CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 136/12
[2013] ZACC 32

In the matter between:

MAIL AND GUARDIAN MEDIA LIMITED	First Applicant
INDEPENDENT NEWSPAPERS (PTY) LTD	Second Applicant
MEDIA 24 LIMITED	Third Applicant
and	
M J CHIPU N.O. (CHAIRPERSON OF THE REFUGEE APPEAL BOARD)	First Respondent
RADOVAN KREJCIR	Second Respondent
MINISTER OF HOME AFFAIRS	Third Respondent
and	
SOUTHERN AFRICA LITIGATION CENTRE	Amicus Curiae

Heard on : 14 May 2013

Decided on : 27 September 2013

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Froneman J, Jafta J, Khampepe J, Mhlantla AJ, Nkabinde J and Skweyiya J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order made by the North Gauteng High Court, Pretoria (High Court) on 6 December 2012. The applicants brought an application in the High Court against the respondents for various orders.[1] Those orders were sought on the basis that the Refugee Appeal Board (Appeal Board) had a discretion to allow access to its proceedings. In the event that the Court found that the Appeal Board had no discretion to allow access to its proceedings, the applicants sought in the alternative an order declaring that section 21(5) of the Refugees Act (Act)[2] was inconsistent with the right to freedom of expression in section 16 of the Constitution to the extent that it precluded the Appeal Board from allowing, in appropriate cases, members of the public or the media to attend and report on proceedings of the Appeal Board. The basis of the order declaring section 21(5) inconsistent with section 16 was that it constituted an unreasonable and unjustifiable limitation of the right to freedom of expression. The applicants also sought that certain words be read into section 21(5) of the Act so as to cure the alleged constitutional defect.

[2] The High Court, through Fabricius J, concluded that, although section 21(5) of the Act constituted a limitation of the right to freedom of expression, the limitation

[1] One of the orders they sought was an order reviewing and setting aside a decision of the Refugee Appeal Board refusing them access to the second respondent's asylum appeal hearing. That order had been sought on the basis that the Refugee Appeal Board had a discretion to allow such access to an appeal but that its refusal to allow the applicants access to that hearing was based on the erroneous view that it did not have a discretion.

[2] 130 of 1998.

was reasonable and justifiable as contemplated by section 36 of the Constitution. The Court inter alia made a declaratory order to that effect. It, accordingly, dismissed the application for an order declaring section 21(5) unconstitutional. This is the order against which the applicants seek leave to appeal.

The parties

[3] The first applicant is Mail and Guardian Media Limited which publishes the *Mail and Guardian* newspaper, a weekly national newspaper. The second applicant is Independent Newspapers (Pty) Ltd. It publishes various national and regional newspapers.[3] The third applicant is Media 24 Limited. It publishes several newspapers and magazines that are distributed throughout South Africa.[4]

[4] The first respondent is Mr M J Chipu, who is cited in his official capacity as chairperson of the Appeal Board. The Appeal Board's main function is to hear appeals from determinations made by the Refugee Status Determination Officer[5] (RSDO) in applications for asylum.[6] The second respondent is Mr Radovan Krejcir. The High Court application was aimed at securing the attendance of the applicants' journalists at Mr Krejcir's appeal hearing before the Appeal Board and reporting on it. The third respondent is the Minister of Home Affairs (Minister). She is responsible for the administration of the Act.

[3] Such as: *The Star, Saturday Star, Cape Times, Cape Argus, Pretoria News, The Mercury, Daily News* and others.

[4] Including: *Beeld, City Press, City Vision, Daily Sun, Die Burger, Mirror, Sunday Sun, The Witness* and others.

[5] A Refugee Status Determination Officer is an officer who is given power under the Act to determine applications for asylum at first instance. See section 24(1) to (3) of the Act.

[6] Section 26(1) and (2) of the Act.

[5] The Southern Africa Litigation Centre was admitted as amicus curiae (friend of the Court). It is a regional human rights non-governmental organisation that seeks to promote and advance human rights and the rule of law in Southern Africa through research, capacity-building, training and advocacy, and strategic litigation.[7] The amicus filed written submissions and presented oral argument.

Lawyers for Human Rights' application for admission as amicus curiae and for the admission of new evidence

[6] Lawyers for Human Rights (LHR) brought an application for admission as amicus curiae and for the admission of new evidence. It said that it only sought to be admitted as an amicus if the new evidence would be admitted. LHR's application for the admission of new evidence was made in terms of Rule 31 of the Rules of this Court,[8] alternatively Rule 30 of the Rules of this Court[9] read with section 22 of the Supreme Court Act.[10]

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[7] It was established by a Deed of Trust the objectives of which include: offering rapid-response support relating to human rights, constitutional and public interest cases; promoting awareness of human rights litigation; capacity-building; and stimulating advocacy for law reform, human rights and constitutionalism.

[8] Rule 31 reads:

> "**Documents lodged to canvass factual material**
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> (1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon

[7] Rule 30 incorporates the provisions of section 22 into the Rules of this Court. Section 22 reads as follows:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
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> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
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> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

In this judgment a reference to section 22 must be read as a reference to Rule 30 read with section 22.

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such facts to the extent necessary and appropriate for a proper decision by the Court."

[9] Rule 30 reads:

> "**Application of certain sections of the Supreme Court, 1959 (Act No. 59 of 1959)**
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> The following sections of the Supreme Court Act, 1959 (Act No. 59 of 1959), shall apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court.
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> | **Section** | **Subject** |
> |---|---|
> | 19*bis* | Reference of particular matters for investigation by referee |
> | 22 | Powers of court on hearing of appeals |
> | 32 | Examinations by interrogatories of persons whose evidence is required in civil cases |
> | 33 | Manner of dealing with commissions rogatoire, letters of request and documents for service originating from foreign countries: Provided that this provision shall apply subject to the replacement of English or Afrikaans with the phrase 'any official language'." |

[10] 59 of 1959. Section 22 is quoted in [7] below.

