**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 107/17

In the matter between:

**CISHAHAYO SAIDI AND 28 OTHERS** First to Twenty-Ninth Applicants

and

**MINISTER OF HOME AFFAIRS** First Respondent

**DIRECTOR GENERAL,**
**DEPARTMENT OF HOME AFFAIRS** Second Respondent

**MANAGER, CAPE TOWN REFUGEE FACILITY** Third Respondent

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| **Neutral citation:** | *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9 |
| **Coram:** | Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ |
| **Judgments:** | Madlanga J (majority): [1] to [48]<br>Jafta J (dissenting): [49] to [87] |
| **Heard on:** | 21 November 2017 |
| **Decided on:** | 24 April 2018 |

## ORDER

On appeal and cross-appeal from the Supreme Court of Appeal (hearing an appeal and cross-appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:

1. Leave to appeal and cross-appeal is granted.
2. The appeal is upheld.
3. The cross-appeal is dismissed.
4. The orders of the Supreme Court of Appeal and High Court are set aside and substituted with the following:

   "It is declared as follows:

   (a) A Refugee Reception Officer does have the power to extend the permit provided for in section 22(1) of the Refugees Act 130 of 1998 (permit) pending finalisation of proceedings for the judicial review, in terms of the Promotion of Administrative Justice Act 3 of 2000, of a decision made in terms of the Refugees Act refusing an application for asylum made in terms of section 21(1) of the Refugees Act.

   (b) Pending finalisation of the review proceedings referred to in (a), a Refugee Reception Officer is obliged to issue or extend the permit of the asylum seeker concerned.

   (c) The permit must be issued or extended in accordance with the provisions of the Refugees Act and Regulations made in terms of section 38 of that Act."
5. The respondents must pay the applicants' costs, including the costs of two counsel, in this Court, the Supreme Court of Appeal and High Court.

## JUDGMENT

MADLANGA J (Zondo ACJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J, Theron J, and Zondi AJ concurring):

[1] Does a Refugee Reception Officer[1] (RRO) have the power to extend a temporary asylum permit pending the outcome of a review – in terms of the Promotion of Administrative Justice Act[2] (PAJA) – of a decision of a Refugee Status Determination Officer[3] (RSDO) rejecting an application for asylum, including the PAJA review of decisions on internal reviews and appeals? That is the principal question that must be answered in this matter.

*Background*

[2] The applicants whom I will also refer to as asylum seekers are foreign nationals seeking refugee status in South Africa. They lodged applications for refugee status with the Cape Town RRO. Pursuant to the provisions of section 22(1) of the Refugees Act, they each received an asylum seeker permit. This is a temporary permit that entitles an asylum seeker to lawfully reside in the Republic for the duration of the application process. It took a while for the asylum seekers' applications to be finalised. As a result, their temporary permits – which had each been issued for a specific period – expired and the applicants sought and obtained extensions[4] from the RRO a few times as they awaited the outcome of their applications.

[1] A Refugee Reception Officer is an administrative official whose position is created in terms of section 8(2) of the Refugees Act 130 of 1998.

[2] 3 of 2000.

[3] This too is an administrative official whose position is created in terms of section 8(2) of the Refugees Act. The RSDO decides applications in terms of section 24(3) of this Act.

[4] I use the terms "extension" "renewal" and "re-issue" interchangeably throughout this judgment.

[3] All the applications were rejected by the RSDO in terms of section 24(3) of the Refugees Act. Subsequent internal reviews or internal appeals respectively lodged in terms of sections 25 and 26 of the Refugees Act were unsuccessful. The asylum seekers instituted review proceedings in terms of PAJA challenging the rejection of their applications.

[4] A practice had developed in terms of which – upon being furnished with documentation showing that an unsuccessful asylum seeker had lodged a PAJA review – the Cape Town RRO extended the temporary permit automatically. This practice was instituted to avoid the launching of urgent applications for interim relief in the High Court, the object of which would be to retain the status quo pending judicial review. The practice also averted incurring legal costs unnecessarily. After an acting manager of the Cape Town Refugee Facility had assumed duties, she did away with this practice. This was before the applicants lodged their PAJA reviews. She refused to extend any of the applicants' permits. She took the view that, after the exhaustion of internal remedies, an RRO had no power to extend a temporary permit and that the permit could only be extended by means of a High Court order. Incidentally, her predecessor had, in so many words, assured the applicants' attorneys that the applicants' permits would be extended pending judicial review.

[5] The applicants brought an urgent High Court application against a number of respondents.[5] Of those, only the Minister of Home Affairs, the Director-General, Department of Home Affairs and the Acting Manager, Cape Town Refugee Facility participated in the application before us. The applicants were asking that the Acting Manager be compelled to renew their permits until finalisation of the PAJA review. The matter was argued on the basis that the Acting Manager was the RRO. The respondents resisted the application on the basis that the RRO lacks the power to extend after internal remedies have been exhausted. The High Court held that section 22(3) of

[5] The respondents before the High Court were the Minister of Home Affairs, the Director General, Department of Home Affairs, the Acting Manager, Cape Town Refugee Facility, the Standing Committee for Refugee Affairs, Mr K Sloth-Nielson, NO (Chairperson of the Standing Committee for Refugee Affairs), the Refugee Appeal Board and Mr M Chipu N.O. (Chairperson of the Refugee Appeal Board).

the Refugees Act does empower an RRO to extend a permit pending judicial review. However, the extension was not automatic, but subject to the exercise of discretion by the RRO.[6] It further held that – because of her view on the legal position – the RRO had not exercised her discretion and that, therefore, the question of the extensions had to be left for decision by her. It remitted the matter to her to decide whether to extend the applicants' permits.

