of which the applicants complained and acknowledged by him are the result of a lamentable lack of capacity on the part of his E department to have taken steps efficiently to handle the volume of applications for asylum. Mr Frazer's explanations for such lack of capacity are no more than that. As far as compliance with the law is concerned, the State is required to lead by example (see Mohamed and Another v President of the Republic of South Africa and Others F (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) (2001 (7) BCLR 685) in para [68]), and administrative convenience is not acceptable as an excuse (see Singh v Canada (Minister of Employment and

Immigration) [1985] 14 CRR 13, especially the views of Wilson J at 57 which were referred to with approval by Mokgoro J and Sachs J in the minority judgment in Bel Porto School Governing Body and G Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) (2002 (9) BCLR 891) in para [170]). The Constitutional Court, in S v Jaipal 2005 (4) SA 581 (CC) (2005 (1) SACR 215; 2005 (5) BCLR 423) in para [56], has held that, as far as the upholding of the fundamental rights and other imperatives of the Constitution are H concerned, all those involved in the public administration must, despite a lack of adequate resources, purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances, and that 'responsible, careful and creative measures, borne (sic) out of consciousness of the values and requirements of our Constitution should go a long way to I avoid undesirable situations'.

[30] While it is gratifying to know that steps to remedy the undesirable situation as regards the receiving and processing of asylum-seeker permits have now been introduced - rather belatedly - it is clear from the facts that have been placed before this Court that the applicants were J

entitled to have approached it for relief in terms of prayer 2 of the notice of motion, A both in their own as well as in the public interest. As is apparent from the nine further supporting affidavits that have been filed, the situation had not been adequately addressed by 20 April 2005, the date on which those individuals deposed to their affidavits.

[31] In the circumstances, the applicants, in my view, are B entitled to an order in terms of prayer 2 of the notice of motion. This Court is, by s 172(1) of the Constitution, empowered to declare any law or conduct that is inconsistent with it invalid to the extent of its inconsistency. In the premises, an order is made declaring that the conduct of the respondents, by having introduced a policy and practice in the refugee reception office of the Western Cape in terms C whereof their officials are required to process only 20 asylum-seeker permits per day, is inconsistent with the fundamental rights of illegal foreigners as embodied in ss 10 and 12 of the Constitution.

[32] As far as the relief sought in prayer 4 (it should have been numbered 3) is concerned, it is common cause that the applicants D have already been provided with the required permits. As far as other illegal foreigners are concerned, their numbers and identities are not known (save for the deponents to the nine affidavits that were filed in support of the application) but they themselves have not sought relief of any kind. In the circumstances, any order made in terms of prayer 4 E would not only hold the risk of offending against the doctrine of separation of powers (cf South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883

(CC) (2001 (1) BCLR 77) in para [26]), but would furthermore be so vague as to be impossible of enforcement in the event of non-compliance. Courts, F understandably, are loath to make orders of that kind and I, accordingly, decline to do so. However, as the manner in which the Department discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings, but also fails to adhere to the values embodied in the Constitution, I incline to the view that the instant G case is an appropriate one for the granting of a structural interdict (see Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 1) 2003 (5) SA 518 (C) at 590F - I) under claim 6 of the notice of motion which is for further and alternative relief. The requirements to invoke that prayer for the making of an order not specifically claimed and were enumerated by Berman J in H Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) at 112D - E, in my view, are present. The purpose of the structured interdict that I intend making is to ensure that the manner in which the respondents receive and process applications for asylum in the future does not I offend against any of the State's obligations under international law and its obligations under the Constitution, as well as the legislation applicable to refugees. In my view, the only manner in which that objective could be achieved is to require the respondents to provide this Court with a report in the form of an affidavit by the Western Cape Chief Immigration Services Officer in the Department of Home J

Affairs by not later than 3 May 2006, in which the following aspects, to the extent that they apply to the Cape Town refugee A reception office, are dealt with:

[32.1] whether, and if so, the extent to which the reception procedures set out in para 5 of the document styled 'plan for facilitating reception of asylum seekers at refugee reception B offices' - annexure B to the respondents' counsels' heads of argument - have been implemented.

[32.2] The numbers of officials assigned to:

[32.2.1] the receiving of applications for asylum-seeker permits; C

[32.2.2] the extension of asylum-seeker permits already granted; and

[32.2.3] determining the status of fugitives to whom asylum-seeker permits have been issued.

[32.3] The days of the week on which such tasks are performed, the number of hours each official is obliged to work every D day and the hours during the day

that such officials are accessible (to the extent that such access is necessary for the discharge of their functions) to those requiring their services. If any official is not accessible for the performance of such tasks for the full duration of every workday, what is the justification therefor? E

[32.4] Whether provision has been made for the working of overtime by officials involved in the tasks in [32.2] above and, if so, the numbers and the duties of those involved therein; the days of the week on which overtime is worked by such or other officials; and the hours during which such services are rendered outside normal office F hours.

[32.5] The number, on a daily basis, of illegal foreigners who attend at the refugee reception offices in Cape Town for the purpose of applying for asylum-seeker permits.