[8] In *Rail Commuters*[11] one of the requirements applied by this Court for the admission of new evidence under section 22 was that it must be "weighty and material and presumably to be believed".[12] It also applied the requirement that there must be a reasonably sufficient explanation as to why such evidence was not presented in the court of first instance.[13] In *Bel Porto*[14] this Court said that its power to accept further evidence should not be exercised "unless the circumstances are such that compelling reasons exist to do so."[15] It follows from this that, if the evidence sought to be adduced in this Court under section 22 is not weighty and material or if it is weighty and material but there are no compelling reasons for this Court to exercise its power in favour of admitting it, the application for the admission of the evidence should be dismissed.

[9] In terms of Rule 31 an amicus admitted to proceedings in this Court is entitled, in documents lodged with the Registrar of this Court, to canvass relevant factual material that does not appear on the record. However, the factual material must either be common cause or otherwise incontrovertible or must be of an official, scientific or statistical nature capable of easy verification.

[10] The new evidence that LHR seeks to place before this Court relates to—

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[11] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters*).

[12] Id at para 41.

[13] Id.

[14] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*).

[15] Id at para 119.

(a) how dependent asylum applicants are upon appeals before the Appeal Board for the ultimate fate of their asylum applications;

(b) the sensitive nature of asylum claims; this is based on, among others, the nature of persecution to which asylum seekers would have been subjected in their countries of origin;

(c) credibility assessments of asylum seekers; this deals with the fact that both at first instance level and at appeal level asylum applicants will not be able to produce any documentation to support their claims of persecutions and both the RSDOs and the Appeal Board have to assess their credibility themselves;

(d) how asylum applications are processed under the Act and how appeals are disposed of by the Appeal Board;

(e) various documents attached to Ms Ramjathan-Keogh's affidavit including reports all of which fall under one or other of the headings in (a) to (d) above. LHR seeks to furnish international and domestic statistics. Ms Ramjathan-Keogh, who is the Programme Manager of LHR's Refugee and Migrant Rights Programme and the deponent to LHR's founding affidavit, gives this country's rejection rate in regard to asylum applications at first instance which results in an increased

> backlog at appeal level. LHR seeks admission of this evidence in order to show how bad the decisions made by the RSDOs are.

[11] Whether LHR's application is considered under section 22 or Rule 31 the first question that arises is whether the new evidence is relevant.[16] Under section 22, another question will be whether the evidence is weighty and material. Yet another question under section 22 would be whether LHR has shown that there are compelling reasons for this Court to exercise its power in favour of admitting the new evidence and that there is an acceptable explanation why the evidence was not placed before the court of first instance. If the new evidence is found not to be relevant, LHR's application falls to be dismissed under both section 22 and Rule 31. The relevance of the new evidence must be assessed against the issues that we are called upon to determine.

[12] In this case the applicants and the respondents are agreed that in asylum applications and appeals to the Appeal Board there is a need for confidentiality. Where they differ is on whether or not the confidentiality should be absolute and invariable. In this regard the applicants contend that there is no justification for the confidentiality to be absolute and that the Appeal Board should have a discretion to relax the requirement of confidentiality in appropriate cases. The respondents contend that absolute confidentiality is required to maintain the integrity of the asylum system and to protect asylum applicants and their families and friends against possible threats

[16] Although section 22 does not expressly refer to the requirement of relevance, it is necessarily implied that any new evidence would need to be relevant before it could be admitted.

or danger to their safety and lives. As is explained later, the issue between the parties translates into an inquiry whether section 21(5) is a reasonable and justifiable limitation of the right to freedom of expression. I now turn to consider whether the evidence is relevant. This makes it necessary to go back to the headings under which the new evidence falls as set out above.[17]

[13] The evidence referred to in paragraph 10(a) above is about how dependent asylum applicants are upon appeals before the Appeal Board for the ultimate fate of their asylum applications and appeals. LHR says that the decisions of RSDOs are mostly bad. This evidence says nothing about why there should be no exceptions to the requirement of confidentiality which is the issue between the parties. Therefore, I am of the view that the evidence under paragraph 10(a) is irrelevant and should, accordingly, not be admitted both under section 22 and under Rule 31.

[14] The evidence to which reference is made in 10(b) is evidence relating to the sensitive nature of asylum claims. This relates to the nature of persecutions to which asylum seekers would have been subjected in their countries of origin. One does not need any evidence to accept that asylum seekers are driven to applying for asylum because they have been subjected to all kinds of persecutions in their countries of origin, including assault, unlawful detention or imprisonment, the persecution of members of their families, colleagues and friends. That a person has been subjected to persecution or threats of persecution follows from the very fact of being a bona fide

[17] See [10] above at (a)-(e).

asylum seeker. This new evidence referred to in 10(b) does not relate to the issue between the parties. Accordingly, it is irrelevant and should also not be admitted.

[15] The evidence referred to in 10(c) above relates to the credibility assessment of asylum seekers. Evidence under this heading is also irrelevant to the issue before us. The evidence under 10(d) above relates to how asylum applications are processed and decided under the Act. This evidence is irrelevant because it tells us what we can read for ourselves in the Act.

[16] LHR also filed three confirmatory affidavits deposed to by certain refugees. The deponents to those affidavits say that they confirm what is stated in Ms Ramjathan-Keogh's affidavit in so far as it relates to them but a reading of her affidavit does not reveal any reference to their personal experiences in the asylum system. Accordingly, the confirmatory affidavits are of no use, irrelevant and cannot be admitted.

[17] The conclusions reached above in respect of the evidence falling under paragraph 10(a) to (d)[18] mean that all of the new evidence LHR seeks to have admitted in these proceedings is irrelevant. On this ground alone, LHR's application for the admission of new evidence must be dismissed. Under section 22, even if the new evidence or part of it were to be said to be relevant, the application would still be dismissed on the basis that it is not weighty and material.

[18] Although there is no self-standing discussion of paragraph 10(e), the reports and documents to which reference is made in that paragraph fall under one or other of paragraphs 10(a) to (d).

[18] Under section 22 LHR was also required to show that compelling reasons exist why the new evidence should be admitted in this Court when it had not been introduced in the High Court.[19] The main explanation given by LHR was that it made a strategic decision not to introduce this new evidence in the High Court because of scarce resources or due to costs. This explanation is unacceptable and cannot be said to constitute a compelling reason for the admission of the new evidence. For this reason, too, LHR's application should be dismissed in so far as it was brought under section 22.