[6] The respondents appealed to the Supreme Court of Appeal, persisting in the argument that the RRO lacked power to extend temporary permits pending judicial review. The applicants cross-appealed against the remittal contending that – once judicial review proceedings have been lodged – extensions are automatic and that, therefore, the High Court ought to have compelled the RRO to extend the permits. The Supreme Court of Appeal largely upheld the High Court's approach.

[7] The applicants now seek leave to appeal from us. And the respondents are seeking leave to cross-appeal. Before dealing with the principal issue identified at the beginning, I will first consider the questions of jurisdiction and leave to appeal.

*Jurisdiction and leave to appeal*

[8] The applications for leave to appeal and cross-appeal relate to the same issues. What I discuss applies to both.

[9] This matter concerns the interpretation of part of the Refugees Act. As will soon become apparent, this point of law is arguable.[7] In addition, it is manifestly of general public importance.[8] Also, a few constitutional rights are implicated, namely the right of access to court, the right to just administrative action, the right to life, and the right to freedom and security of the person. We have jurisdiction.

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[6] *Saidi v Minister of Home Affairs* [2015] ZAWCHC 201 (High Court judgment) at para 20.

[7] On the test, see *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 20-4.

[8] Id at paras 25-7.

[10] The issues raised by the application are novel and of great import. There are reasonable prospects of success. It is thus in the interests of justice that leave be granted.

[11] I now proceed to deal with the principal issue. I will do so under the following two headings:

(a) Is there a power to extend a permit pending judicial review?
(b) If there is, is the renewal automatic or, must the RRO exercise a discretion whether to extend?

*Power to extend pending judicial review*

[12] Section 22(1) of the Refugees Act reads:

> "The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit."[9]

[13] Temporary permits issued in terms of this section are critical for asylum seekers. They do not only afford asylum seekers the right to sojourn in the Republic lawfully and protect them from deportation but also entitle them to seek employment and access educational and health care facilities lawfully.

[14] It seems to me that, on a proper interpretation of the section, the permit may be issued once and remain valid until the outcome of the application. That is so because section 22(1) authorises the issuing of a permit pending the outcome of an application for refugee status in terms of section 21(1). But section 22(3) does envisage the issuing

[9] Section 21(1), which is referred to in the quotation, reads:

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

of permits for specified periods extendable periodically.[10] Regulation 7(1)(b) of the Regulations made under section 38 of the Refugees Act, unlike this section which appears to be permissive, requires that temporary permits be issued for specified periods extendable repeatedly until the applications have been decided.[11]

[15] It is not in dispute that RROs issue permits for periods of three to six months. Each time the asylum seeker must attend the Refugee Reception Office to have the permit renewed before it expires. In practice, asylum seekers are required to attend on the date of expiry. It is on these visits that decisions on the status of applications for refugee status are communicated.

[16] Section 22(3) deals with permit extensions and provides:

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

The parties are in agreement that subsections (1) and (3) of section 22 must be read together with the effect that the word "may" in section 22(3) does not grant the RRO any discretion over the issuing of permits. They interpret "may" to grant the RRO the power to extend permits, coupled with an obligation to exercise it; that is an obligation to extend the permit pending the outcome of an application for refugee status.

[17] In some instances this Court has adopted this approach in interpreting "may". At issue in *Van Rooyen*[12] was the meaning of "may" in section 13(3)(*a*A) of the Magistrates Act.[13] The question was whether – since the section provided that the Minister of Justice "may" confirm a recommendation by the Magistrates Commission

[10] I quote this section at [16].

[11] Of course, the provisions of the Regulations have no bearing on the interpretative exercise.

[12] *Van Rooyen v The State (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).

[13] 90 of 1993.

that a magistrate be suspended – the Minister could exercise a discretion not to suspend the magistrate. Answering the question in the negative, Chaskalson CJ held:

> "As far as the Act is concerned, if 'may' in section 13(3)(*a*A) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. . . .
>
> In my view this is the constitutional construction to be given to section 13(3)(*a*A). On this construction, the procedure prescribed by section 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence."[14]

[18] Based on this, I agree with the parties' interpretation. This interpretation better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of: enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference.

[19] Where the parties differ is in the interpretation of "outcome" in section 22(1). To recapitulate, in terms of section 22(1) an RRO "must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit . . . allowing the applicant to sojourn in the Republic temporarily". The operative word is "outcome". Is this a reference only to an outcome in terms of the process provided for in the Refugees Act, including internal reviews and internal appeals? Or, does "outcome" also include the final outcome of judicial review? As indicated, the respondents contend for the first interpretation. The applicants press for the latter.

[14] *Van Rooyen* above n 12 at paras 181-2. See also *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) at para 73 and *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); 2007 (5) BLLR 383 (CC) (*SAPS*) at para 15.

[20] The applicants submit that the natural reading of "outcome of an application" is the final determination; meaning there is no longer an opportunity to reach a different decision. A PAJA review is intended to alter the outcome reached administratively in terms of the Refugees Act. There can be no final determination of an application until the end of a judicial review process. The applicants conclude by arguing that "outcome" in section 22(1) must, therefore, include PAJA review.