[32.6] The total number of applications for asylum-seeker G permits the refugee reception office in Cape Town is capable of attending to and granting on a daily basis.

[32.7] Details of what the extent of the backlog was in respect of applications for asylum-seeker permits, extensions thereof and status determinations on 30 April 2005 and what such backlog, if any, was on 30 April 2006. H

[32.8] The progress, if any, that has been made with the availability of more suitable premises, as well as improvements, if any, in the information-technology facilities not only in the refugee reception offices in Cape Town but also the linkage of such facilities between the different centres in the Republic of South Africa. I

[32.9] Whether, and if so, the extent to which any such remedial steps that have already been introduced have resulted in an improvement in the speed and manner in which applications for asylum-seeker permits are being dealt with.

[32.10] Have any projections been made as regards anticipated J

increases in applications for asylum in the future, and have any strategies been put in place as regards budgeting for the A recruiting and training of additional staff if the projections show a need therefor?

[32.11] Details of how far each of the applicants' applications for refugee status has progressed. B

[33] The respondents must, prior to filing a copy of a report, deliver a copy thereof to the applicants' attorneys of record, and the applicants will be entitled to respond

thereto on oath, if so advised, by not later than 18 May 2006 and, in turn, must deliver a copy thereof to the respondents' attorneys of record. C

[34] The respondents are entitled to reply to such response by not later than 30 May 2006.

[35] In the premises the following orders are made:

(a) It is declared that the conduct of the respondents by having introduced a policy and practice in the D refugee reception centre of the Western Cape in terms whereof officials are required to process only 20 asylum-seeker permits per day, is inconsistent with the fundamental rights of illegal foreigners as are embodied in ss 10 and 12 of the Constitution.

(b) The respondents are directed to provide this Court, by not later than 3 May 2006, with a report in the form of E an affidavit by the Western Cape Chief Immigration Services Officer in the Department of Home Affairs in which the following aspects, to the extent that they apply to the Cape Town refugee reception office, are dealt with: F

(i) whether, and if so, the extent to which, the reception procedures set out in para 5 of the document styled 'plan for facilitating reception of asylum seekers at refugee reception offices' - annexure B to the respondents' counsels' heads of argument - have been implemented;

(ii) the number of officials assigned to: G

(aa) the receiving of applications for asylum-seeker permits;

(bb) the extension of asylum-seeker permits already granted; and

(cc) determining the status of fugitives to whom asylum-seeker permits have been issued.

(iii) The days of the week on which such tasks are H performed, the number of hours each official is obliged to work every day and the hours during the day that such officials are accessible (to the extent that such access is necessary for the discharge of their functions) to those requiring their services. If any official is not accessible for the performance of such tasks for the full duration of I every workday, what is the justification therefor?

(iv) Whether provision has been made for the working of overtime by officials involved in the tasks in [32.2] above and, if so, the number and the duties of those involved therein, the days of the week on which overtime is worked by such or J

other officials and the hours during which such services are rendered outside normal office hours. A

(v) The number, on a daily basis, of illegal foreigners who attend at the refugee reception offices in Cape Town for the purpose of applying for asylum-seeker permits.

(vi) The total number of applications for asylum-seeker permits B the refugee reception office in Cape Town is capable of attending to and granting on a daily basis.

(vii) Details of what the extent of the backlog was in respect of applications for asylum-seeker permits, extensions thereof and status determinations on 30 April 2005 and what such backlog, if any, there was on 30 April 2006. C

(viii) The progress, if any, that has been made with the availability of more suitable premises, as well as improvements, if any, in the information technology facilities, not only in the refugee reception offices in Cape Town, but also the linkage of such facilities between the different centres in the Republic of South Africa. D

(ix) Whether, and if so, the extent to which, any such remedial steps that have already been introduced have resulted in an improvement in the speed and manner in which applications for asylum-seeker permits are being dealt with. E

(x) Have any projections been made as regards anticipated increases in applications for asylum and have any strategies been put in place as regards budgeting for, the recruiting and training of additional staff if the projections show a need therefor? F

(xi) Details of how far each of the applicants' applications for refugee status has progressed.

(c) Respondents prior to filing a copy of their report are directed to deliver a copy thereof to the applicants' attorneys of record, and the applicants may respond thereto on oath, if so advised, by not later than 18 May 2006 and must deliver a copy thereof to the respondents' attorneys of record. G

(d) The respondents will be entitled to reply to such response by not later than 30 May 2006.

(e) The application, to the extent that it relates to the relief sought in prayer 4 of the notice of motion, is postponed to 8 June 2006 for the purpose of considering the report and any H responses thereto and to consider the further conduct of the matter, including costs, in the light thereof.

(f) As the applicants have been substantially successful in respect the relief claimed in prayer 2 of the notice of motion, in my view, they are entitled to be awarded their costs up to the date of the handing down of this judgment, on a party-and-party basis, as I against the respondents jointly and severally, the one paying the other to be absolved.

Applicants' Counsel instructed by: Legal Resources Centre, Cape Town. Respondents' Attorney: State Attorney, Cape Town.