[19] The applicants contended that the new evidence could not be admitted under Rule 31 because, in order to be admitted under this Rule, it was required to be undisputed or to be of a statistical, scientific or official nature capable of easy verification. They argued that to the extent that some of the evidence that LHR sought to be admitted is of a statistical nature, it cannot be admitted under Rule 31 because it is irrelevant to the issue we are called upon to determine.

[20] As to the other evidence, Mr Dario Milo, the applicants' attorney, deposed to an affidavit. He said that Ms Ramjathan-Keogh's affidavit in this case to the effect that there should be absolute confidentiality in asylum applications as well in proceedings before the Appeal Board was in conflict with her affidavit in another matter in the High Court. Mr Milo attached a copy of that affidavit to his affidavit. Accordingly,

[19] See *Bel Porto* above n 14 at para 119.

the applicants contended that the evidence that LHR sought to have admitted was disputed and could not, therefore, be admitted under Rule 31. I agree. On this ground, too, LHR's application for the admission of new evidence stands to be dismissed.

[21] In the light of the dismissal of LHR's application for the admission of new evidence, its application for admission as amicus also falls to be dismissed.

Background

[22] South Africa is a party to the—

(a) 1949 Geneva Conventions;

(b) 1951 Convention relating to the Status of Refugees (1951 Refugee Convention);

(c) 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention);

(d) 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; and

(e) 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984 Torture Convention).

[23] South Africa has enacted the Implementation of the Geneva Conventions Act[20] in order to ensure the implementation of the Geneva Conventions. The 1984 Torture Convention incorporates the so-called *aut dedere aut judicare* principle which means "extradite or prosecute". It requires signatories to this Convention to either extradite perpetrators of torture and cruel, inhuman or degrading treatment or prosecute them. A state which subscribes to the Convention must either prosecute a person accused of certain specified crimes itself or extradite such a person to a country that will prosecute him.[21] This means that, should such perpetrators enter South Africa, the relevant authorities are obliged to either prosecute them or extradite them. South Africa may not give them refugee status.[22]

[24] South Africa is also a party to the Rome Statute of the International Criminal Court (Rome Statute). It ratified the Rome Statute in 2000. In 2002 it passed the Implementation of the Rome Statute of the International Criminal Court Act[23] for the purpose of the implementation of the Rome Statute.[24] The preamble to the Rome

[20] 8 of 2012.

[21] The principle of *aut dedere aut judicare* is also found in other conventions such as the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the 1977 European Convention on the Suppression of Terrorism; and other treaties.

[22] See section 4(1)(a) of the Act.

[23] 27 of 2002.

[24] Section 3(d) and (e) of the Implementation of the Rome Statue of the International Criminal Court Act reads as follows:

> "(d) to enable, as far as possible and in accordance with the principle of complementarity as referred to in Article 1 of the Statute, the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances; and
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> (e) in the event of the national prosecuting authority declining or being unable to prosecute a person as contemplated in paragraph (d), to enable the Republic to

Statute reflects in part that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

[25] Article 1(F)(a) of the 1951 Refugee Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes".

Both the 1951 Refugee Convention and the 1969 OAU Convention recognise classes of persons who are not eligible for refugee status.

[26] The Act was enacted pursuant to South Africa's assumption of certain obligations in terms of the 1951 Refugee Convention, its 1967 Protocol Relating to the Status of Refugees, the 1969 OAU Convention as well as other human rights instruments. These obligations included the obligation to receive refugees in its territory and to treat them in accordance with the standards and principles established in international law. The purpose of the Act is to give effect—

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cooperate with the Court in the investigation and prosecution of persons accused of having committed crimes or offences referred to in the Statute, and in particular to—

(i) enable the Court to make requests for assistance;

(ii) provide mechanisms for the surrender to the Court of persons accused of having committed a crime referred to in the Statute;

(iii) enable the Court to sit in the Republic; and

(iv) enforce any sentence imposed or order made by the Court."

"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."[25]

[27] Section 2 of the Act contains a general prohibition against the refusal of entry into South Africa, expulsion from South Africa or extradition of any person 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."

[28] Section 3 of the Act lays down the qualifications for refugee status. It reads:

"Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

[25] See the purpose of the Act.

(c) is a dependant of a person contemplated in paragraph (a) or (b)."

[29] Section 4 of the Act lays down four categories of persons who do not qualify for refugee status for the purposes of the Act. It reads:

> "(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—
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> (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
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> (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or
>
> (c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or
>
> (d) enjoys the protection of any other country in which he or she has taken residence."

[30] A literal reading of section 4(1)(b) is that an applicant for asylum who has committed a non-political crime which, if committed in South Africa, would be punishable by imprisonment is disqualified from refugee status. However, it may well be that section 4(1)(b) should not be read literally and rigidly. Section 4(1)(b) seeks to give effect to, among others, the 1951 Refugee Convention. A reading of part of the United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status[26] (UNHCR Handbook) dealing with the provisions of the 1951 Refugee Convention reveals that the relevant provision of the Convention should not be read rigidly and that there are

[26] First published in 1979, re-edited in 1992 and re-issued in 2011.

circumstances in which a person who has committed a non-political crime may, nevertheless, qualify for refugee status.[27]

[31] Under the Act a person who wants to obtain refugee status is required to attend in person at the Refugee Reception Office (Reception Office) where he or she must apply for that status.[28] At the Reception Office an asylum seeker will be attended to by a reception officer. The reception officer has the power to conduct an inquiry in order to verify the information furnished in the application.[29] The Reception Officer is required to forward the application to an RSDO who has the power to make a decision on that application.[30] An RSDO is required to grant asylum or reject the application as manifestly unfounded,[31] abusive[32] or fraudulent[33] or reject the

[27] Id paragraphs 156-7 read as follows:

> "In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.
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> In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates."

[28] Section 21(1) of the Act.

[29] Id section 21(2)(c).

[30] Id section 21(2)(d).