[21] This is plausible.

[22] The respondents contend that the "application" referred to in that part of section 22(1) that says "pending the outcome of an application in terms of section 21(1)" is the application for refugee status made to an RRO. "Outcome" is the final internal administrative outcome in terms of the Refugees Act. The respondents then summarise the process leading to this outcome. It is: the lodgement of an application with the RRO in terms of section 21(1); a decision by the RSDO in terms of section 24(3); a review by a Standing Committee in terms of section 25; and an appeal to an Appeal Board in terms of section 26.

[23] The respondents contend that the application referred to in section 21(1) is not an application for judicial review. An application for judicial review is made in terms of PAJA pursuant to the provisions of section 33 of the Constitution. The Constitution and PAJA afford an applicant a right extraneous to the Refugees Act. Therefore, a PAJA review cannot be said to be "an application in terms of section 21(1)". Likewise, the outcome of a PAJA review cannot be said to be the outcome of an application in terms of section 21(1).

[24] The respondents also place reliance on the provisions of section 21(4) of the Refugees Act. This section provides:

> "Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if—

> (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
>
> (b) such person has been granted asylum."

[25] The respondents argue that the words "rights of review or appeal in terms of Chapter 4" are a clear reference to internal reviews and appeals as it is these internal processes that are pursued in terms of Chapter 4, and not PAJA reviews. The argument continues: the import of the section is that, once internal reviews and appeals have been exhausted and an applicant has not succeeded, an asylum seeker may be prosecuted for unlawful entry; and it does not make sense for the Refugees Act to allow for this but simultaneously require that a permit be extended beyond this point. Without doubt, this is so potent an argument that it has the effect of making the respondents' interpretation also plausible.

[26] What then does "outcome" mean? What must carry the day is a meaning that better accords with the purposes of the Refugees Act[15] and is more consonant with the constitutional rights of asylum seekers.[16]

[27] This Court has repeatedly emphasised that courts must adopt a purposive reading of statutory provisions.[17] One of the purposes of the Refugees Act is to "give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees".[18] At the heart of international refugee

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[15] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*) at para 51.

[16] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 87-9.

[17] See, for example, *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 21 and *Goedgelegen* above n 15 at para 53.

[18] The long title of the Refugees Act provides:

> "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."

law is the principle of *non-refoulement* (non-return). This is not about non-return for the sake of it; it is about not returning asylum seekers to the very ills – recognised as bases for seeking asylum[19] – that were the reason for their escape from their countries of origin. This principle is captured in section 2 of the Refugees Act, which provides:

> "*Notwithstanding any provision of this Act or any other law to the contrary*, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—
>
> (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
>
> (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country." (Emphasis added.)

[28] Of importance, all other provisions of the Refugees Act are subordinated to those of section 2. That means section 2 takes precedence over section 21(4).

[29] The paramount importance of protecting genuine refugees from expulsion is highlighted in the introduction of the Refugee Convention, which says:

> "The principle of *non-refoulement* is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("*refouler*") a refugee against his or her will, *in any manner whatsoever*, to a territory where he or she fears threats to life or freedom."[20] (Emphasis added.)

[19] For these, see paragraphs (a) and (b) of section 2 of the Refugees Act which I quote shortly.

[20] Convention Relating to the Status of Refugees, 28 July 1951 at 3.

This Convention has particular significance. Section 6(1)(a) of the Refugees Act provides that "[t]his Act must be interpreted and applied with due regard to . . . the Convention Relating to the Status of Refugees".

[30] The respondents' interpretation exposes asylum seekers to the real risk of *refoulement* in the interim whilst the outcome of judicial review is pending. Without a temporary permit, there is no protection. This runs counter the very principle of *non-refoulement* and the provisions of section 2 of the Refugees Act. It is cold comfort to say – between the exhaustion of internal remedies and the outcome of judicial review – an asylum seeker may seek and obtain interim protection by means of an urgent application to court. Litigation being what it is, there is no guarantee that the approach to court will succeed; the urgent application may be dismissed on a technicality or any other legally cognisable basis. That would then expose the asylum seeker to the risk of return. What then of the notion of *non-refoulement* against one's will "in any manner whatsoever"? South Africa may be saying it is not opposed to its administrative refusal of an asylum seeker's application being challenged by way of judicial review. But it will be making it possible for *refoulement* to take place in the interim. That is a breach of the principle of *non-refoulement*.

[31] What must we make of the respondents' section 21(4) argument? Crucially, the applicants' interpretation accords with international law. Section 233 of the Constitution provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[32] In a separate concurrence to a unanimous judgment of the European Court of Human Rights in *Hirsi Jamaa* Judge Pinto de Albuquerque emphasises the fact that *non-refoulement* is a principle of international law. He says:

> "[T]he prohibition of *refoulement is a principle of customary international law*, binding on all States, even those not parties to the United Nations Convention relating to the Status of Refugees or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted."[21] (Emphasis added.)