[31] In section 1 of the Act a manifestly unfounded application is defined as meaning "an application for asylum made on grounds other than those on which such an application may be made under this Act".

[32] An abusive application is defined in section 1 of the Act as meaning:

> "[A]n application for asylum made—
>
> (a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or

application as unfounded or refer any question of law to the Standing Committee established in terms of section 9 of the Act.[34] An RSDO may request any information or clarification from an applicant or the Refugee Reception Office.[35] He or she may also, where necessary, consult with and invite a UNHCR representative to furnish information on specified matters.[36] With the permission of the asylum seeker, an RSDO may also provide the UNHCR representative with such information as the latter may request.[37]

The Standing Committee

[32] Section 9 of the Act makes provision for a Standing Committee. It is composed of a chairperson and "such number of other members as the Minister may determine, having regard to the likely volume of work to be performed by the Committee."[38] Its members are appointed by the Minister with due regard to their experience, qualifications, expertise and their ability to perform the functions laid down in the Act for the Committee. Its powers and duties include:

(a) formulating and implementing procedures for the granting of asylum;

(b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin".

[33] A fraudulent application for asylum is defined in section 1 as meaning "an application for asylum based without reasonable cause on facts, information, documents or representations which the applicant knows to be false and which facts, information, documents or representations are intended to materially affect the outcome of the application".

[34] Section 24(3)(a) to (d) of the Act.

[35] Id section 24(1)(a).

[36] Id section 24(1)(b).

[37] Id section 24(1)(c).

[38] Id section 10(1).

(b) regulating and supervising the work of the Refugee Reception Offices;

(c) liaising with representatives of the UNHCR or any non-governmental organisation;

(d) reviewing decisions by RSDOs in respect of manifestly unfounded applications;

(e) deciding any matter of law referred to it by an RSDO; and

(f) monitoring the decisions of the RSDOs.[39]

The Refugee Appeal Board

[33] An appeal against a decision of an RSDO lies with the Appeal Board.[40] The Appeal Board is composed of a chairperson and at least two other members appointed by the Minister with due regard to their suitability to serve as members of the Appeal Board by virtue of their experience, qualifications, expertise and capability to perform the functions of the Appeal Board properly.[41] At least one member of the Appeal Board is required to be legally qualified.[42] A member of the Appeal Board must be a South African citizen.[43] In terms of section 14(1) of the Act its powers and duties are to—

"(a) hear and determine any question of law referred to it in terms of this Act;

(b) hear and determine any appeal lodged in terms of this Act;

[39] Id section 11.

[40] Id section 26(1).

[41] Id section 13(1).

[42] Id section 13(2).

[43] Id section 13(3)(a).

> (c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Appeal Board."

In terms of section 14(2) the Appeal Board may determine its own practice and make its own rules. In terms of section 14(3), rules made under section 14(2) must be published in the Gazette.

[34] Mr Krejcir is a Czech national. It seems that at some stage he was in Seychelles because it was from Seychelles that he came to South Africa in 2007. He was granted a temporary asylum-seeker's permit in terms of section 22(1) of the Act.[44] Mr Krejcir applied for asylum but this was refused. He then appealed to the Appeal Board against that decision.

[35] In 2008 the government of the Czech Republic instituted extradition proceedings against Mr Krejcir in the Kempton Park Magistrate's Court. The Magistrate's Court refused to extradite Mr Krejcir. In September 2010 the South Gauteng High Court, Johannesburg set the decision of the Kempton Park Magistrate's Court aside on the basis that the Magistrate who dealt with the matter had prejudged it. The High Court ordered that the extradition application be heard afresh. It is not clear whether that hearing has taken place.

[44] Section 22(1) of the Act provides:

> "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."

[36] According to the applicants, various allegations have appeared in the media concerning Mr Krejcir. They include that he—

(a) obtained his asylum seeker permit fraudulently;

(b) was involved in a "cash-swap" deal with a Mr Lolly Jackson who is now deceased;

(c) was involved in a scheme in which imported cars were used to smuggle cash into the country;

(d) was connected to the murder of one Frantisek Mrazek, allegedly an organised crime figure in the Czech Republic;

(e) is heavily involved in organised crime in the Czech Republic;

(f) has bribed members of the police to interfere with the investigation of the Hawks;[45]

(g) admitted in his bail hearing that he had been convicted of fraud and sentenced to six years' imprisonment in the Czech Republic;

(h) obtained a false passport;

(i) was involved in certain murders; and

(j) was arrested on charges of insurance fraud.

[37] After Mr Krejcir had appealed to the Appeal Board, the applicants requested the Appeal Board to allow their journalists to attend his appeal hearing and report thereon. The Appeal Board refused the request and indicated that the proceedings were confidential. Subsequently, the applicants' attorneys also sent letters to the Appeal

[45] South Africa's Directorate for Priority Crime Investigation is commonly known as the Hawks, established in compliance with section 17C of the South African Police Service Act 68 of 1995.

Board in further attempts to persuade it to grant the request but the Appeal Board was not prepared to change its decision.

High Court

[38] The applicants approached the High Court for various orders which, as I have already indicated, the High Court refused to grant. As I have also said above, one of the orders that the High Court refused to make was an order declaring section 21(5) unconstitutional. It held that, although section 21(5) constituted a limitation of the right to freedom of expression, it was a reasonable and justifiable limitation of that right.

Leave to appeal

[39] If granted leave to appeal, the applicants seek to attack the conclusion of the High Court that section 21(5) is a reasonable and justifiable limitation of the right to freedom of expression.

[40] This Court has jurisdiction to entertain this matter because it is a constitutional matter, namely, whether section 21(5) constitutes a reasonable and justifiable limitation of the right to freedom of expression. This issue is one of importance upon which a decision of this Court is desirable. Furthermore, the applicants have reasonable prospects of success. It is in the interests of justice that the applicants be granted leave to appeal to this Court.

Merits

[41] Section 16(1)(a) and (b) reads as follows:

> "(1) Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas".

As I explain later, the right to freedom of expression is a very important right in our democracy.

Limitation of the right

[42] Section 21(5) reads as follows:

> "The confidentiality of asylum applications and the information contained therein must be ensured at all times."

It is common cause that section 21(5) constitutes a limitation of the right to freedom of expression.

Issue

[43] What is in issue between the parties is whether the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" as required by section 36 of the Constitution. The applicants concede that as a general proposition, in applications for asylum, confidentiality is justified. They even go further and say that in most applications for asylum there is a need for confidentiality. Their quarrel with section 21(5) is that it does not admit of any exception to the requirement of confidentiality and the Appeal Board has no discretion

to relax this requirement under any circumstances. They contend that there will be cases where there is no justification for confidentiality because, for example, the information in the application is already in the public domain and the requirement of confidentiality serves no purpose. The amicus adopted the stance that, even though confidentiality is important, there are exceptions where confidentiality should be relaxed.

[44] The respondents contend that a statutory requirement that applications for asylum be treated with absolute confidentiality is necessary and fully justified. They argue that the media and members of the public should not have access to such an application nor should they be entitled to attend a hearing of an appeal concerning an asylum application before the Appeal Board.

[45] The result is that, on the one hand, the applicants contend for a position where the Appeal Board would have a discretion in an appropriate case to allow the public or the media access to a particular appeal hearing and asylum application. The respondents, on the other hand, contend for absolute confidentiality in such applications and appeal hearings before the Appeal Board with no exceptions to be made under any circumstances. It is necessary to enquire into whether or not section 21(5) is a reasonable and justifiable limitation of the right to freedom of expression. If section 21(5) is a reasonable and justifiable limitation, it is constitutional and the appeal falls to be dismissed. However, if section 21(5) is not a

reasonable and justifiable limitation, it is unconstitutional and the appeal would be upheld.

Is section 21(5) a reasonable and justifiable limitation of the right to freedom of expression?

[46] In seeking to determine whether section 21(5) is a reasonable and justifiable limitation of the right to freedom of expression, we are required by section 36 of the Constitution to take into account all relevant factors including—

> "(a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[47] These factors should not be considered as a checklist. In *Manamela*[46] this Court said:

> "It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due

[46] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) (*Manamela*).

> regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[47] (Footnote omitted.)

[48] In *National Coalition (1998)*[48] this Court had the following to say about the inquiry into the reasonableness and justifiability of a limitation of a right entrenched in the Bill of Rights:

> "The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose."[49] (Footnote omitted.)

I now proceed to the justification analysis.

Nature and importance of the right

[49] The right which section 21(5) limits is the right to freedom of expression, particularly freedom of the press and other media and freedom to receive or impart information or ideas. The right is not confined to the press and other media. Members of the public also have the right to receive and impart information or ideas.

[47] Id at para 32.

[48] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition (1998)*).

[49] Id at para 35.

This Court has dealt with the nature and importance of the right to freedom of expression in a number of cases. In *Phillips*[50] this Court, through Yacoob J, said:

> "The right to freedom of expression is integral to democracy, to human development and to human life itself. It must be all the more zealously guarded because the infringement of this right was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans."[51]

[50] Counsel for the applicants correctly submitted that a key purpose of the right is to enable the public to form and express opinions on a wide range of matters. In this regard he relied upon the decision of this Court in *SABC*[52] where this Court said:

> "Freedom of expression is another of the fundamental rights entrenched in Chapter 2 of the Constitution. This Court has frequently emphasised that freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."[53] (Footnotes omitted.)

In *SANDF*[54] this Court said that "[f]reedom of expression lies at the heart of a democracy."[55]

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[50] *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) (*Phillips*).

[51] Id at para 23.

[52] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (*SABC*).

[53] Id at para 23.

[54] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (*SANDF*).

[55] Id at para 7 footnote omitted.

[51] The terms in which this Court has described the right to freedom of expression show how vitally important the right to freedom of expression is to a democracy. Indeed, if there is no right to freedom of expression, certain rights are weakened.[56]

[52] The applicants correctly submit that the media plays a key role in society and is not only protected by the right to freedom of expression but is also a key facilitator and guarantor of the right. In *Khumalo and Others v Holomisa*[57] this Court said "[t]he print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society."[58] A little later in the same case this Court pointed out that "the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require."[59] The Court went on to say:

> "In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility."[60]

[56] Those rights include the right to freedom of religion, belief and opinion contained in section 15, the right to assemble, demonstrate, picket and petition contained in section 17 and the right to freedom of association contained in section 18 of the Constitution. If the right to freedom of expression is respected, promoted and strengthened, those rights, too, are strengthened.

[57] [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC).

[58] Id at para 22.

[59] Id at para 23 footnote omitted.

[60] Id at para 24.

[53] Counsel for the applicants also relied upon the principle of "open justice". In *SABC* Langa CJ *et al* said that the principle that underlies the right to a trial in public, which is part of the right to a fair trial may aptly be called a principle of "open justice".[61] They went on to say immediately thereafter:

> "This principle does promote the accountability of courts and the administration of justice. It has traditionally been understood to mean that court hearings must be open to members of the public who wish to observe them and to journalists who wish to report upon them. Traditionally the principle has never been absolute. Trials and parts of trials may be, and often are, held behind closed doors to protect the privacy or security of witnesses."[62]

The respondents do not take issue with any of the above. However, it must be borne in mind that the principle of "open justice" is normally applied to courts.

The importance of the purpose of the limitation

[54] It is common cause that the purpose of section 21(5) is to—

(a) protect the integrity of the asylum process;

(b) encourage applicants for asylum to disclose information truthfully in the knowledge that only those who officially need to deal with asylum applications will have access to the applications and the information contained therein; and

(c) protect asylum applicants and their families and friends in their countries of origin from possible dangers or threats to their lives and

[61] *SABC* above n 52 at para 50.

[62] Id.

> safety that could arise if the fact of the application for asylum and the information contained therein were disclosed.