[33] He also says:

> "When there is a risk of serious harm as a result of foreign aggression, internal armed conflict, extrajudicial death, forced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, or trial based on a retroactive penal law or on evidence gathered by torture or inhuman and degrading treatment in the receiving State, the obligation of *non-refoulement* is an absolute obligation of all States."[22]

[34] The respondents' interpretation exposes an asylum seeker whose application has been administratively turned down, but who is desirous of seeking, or has launched, a judicial review, to all the risks set out in the preceding quote. That, when a judicial review may eventually establish that the asylum seeker was, in fact, entitled to be recognised as a refugee. This is absurd, especially in the light of another point made by Judge Pinto de Albuquerque that "[a] person does not become a refugee because of recognition, but is recognised because he or she is a refugee".[23]

[35] To illustrate a little more on the absurdity, an asylum seeker would be immune from prosecution while pursuing an internal appeal or review. This immunity would end as soon as this internal process is finalised. She or he would not have immunity pending a PAJA review. However, upon completion of the PAJA review, with the court deciding that the applicant ought to have been granted asylum, the immunity would kick in again. An unfortunate, ominous game of "ping pong". As indicated, according to

[21] *Hirsi Jamaa v Italy* [GC], no. 27765/09, ECHR 2012 at 64.

[22] Id at 63-4.

[23] Id at 63.

the respondents, to avoid arrest during the intervening period an asylum seeker must apply to court for interim relief pending judicial review. Experience has shown that, for any number of reasons, some time may elapse between the date of the administrative decision and taking it to court for judicial review. During that intervening period an asylum seeker would be at risk.

[36] This Court has noted on numerous occasions that text is not everything.[24] Unless there is no other tenable meaning, words in a statute are not given their ordinary grammatical meaning if, to do so, would lead to absurdity.[25] Here there is another tenable meaning.

[37] With all this in mind, only one thing commends the respondents' section 21(4) argument. It accords with a textual reading of the section, something I have concluded does not assist the respondents. It is at odds with international law imperatives. It seems to me then that, despite the provisions of section 21(4), the principle of *non-refoulement* has an overarching effect that, at the very least, endures until judicial review proceedings have been finalised or it has become plain that none will be instituted.[26] With that overarching prohibition on *refoulement*, it must follow that there is a continued entitlement to a temporary permit which, not only "allow[s] the applicant to sojourn in the Republic temporarily",[27] but is documentary proof to state officials that this is the position. That, in turn, must mean the RRO does have the power to issue this permit pending finalisation of a judicial review.

[24] See *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* [2017] ZACC 3; 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC) at paras 32-4; *Democratic Alliance v Speaker, National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at paras 19-28; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18; *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28; and *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at para 105.

[25] Compare *Cool Ideas* id.

[26] For example, that may be after the 180-day period stipulated by section 7 of PAJA as the period within which to bring a review has elapsed.

[27] Section 22(1) of the Refugees Act.

[38] To the extent that it may still be necessary to say more on this, in line with the injunction in section 39(2) of the Constitution, we must interpret "outcome" in a manner that better protects rights in the Bill of Rights. In *Makate* Jafta J elucidates this thus:

> "If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in *Fraser*:
>
> > 'Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.'"[28]

[39] Sachs J cautions in *SAPS*:

> "Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution."[29]

[40] Constitutional rights that may potentially be infringed if the respondents' interpretation were to be upheld include, in the first place, the right to life, the right to human dignity, the right to freedom and security of the person, the right of access to courts and the right to just administrative action. The right of access to court could be infringed if – out of fear of deportation – an asylum seeker were to go into hiding and not prosecute a judicial review. This would, in turn, deny her or him an opportunity to exercise the right to just administrative action. The denial of these rights is equally true even where the asylum seeker does not go into hiding, but gets deported. It might not be practical to institute and prosecute review proceedings from outside the Republic.

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[28] *Makate* above n 16 at para 87. The full citation of *Fraser* that Jafta J quotes is *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC). See also *Goedgelegen* above n 15 at para 53 where Moseneke DCJ tells us that courts "must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees".

[29] *SAPS* above n 14 at para 20.

Most gravely, asylum seekers may be returned to a situation where they face persecution, often in the form of physical violence and death in violation of the right to freedom and security of the person[30] and the right to life.[31]

[41] Needless to say, the applicants' interpretation promotes the implicated rights contained in the Bill of Rights which I have just discussed. The respondents' imperils the enjoyment of those rights.

*Is the renewal subject to an exercise of discretion?*

[42] What I have held above relative to the existence of the power to renew pending judicial review does not leave much room for the exercise of a discretion before renewal. In particular, the imperatives of the principle of *non-refoulement* dictate that, until judicial review proceedings have been finalised, there must be a permit in place. Denying an RRO a discretion which she or he does not have before finalisation of the internal application process does not place the state in a disadvantageous position. To the extent that, for whatever legally acceptable reason, an asylum seeker should not have a permit, there may be a withdrawal by the Minister in terms of section 22(6) of the Refugees Act.

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[30] Section 12 of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

[31] Section 11 of the Constitution provides: "Everyone has the right to life."

[43] If I must say more, here are additional reasons why the RRO has to extend automatically. Section 22(6) carefully circumscribes the bases on which the Minister may cancel an existing permit. On the other hand, nothing in the Refugees Act delineates the circumstances under which an RRO may exercise a discretion not to renew. In my view, if the RRO did have a discretion under section 22(3), in some respects its exercise would be similar in effect to a cancellation by the Minister under section 22(6). Here is why. In terms of section 22(1) an asylum seeker is entitled to a permit until the outcome of her or his application. A refusal to extend pursuant to the exercise of discretion would have the effect of bringing that entitlement to an end before the outcome of the application for asylum. In some respects (for example, where the Minister cancels in terms of section 22(6)(a) before finalisation of the application for asylum on the basis that the asylum seeker has contravened the conditions endorsed on the permit), a cancellation by the Minister has a similar effect. Here is a problem that I have. As I have said, in the case of the Minister, section 22(6) clearly specifies the circumstances under which the Minister may effect cancellation. The RRO, on the other hand, is given *carte blanche*, the discretion presumably bounded only by legality and the obligation not to be found to have flouted the review grounds set out in section 6 of PAJA. That to me seems odd; why would the Minister's discretion be circumscribed, and the RRO's not? If anything, I would have expected the situation to be the reverse. To me, this is a pointer that – pending finalisation of judicial review – the RRO must extend a permit automatically.