[55] People who qualify for asylum status flee their countries of origin mostly because of political, religious or cultural persecution. Usually, the governments or entities responsible for the persecution would not hesitate to pursue such people to wherever they can find them. They would also persecute their families and friends back home when they cannot find their targets. Accordingly, those people live in constant fear of being found out by the governments of their countries of origin or their agents. This is not only before they may be granted refugee status but also for a long time thereafter. Therefore, their and their families' and friends' protection is of vital importance. From this it must be accepted that an asylum system which does not provide for any confidentiality whatsoever is highly unlikely to be effective. Many people who qualify as refugees would naturally be disinclined to expose themselves to the serious risks inherent in such a system. The purpose of section 21(5) is vitally important.

[56] The applicants have made it clear that the information that they seek in Mr Krejcir's asylum application and the appeal hearing before the Appeal Board is not of a personal nature and they will respect whatever conditions the Appeal Board may attach to granting them access if it does grant access. They say that what they are interested in is possible nationwide and international criminal activity and corruption on Mr Krejcir's part. They point out that this is a matter which falls squarely within

the public domain. Accordingly, the applicants contend that there is little or no threat to Mr Krejcir's right to privacy. In effect the applicants' point is that section 21(5) cannot legitimately be used for the purpose of shielding those who may be involved in international crime and those who may be a threat to our society.

Nature and extent of the limitation

[57] The limitation contained in section 21(5) is of the nature of confidentiality. The confidentiality required by the section is absolute. The respondents seek to justify the requirement of absolute confidentiality in all asylum applications irrespective of the circumstances. Section 21(5) prohibits access to information in an asylum application even if the publication of that information will not disclose the identity of the applicant for asylum or his country of origin and even if the information is already in the public domain. It also prohibits the publication of information that could disqualify an applicant for asylum such as information that he committed or may have committed a crime against humanity in his country of origin. In this regard it is important to point out that a person who has committed a crime against humanity or who has committed a crime against peace is disqualified from getting refugee status[63] and yet the section 21(5) limitation is so wide that it even covers a person in the sense that, even after his application has been rejected on the grounds that he has committed a crime against peace or a crime against humanity, section 21(5) would still prohibit access to his asylum application. The question that arises is: what purpose does

[63] Section 4(1)(a) of the Act.

keeping that person's information confidential serve after his application has been rejected on such a basis?

The relation between the limitation and its purpose

[58] I have already discussed above the limitation contained in section 21(5) as well as its purpose and the importance thereof. It is not necessary to repeat that discussion. It suffices to say that, quite clearly, there is a relation between the limitation in section 21(5) and its purpose. The limitation serves the purpose of protecting the integrity of the asylum system and of providing asylum applicants with protection against disclosure of the fact that they have applied for asylum and the information in their asylum applications.

Less restrictive means to achieve the purpose

[59] Section 36(1)(e) of the Constitution[64] requires that, before a limitation of a right entrenched in the Bill of Rights can be said to be reasonable and justifiable, a court is required to consider whether there is a less restrictive way in which that right may be limited. I, therefore, now turn to that inquiry. The question which arises is this: how is the purpose of the limitation achieved in the case, for example, of a person who, after arriving in South Africa, discloses publicly, maybe in a press conference, the reasons why he fled his country of origin and other information that is relevant to the asylum application? If the applicants in the present case wanted their journalists to attend the asylum appeal hearing of that person before the Appeal Board, why should

[64] Any further reference to section 36 in this judgment is a reference to section 36 of the Constitution.

section 21(5) preclude the applicants' journalists from attending that person's hearing and reporting on it? In such a case there is no purpose served by the limitation and the limitation cannot be justified. In its judgment the High Court did not deal with this scenario nor did the respondents do so in their written submissions despite the fact that in their written submissions the applicants had alluded to a case where the information is already in the public domain and, therefore, section 21(5) would not serve its purpose.

[60] I have referred above to section 4(1)(b) of the Act. In terms of that provision a person who "has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment" does not qualify for refugee status. However, I pointed out above that there may be cases where this disqualification might not be applied rigidly. The rationale for this disqualification is the protection of the citizens of the host country against common criminals who may abuse the refugee or asylum system of the country and seek refugee status or asylum when they do not deserve it.

[61] I have already above referred to a situation where an asylum applicant has committed a crime against humanity or a crime against peace. Both in terms of the international conventions to which South Africa is a party and in terms of the Act such a person does not qualify for refugee status. However, should he or she apply for refugee status under the Act and his application is rejected because of this reason, there is no logical reason why section 21(5) should require that there should be no

access to that person's asylum application. Therefore, in that case the limitation does not serve its purpose.

[62] In a discussion of the application of Article 1F of the 1951 Refugee Convention, to which section 4 of the Act seeks to give effect, the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses dated 4 September 2003 (2003 UNHCR Guidelines) reads as follows in relevant part:

> "The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied 'scrupulously' to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997."[65]

[63] The applicants contend that there is a less restrictive means by which the purpose of the limitation may be achieved than the one contained in section 21(5). They submit that the Appeal Board should be given a discretion to allow the media and the public access in appropriate cases on such conditions as the Appeal Board may impose and to refuse access in those cases in which it would not be appropriate to allow the public or media access to the information. The applicants submit that, if this were to be done, an appropriate balance would be struck between the protection of the legitimate interests of an applicant for asylum and an unjustifiable limitation of the

[65] At para 2.

right to freedom of expression. The respondents argue that only absolute confidentiality will ensure that the integrity of the asylum system is protected and that the lives and safety of asylum applicants, their families and friends are not jeopardised.

[64] The High Court took the view that conferring a discretion on the Appeal Board would not achieve the purpose of the limitation because absolute confidentiality gives asylum applicants certainty which a discretion cannot give them. It is true that section 21(5) gives asylum applicants certainty, and that, if the Appeal Board has a discretion to allow access in appropriate cases, that will not give them certainty. This is so because in exercising its discretion the Appeal Board would allow access in some cases and not allow it in others. However, what is required by section 36 is the achievement of proportionality. What the respondents do not address, which the High Court also did not address, is the applicants' contention that there are cases where it may be appropriate to allow access because, for example, the asylum applicant has already put certain information relevant to an asylum application in the public domain, in which case confidentiality does not serve its purpose.