[44] Also, if the RRO can refuse to extend based on similar grounds as those specified in section 22(6) in respect of the Minister, the question arises as to why the Refugees Act would confer similar powers on more than one functionary.

*Conclusion*

[45] In conclusion, the appeal must succeed with costs.

[46] I do not propose making a specific order for the issuing of extensions of the applicants' temporary permits. Instead, I propose making declaratory orders in accordance with what I have held. It is left to the applicants to again approach the RRO and for the RRO to act in accordance with this judgment and the declaratory orders.

*Condonation*

[47] The applicants have applied for condonation of the late filing of their affidavit in answer to the Minister's cross-appeal. The applicants' attorneys explain that they were alerted to the fact that this affidavit was not part of the record lodged with this Court by the respondents' attorneys. They say they have no idea how this came about, as that affidavit had previously been filed at Court. The respondents accept that this mishap did not cause them any prejudice. It is in the interests of justice that condonation be granted, and it is granted.

*Order*

[48] The following order is made:

1. Leave to appeal and cross-appeal is granted.
2. The appeal is upheld.
3. The cross-appeal is dismissed.
4. The orders of the Supreme Court of Appeal and High Court are set aside and substituted with the following:

   "It is declared as follows:

   (a) A Refugee Reception Officer does have the power to extend the permit provided for in section 22(1) of the Refugees Act 130 of 1998 (permit) pending finalisation of proceedings for the judicial review, in terms of the Promotion of Administrative Justice Act 3 of 2000, of a decision made in terms of the Refugees Act refusing an application for asylum made in terms of section 21(1) of the Refugees Act.

(b) Pending finalisation of the review proceedings referred to in (a), a Refugee Reception Officer is obliged to issue or extend the permit of the asylum seeker concerned.

(c) The permit must be issued or extended in accordance with the provisions of the Refugees Act and Regulations made in terms of section 38 of that Act."

5. The respondents must pay the applicants' costs, including the costs of two counsel, in this Court, the Supreme Court of Appeal and High Court.

JAFTA J (Kollapen AJ concurring):

[49] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (first judgment). While I agree with much of what it contains, I am unable to embrace its interpretation of section 22(3) of the Refugees Act. Consequently, I cannot support paragraph 4(b) of the proposed order.

[50] I agree with the High Court and the Supreme Court of Appeal that the relevant provision vests a Refugee Reception Officer (RRO) with a discretionary power to extend a temporary asylum permit, from time to time.[32] On this point the Supreme Court of Appeal held—

> "In my view, however, the present use of the word 'may' in section 22(3) falls into the category of a true discretion rather than the conferring of a power coupled with a duty to use it in a certain way. As I have said, it may be that factors such as criminal activity on the part of an asylum seeker have been established. In such circumstances, the RRO would not be obliged to extend the permit at all. The discretion whether to extend is accompanied by a discretion as to the date to which it is to be extended and the discretion whether to amend the conditions of the permit. All three are clearly beyond any power coupled with a duty."[33]

[32] High Court judgment above n 6 at para 10.

[33] *Minister of Home Affairs v Saidi* [2017] ZASCA 40; 2017 (4) SA 435 (SCA) at para 42.

[51] This conclusion was reached after consideration of decisions of this Court in *SAPS*[34] and *Van Rooyen*.[35]

[52] The first judgment holds that the relevant provision does not confer a discretion because it grants power coupled with an obligation to exercise it. Reliance is placed on *Van Rooyen* where it was stated:

> "As far as the Act is concerned, if 'may' in section 13(3)(*a*A) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. In that event the reference in section 13(3)(c) to a report on the reasons for the suspension would be construed as referring to the Commission's reasons for its decision."[36]

[53] This statement must be read in its proper context which is section 13(3) of the Magistrates Act.[37] The nature of the power conferred by a particular statutory provision may be determined with reference to the language of the provision. It is the context within which words are used which sheds light on their meaning. The fact that a particular word is given a specific meaning in one statute does not mean that the word must carry the same interpretation in every statute. The meaning to be ascribed to it depends on the sense in which the word was used. This is the context in which *Van Rooyen* must be understood.

[54] Section 13, with which this Court was concerned in *Van Rooyen*, provided:

[34] *SAPS* above n 14.

[35] *Van Rooyen* above n 12.

[36] Id at para 181.

[37] 90 of 1993.

"(3) (a) The Commission may provisionally suspend a magistrate from office pending an investigation by the Commission into such magistrates fitness to hold office.

(*a*A) The Minister may confirm such suspension if the Commission recommends that such magistrate be removed from office—

(i) on the ground of misconduct;

(ii) on account of continued ill-health; or

(iii) on account of incapacity to carry out the duties of his or her office efficiently.

(b) A magistrate so suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the Minister on the recommendation of the Commission.

(c) A report in which the suspension in terms of paragraph (*a*A) of a magistrate and the reason therefor are made known, shall be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(d) Parliament shall, within 30 days after the report referred to in paragraph (c) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

(e) After a resolution has been passed by Parliament as contemplated in paragraph (d), the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be.

(4) The Minister shall remove a magistrate from his or her office if Parliament passes a resolution recommending such removal on the ground of misconduct of the magistrate or on account of his or her continued ill-health or his or her incapacity to carry out his or her duties of office efficiently."

[55] What emerges from a consideration of the language of section 13 is that the suspension of a magistrate from office is initiated by the Commission, which may provisionally suspend him or her pending an investigation into his or her fitness to hold office. If the Commission, upon conclusion of the investigation, recommends that the magistrate concerned should be removed from office, the Minister of Justice may confirm the suspension which shall continue to operate pending the decision by Parliament. In terms of section 13(3)(c), a report and reasons for the Commission's decision to suspend must be tabled before Parliament within 14 days from the date of suspension. Parliament must, within 30 days from the date of tabling, pass a resolution to reinstate or remove the magistrate from office. The Minister must implement the resolution taken by Parliament by removing or reinstating the magistrate from office, as the case may be.

[56] It was against this scheme that this Court had to determine whether the words "the Minister may confirm such suspension" conferred on the Minister a discretion to confirm or not to confirm. With reference to section 13(3)(a), the Court concluded that the provision conferred power with an accompanying obligation to exercise it. The Court held, in the statement quoted in paragraph 52 above, that the Minister was granted the power to confirm a suspension which was conferred with a duty to table a report on the suspension before Parliament. In the circumstances, the discretion not to confirm and not to table would have been inconsistent with the clear language of section 13(3)(c) and would have deprived Parliament of the exercise of its powers to determine whether the suspension must be lifted or that the magistrate should be removed from office.

[57] The question whether the RRO here is obliged to rubber stamp every application for an extension depends on the language of section 22 of the Refugees Act. But before I examine this language, it is necessary to outline the relevant scheme.

[58] Officials in the Department of Home Affairs are obliged to permit entry into this country of any foreign national who desires to seek asylum.[38] Once an application for asylum is made, the RRO must issue a permit to the applicant which authorises him or her to remain in South Africa temporarily.[39] Although such permit is issued for a limited period, it ought to endure until the application for asylum is finalised. The Standing Committee may impose conditions on which the permit is issued. These conditions must be endorsed on the permit by the RRO.[40] Since the permit is issued for a fixed period of time, its duration may terminate before the application for asylum is determined. The RRO is empowered to extend the currency of the permit from time to time. And if the permit was subject to conditions, the RRO is authorised to amend them where necessary.[41] The Minister may withdraw a temporary permit at any time under certain specified conditions.[42]

[59] The application for asylum which entitles the applicant to a temporary permit must be made in person and submitted to the RRO who must forward it to the Refugee Status Determination Officer (RSDO) for decision.[43] In determining it the RSDO must conduct a formal hearing to which the applicant's administrative justice rights apply. Importantly, the RSDO must, before commencement of the hearing, ensure that the applicant understands the rights guaranteed by section 33 of the Constitution, the procedures to be followed at the hearing and the applicant's responsibilities relating to evidence to be produced at the hearing.[44] At the conclusion of such hearing, the RSDO may refer any question of law to the Standing Committee for resolution and clarification before the RSDO takes a decision on the outcome of the application.[45] But if the RSDO

[38] Section 2 of the Refugees Act.

[39] See section 22(1) of the Refugees Act.

[40] Id.

[41] Id section 22(3).

[42] Id section 22(6).

[43] Id section 21(1) and (2).

[44] Id section 24(2).

[45] Id section 24(3)(d).

is in a position to decide the matter, he or she may grant asylum or reject it.[46] If the application is unfounded; manifestly unfounded; abusive or fraudulent, the RSDO must refuse asylum.[47]

[60] If the applicant for asylum is unhappy with the decision of the RSDO, he or she may appeal to the Appeal Board. However, an appeal to the Board is limited to a decision made in terms of section 24(3)(c).[48] This happens where an application is rejected on the ground that it is unfounded. If the ground for rejection is that the application was manifestly unfounded, abusive or fraudulent, the RSDO's decision goes to the Standing Committee on automatic review.[49]

[61] It is now convenient to consider the relevant provisions of section 22. It reads:

> "(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.
>
> (2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991, becomes null and void, and must forthwith be returned to the Director-General for cancellation.
>
> (3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

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[46] Id section 24(3)(a) and (b).

[47] Id section 24(3)(b) & (c).

[48] Section 26(1) of the Refugees Act provides:

> "Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24(3)(c)."

[49] Section 25(1) of the of the Refugees Act provides:

> "The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b)."

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

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

(6) The Minister may at any time withdraw an asylum seeker permit if—

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

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

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

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

(7) Any person who fails to return a permit in accordance with subsection (2), or to comply with any condition set out in a permit issued in terms of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment."