The pronouncements of the UNHCR

[65] The second respondent's counsel submitted that the need for confidentiality in the context of refugee claims has been repeatedly and emphatically articulated by the UNHCR in a series of formal pronouncements. In this regard counsel quoted a few passages from UNHCR documents. For example, he quoted a passage from the

UNHCR Guidelines on International Protection: Gender-Related Persecution dated 7 May 2002 which reads as follows:

> "[Claimants of refugee status] require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared.
>
> . . .
>
> The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family."[66]

[66] Counsel for the second respondent also referred to a passage in the 2003 Guidelines where, dealing with exclusion clauses, the UNHCR said:

> "At all times the confidentiality of the asylum application should be respected. In exceptional circumstances, contact with the country of origin may be justified on national security grounds, but even then the existence of the asylum application should not be disclosed."[67]

The UNHCR also said:

> "It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed."[68]

[66] At paras 35-36.

[67] 2003 UNHCR Guidelines at para 33.

[68] UNHCR Handbook at para 200.

[67] Counsel for the second respondent also referred to an advisory opinion given to the Japanese Government on 31 March 2005 by the UNHCR Representative in Japan (UNHCR Advisory Opinion). In that advisory opinion it was, inter alia, said:

> "The right to privacy and its confidentiality requirements are especially important for an asylum-seeker, whose claim inherently supposes a fear of persecution by the authorities of the country of origin and whose situation can be jeopardized if protection of information is not ensured. It would be against the spirit of the [1951 Refugee Convention] to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin until a final rejection of the asylum claim.
>
> Bearing these concerns in mind, the State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim. This applies regardless of whether the country of origin is considered by the authorities of asylum as a "safe country of origin", or whether the asylum claim is considered to be based on economic motives. Likewise, the authorities of the country of asylum may not weigh the risks involved in sharing of confidential information with the country of origin, and conclude that it will not result in human rights violations."[69]

[68] Counsel for the second respondent submitted that it is clear from the pronouncements of the UNHCR that a strict confidentiality regime for asylum seekers is integral to a refugee system. He submitted that there is no suggestion in any of the UNHCR pronouncements that a discretion can or should be built into the requirement of confidentiality.

[69] UNHCR Advisory Opinion on the Rules of Confidentiality regarding Asylum Information, 31 March 2005 at paras 4-5.

[69] I am not satisfied that one can take the pronouncements of the UNHCR as far as counsel for the second respondent would have this Court take them. I think that these pronouncements should be taken as general propositions. They certainly do not appear to have been intended to say that there can be no disclosure of any information whatsoever under any circumstances. In one of the passages quoted above from the Guidelines, it is stated that "[i]n exceptional circumstances, contact with the country of origin may be justified on national security grounds".[70] The last passage quoted above includes a statement that "[i]t would be against the spirit of the [1951 Refugee Convention] to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin *until a final rejection of the asylum claim*."[71] (Emphasis added.)

[70] The above means that, according to the UNHCR Advisory Opinion upon which the second respondent so heavily relies, in certain limited circumstances it is acceptable if the information is shared with the authorities of the country of origin after the rejection of the asylum claim. Section 21(5) does not even make that exception. Furthermore, there is no indication that the UNHCR was dealing with the issue within the context of a limitation of the right to freedom of expression that constitutes a blanket ban on the information which is what we are dealing with in the present case. Therefore, it must not be assumed that, if the UNHCR dealt with the issue in the same context as we have to in this case, it necessarily would have concluded that absolute confidentiality is required without any exception.

[70] 2003 UNHCR Guidelines at para 33.

[71] See the second sentence in the passage quoted in [67] above.

[71] Counsel for the second respondent also submitted that, to the extent that the applicants concede that in the majority of cases confidentiality is justified, that may mean that it is in very few cases that confidentiality will not be justifiable. He referred to the following passage in *Mamabolo*:[72]

> "In the present context, it is unnecessary to engage in an exhaustive limitation analysis. The category of cases where the existence of the crime of scandalising the court still poses a limitation on the freedom of expression is now so narrow, and the kind of language and/or conduct to which it will apply will have to be so serious, that the balance of reasonable justification clearly tilts in favour of the limitation. Furthermore, there are very weighty considerations underlying the retention of the particular sanction, more specifically there is a vital public interest in maintaining the integrity of the Judiciary, an essential strut supporting the rule of law. Weighing the importance of that interest against the minimal degree of limitation involved, the scale once again favours saving the sanction."[73]

Although it is probably true that there will be fewer cases in which confidentiality cannot be justified than those in which it can be justified, I do not think that they will be so few that absolute confidentiality as required by section 21(5) can be said to be a justifiable limitation of the right to freedom of expression.

Is absolute confidentiality the international norm?

[72] The respondents' written submissions suggest that absolute confidentiality is the international norm or practice. Counsel for the applicants disputed this and contended that some countries give the relevant authority dealing with such

[72] *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*).

[73] Id at para 48.

applications a discretion to allow access in certain circumstances. Counsel for the respondents did not give a list of countries in which absolute confidentiality is the norm or practice. However, counsel for the applicants referred to Australia, Canada, New Zealand, USA and Ireland as countries where the relevant authority has some form of discretion to allow access to asylum applications. To those five countries can be added Kenya, Zambia, Lesotho, Botswana and Germany, all of which also do not have absolute confidentiality but either have different levels of power or discretion to relax confidentiality or have no confidentiality requirement at all. I discuss the position in each one of these countries briefly below, starting with our neighbours.

Lesotho

[73] In Lesotho the position is governed by the Refugee Act.[74] Applications for Refugee Status are considered by an Interministerial Committee which includes a representative of the Office of the UNHCR in Lesotho. The Refugees Act of Lesotho makes no provision for confidentiality at all.

Botswana

[74] In Botswana section 5(2) of the Refugees (Recognition and Control) Act[75] provides that the proceedings of a committee holding an inquiry into whether an immigrant should be given refugee status "shall be in private and shall be conducted in such a manner as the Committee may determine: Provided that the immigrant who is the subject of the inquiry shall be notified thereof and be given an opportunity of

[74] 1983.

[75] 1968.

appearing before the Committee and of making representations concerning his case to it." There seems to be nothing in the Botswana Act that deals with access to the written application itself. In Botswana there is absolute confidentiality in regard to attending the inquiry.