[62] In order to determine whether the power vested in the RRO by section 22(3) is discretionary, we must examine the language of the provision which must be read in the context of the entire section. And the provision should be assigned a meaning that attains its purpose. Reminding us of this approach to interpretation of statutes in *Cool Ideas*, Majiedt AJ said:

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve

> their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[50]

[63] This means that we must construe section 22(3) in a manner that enables it to achieve its purpose. We can only do that if we are able to identify that purpose from its language. This subsection reads:

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

[64] A close reading of section 22(3) reveals that the provision has two objectives. First, it enables the RRO to extend the period for which a permit has been issued. The power to extend is open-ended, the RRO may exercise it on as many occasions as necessary. This is apparent from the phrase "from time to time extend the period". Implicit in this is that the RRO, on each occasion, must determine if any extension is necessary and for how long it must be granted. For the RRO to do this, he or she must apply his or her mind to the circumstances of a particular application for extension. It is these circumstances which will show if an extension is warranted and the period of the extension.

[65] If the extension were to be automatic, it would not be necessary for the RRO to consider and apply his or her mind to the motivation for extension. Consequently, the period of the extension would be artificially determined. A period of extension so determined would be irrational and for that reason unconstitutional. *Cool Ideas* reminds us that where it is reasonably possible, we should give a statutory provision a meaning that makes it constitutionally compliant.

[66] The second purpose of section 22(3) is to enable the RRO to amend the conditions imposed by the Standing Committee and which were incorporated into the

[50] *Cool Ideas* above n 24 at para 28.

permit. For an amendment to be effected there must be facts justifying it. The RRO must apply his or her mind to those facts and decide to amend only if he or she is convinced that an amendment is warranted and determine to what extent the conditions have to be amended. An interpretation that says an amendment is automatic would subvert the purpose of imposing conditions. It would mean that the applicant for asylum may change a condition he or she does not like, by simply lodging an application for amendment and dictating how the amendment should be effected.

[67] An interpretation that says the RRO is obliged to extend the duration of the permit or amend the conditions would effectively transfer the power to extend or amend from the RRO to the applicant. This is because the RRO would have no option but to rubber stamp what is placed before him or her by the applicant. This would defeat the purpose of attaching conditions to a permit. Such construction would be at odds with the principle of purposive interpretation. The repository of the power to extend a permit is the RRO and for good reason. The RRO is an official who possesses special qualifications, experience and knowledge of refugee matters which "makes [him or her] capable of performing these functions."[51]

[68] Our Constitution carefully divides and allocates powers to all arms of government. Where power, as here, has been conferred on the executive decision-makers because of their qualifications, experience and knowledge of the subject-matter, the role of a court on review is limited to the interpretation of the empowering provisions and determining whether public power has been exercised in accordance with the Constitution. This function must not result in rendering the

[51] Section 8(2) of the Refugees Act provides:

> "Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer who must—
>
> (a) be officers of the Department, designated by the Director General for a term of office determined by the Director General; and
>
> (b) have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions."

exercise of power nugatory. The other arms of government must be afforded space within which to exercise powers allocated to them.

[69] If legislation vests power in an official who holds special qualifications, a court may not readily adopt an interpretation that denies the official concerned of the right to exercise power in accordance with his or her expertise. Here, Parliament in its wisdom has given the power to extend the duration of a permit and amend conditions attached to a permit, to the RRO. An interpretation that reduces the RRO to a mere rubber stamper will be at odds with the scheme of section 22.

[70] It was within the authority of Parliament to identify the repository of the power and prescribe the qualifications he or she should hold to exercise that power. In *Bato Star* this Court cautioned:

> "[A] Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field."[52]

*Does "may" mean "must"?*

[71] This question may be answered with reference to the structure and language of section 22 as a whole. But the premise from which one departs must be the ordinary grammatical meaning as we are told by *Cool Ideas*. In the ordinary sense "may" does not mean "must". Nor is it its equivalent. This was made plain by Corbett JA in *Shwartz* in these terms:

> "A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. . . . As was pointed out in [*Noble of Barbour v South*

[52] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 48.

> *African Railways and Harbours* 1922 AD 572], this does not involve reading the word 'may' as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of permissive power also imports an obligation in certain circumstances to use the power."[53]

[72] This statement draws a distinction between the principle that a permissive power may at the same time impose an obligation and the proposition that the word "may" is capable of carrying the meaning of "must". A permissive power which imposes an obligation to act does not negate the existence of a discretion. Instead, it eliminates the option of deciding not to use the power. This means that if conditions for exercising the power are met, the repository is obliged to use it.

[73] Using the power in this sense does not imply that the decision-maker is denied the choice of outcome. All it means is that he or she must reach a decision. If there is a range of outcomes from which to choose, he or she must make the choice. In so doing, he or she would be exercising a discretion which he or she is under a duty to exercise. Therefore, the imposition of an obligation to use power does not, of itself, change the meaning of "may" to "must".

[74] The principle that a power conferred in permissive terms may impose a duty to act may neatly be applied to section 22(3). In the context of this provision, it would mean that once an application for the extension of a permit or amendment of conditions is made, the RRO is obliged to consider and make a decision, one way or the other. The obligation to act is limited to the determination of the application.

[75] Another consideration that militates against construing "may" in section 22(3) as meaning "must", flows from the structure and language of the entire section. To illustrate this point we must quote subsections (1) and (3) of section 22. They read:

[53] *Shwartz v Shwartz* 1984 (4) SA 467 (A); [1984] 4 All SA 645 at 473-4.

> "(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.
>
> . . .
>
> (3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued."

[76] It is apparent that, with regard to subsection (1), Parliament chose to use the word "must" to signify that the RRO has no discretion but to issue a temporary permit, once an application for asylum is made in terms of section 21(1) of the Act. By contrast, subsection (3) employs the word "may" in relation to the power granted to the RRO. This is a deliberate change in language which underscores a different sense. There is simply no basis for holding that the text of subsection (3) carries the non-discretionary meaning found in subsection (1).

[77] Moreover, the relevant principle is that a deliberate change of words indicates that a different intention is contemplated. In *Sisilane* Schreiner JA said:

> "It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to impart a change of intention. . . . That principle should operate particularly clearly where, as here, Parliament was dealing with two parts of a single provision and cannot be supposed to have lost sight of the one when dealing with the other."[54]

[78] This principle finds application in the present matter because the change in words occurs in one section. On its strength we are compelled to conclude that Parliament envisaged a situation that differed from the one in subsection (1). It will be recalled that this subsection imposes an obligation on the RRO to issue a permit if the conditions

[54] *R v Sisilane* 1959 (2) SA 448 (A); [1959] 2 All SA 519 (A) at 453.

for lodging an application for asylum are met. If Parliament wanted to place the RRO under an obligation to extend a permit automatically it could have used the same language. It could not have conferred a power instead of an obligation. To construe "may" as meaning "must" would have the effect of replacing the power in section 22(3) with an obligation.

*Section 39(2) of the Constitution*

[79] The question that arises in this regard is whether the interpretation tool introduced by section 39(2) justifies an interpretation that says section 22(3) does not confer a discretion but imposes an obligation to extend a permit or amend conditions, once an application is made. I think not. The principle of interpreting legislation in a manner that promotes the objects of the Bill of Rights is limited to where the language of a provision is reasonably capable of a construction that avoids limiting guaranteed rights. Language deliberately chosen by Parliament may not be distorted in order to advance guaranteed rights.

[80] In *SAPS* this Court defined the obligation of construing legislation consistently with section 39(2) in these terms:

> "Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution."[55]

*Discretion and purpose of section 22(3)*

[81] Does the existence of a discretion alone in the context of the section expose an asylum seeker to *refoulement*? I do not think so. The RRO is under a duty to exercise the discretionary power to achieve the purpose for which it was conferred. That power was granted to extend permits or amend conditions where there are valid reasons to do

[55] *SAPS* above n 14 at para 20.

so. If a good case is made out for an extension, the proper exercise of the discretion would be one that results in granting the extension. Our courts have defined discretionary power in these words:

> "Discretion means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion . . . according to law and not to humour. It is to be not arbitrary, vague and fanciful, but legal and regular."[56]

[82] If the RRO exercises the discretion properly, as he or she is enjoined to do, every deserving application for extension or amendment must be successful. But if the exercise is improper, the difficulty does not stem from section 22(3) but lies with the decision-making by the RRO. And a solution to it is a review application.

[83] We cannot approach the task of construing the section on the footing that the RRO would exercise the discretion improperly, and therefore preference should be given to a reading that excludes the exercise of a discretion. On the contrary, we must assume that given their expertise and experience, the RROs would exercise their discretion properly. A similar context arose in *SAPS* and there this Court stated:

> "It follows in my view that the interpretation of the regulation must be undertaken on the basis that if the Commissioner has a discretion, he will exercise it fairly and with due regard to all the relevant protection to which an incumbent is entitled in terms of the relevant legislation. We are required to determine whether the Commissioner has a discretion, on the assumption that, if he has a discretion, he will exercise it properly. The assumption that he would exercise the discretion improperly is an irresponsible and unjustifiable one. The improper exercise by the Commissioner of a discretion is subject to judicial control."[57]

[56] *Ismail v Durban City Council* 1973 (2) SA 362 (A); [1973] 2 All SA 307 (N) at 373-4. See also *Goldberg v Minster of Prisons* 1979 (1) SA 14 (A); [1979] 3 All SA 238 (AD).

[57] *SAPS* above n 14 at para 75.

[84] But even if an asylum seeker's application for an extension of a permit is declined, in circumstances where it should have succeeded, it does not follow from such refusal alone that he or she must be returned to the country where he or she would be persecuted or subjected to harm. Section 2 of the Refugees Act guarantees foreign nationals certain protections, which are consistent with the international law principle of *non-refoulment* in terms of which states are obliged not to deport a refugee to a country where he or she would be persecuted or face physical harm.[58]

[85] Section 2 does not only oblige South Africa to give entry into its territory to every refugee seeking asylum, but also forbids expulsion, extradition or return if the person concerned would be persecuted, lose freedom or be physically harmed as a result of such expulsion, extradition or return. This prohibition takes precedence over all other laws, including the Refugees Act itself. Moreover, the protections in section 2 do not depend on the existence of a permit or any other condition, except those stipulated in that section.

[86] Again, we must proceed from the premise that officials of the Department of Home Affairs would comply with section 2. For if they do not, their decisions would be susceptible to review to protect the rights of foreign nationals.

[87] For all these reasons I conclude that section 22(3) grants the RRO a discretionary power to do two things. These are to extend permits and to amend conditions attached to them. Therefore, I do not support the declaration that the RRO has no discretion and as a result he or she is obliged to extend every permit upon application.

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[58] Section 2 provides:

> "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—
>
> (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
>
> (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

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|---|---|
| For the Applicants: | M Bishop and P Mdakane instructed by the Legal Resources Centre. |
| For the Respondents: | MA Albertus SC and A Njeza instructed by the State Attorney. |