Zambia

[75] In Zambia the Refugees (Control) Act[76] does not have any specific provision dealing with the issue. That means that there is no confidentiality requirement in Zambia.

Kenya

[76] In Kenya section 24(1) of the Refugees Act[77] precludes a member of the Refugee Affairs Committee or employee or agent of the Department of Refugees from disclosing information acquired under this Act except in the course of his or her duties under that Act or with the consent of the Commissioner. Section 24(2) precludes any person who receives information in contravention of section 24(1) from disclosing or publishing the information. It seems that, although there is confidentiality, the Commissioner is given wide powers to give consent for the disclosure of the information.

[76] 1970.

[77] 2006.

Canada

[77] In Canada the position is governed by section 166(c) and (d) of the Immigration and Refugee Protection Act.[78] In terms of that Act there is an Immigration and Refugee Board which consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division. Section 166 confers power upon a Division to allow public access in certain circumstances.[79]

[78] S.C. 2001, c. 27.

[79] Section 166 reads as follows:

> "(a) subject to the other provisions of this section, proceedings must be held in public;
>
> (b) on application or on its own initiative, the Division may conduct a proceedings in the absence of the public, or take any other measure that it considers necessary to ensure the confidentiality of the proceedings, if, after having considered all available alternate measures, the Division is satisfied that there is
>
> (i) a serious possibility that the life, liberty or security of a person will be endangered if the proceeding is held in public;
>
> (ii) a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the societal interest that the proceedings be conducted in public, or
>
> (iii) a real and substantial risk that matters involving public security will be disclosed;
>
> (c) subject to paragraph (d), proceedings before the Refugee Protection Division and the Refugee Appeal Division must be held in the absence of the public;
>
> (c.1.) subject to paragraph (d), proceedings before the Immigration Division must be held in the absence of the public if they concern a person who is the subject of a proceedings before the Refugee Protection Division or the Refugee Appeal Division that is pending or who has made an application for protection to the Minister that is pending;
>
> (d) on application or on its own initiative, the Division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out in paragraph (b), the Division is satisfied that it is appropriate to do so;
>
> (e) despite paragraphs (b) to (c1), a representative or agent of the United Nations High Commissioner for Refugees is entitled to observe proceedings concerning a protected person or a person who had made a claim for refugee protection or an application for protection; and
>
> (f) despite paragraph (e), the representative or agent may not observe any part of the proceedings that deals with information or other evidence in respect of which an application has been made under section 86, and not rejected, or with information or other evidence protected under that section."

New Zealand

[78] In New Zealand the position is governed by section 18(3) of Schedule 2 of the New Zealand Immigration Act[80] read with section 151 of that Act. Section 18(3) is to the effect that proceedings relating to an application for asylum are not open to the public but section 151 provides that this requirement of confidentiality may be relaxed if, in a particular case, there is no serious possibility that anybody's safety may be jeopardised if there were to be a disclosure of information.

Ireland

[79] Sections 16(14) and 19(2) of Ireland's Refugee Act[81] provide that an oral hearing before the Refugee Appeals Tribunal is conducted in private and requires any person wishing to publish any matter likely to disclose the identity of an applicant to seek the consent of the applicant concerned. Section 16(15) allows the UNHCR or his or her representative in Ireland to be present at the appeal hearing. In their written submissions counsel for the applicants pointed out that the consent of the relevant Minister is required in addition to that of the applicant for refugee status. Neither sections 16(14) nor 19(2) supports this assertion. It would, therefore, seem that in terms of the Refugee Act the only outsider permitted to attend the appeal hearing is the UNHCR or his or representative in Ireland.

[80] 51 of 2009.

[81] 17 of 1996.

United States of America

[80] In the United States of America section 208.6 of Title 8 of the Code of Federal Regulations allows disclosure of information relating to an asylum application either where the asylum applicant gives his or her consent in writing or where the Attorney General exercises his or her discretion in favour of disclosure. It is, therefore, clear that the relevant authority is given a discretion.

Germany

[81] In Germany the position is governed by section 25 of the Asylum Procedure Act.[82] The procedure to be followed in order for a person to be granted refugee status entails making an application for that status. The procedure includes an interview of the applicant. Section 25(6) reads as follows:

> "The interview shall not be open to the public. It may be attended by persons who show proof of their identity as representatives of the Federation, of a *Land*, the United Nations High Commissioner for Refugees or the Special Commissioner for Refugee Matters at the Council of Europe. The head of the Federal Office or his deputy may allow other persons to attend."

[82] It seems to me that, although the norm in Germany is that the interview is not open to the public, the last sentence of section 25(6) confers power upon the head of the Federal Office or his or her deputy to allow other persons to attend. This means that confidentiality is not an absolute requirement but that someone has a discretion to allow more people to attend. That is in regard to attending the interview. There

[82] *Asylverfahrensgesetz*, as amended, August 2007.

seems to be no provision prohibiting access to documents containing information relating to the asylum application.

[83] It is clear from the above that different countries deal with the issue of confidentiality in different ways. Some allow some discretion whereas others do not. Most of those referred to above have certainly not adopted absolute confidentiality as a requirement as has been done by South Africa in the form of section 21(5).

Confidentiality and other South African statutes

[84] In support of the applicants' contention that the blanket confidentiality contained in section 21(5) is not reasonable and justifiable, counsel for the applicants pointed out that in the Extradition Act[83] there is no equivalent of section 21(5) and extradition proceedings are normally held in the open, and yet the person sought to be extradited may fear political persecution in his country of origin should he be extradited. To resist extradition, the person sought to be extradited may use evidence of a likelihood of persecution in his country of origin should he be extradited which could be the same evidence that he would use to obtain asylum under the Act.[84] Section 11(b)(iv) of the Extradition Act reads as follows:

> "The Minister may order that a person shall not be surrendered if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

[83] 67 of 1962.

[84] Id section 11(b)(iv).

[85] The question which arises from this is why the Act requires absolute confidentiality in asylum applications for the integrity of the asylum system and for the safety of the asylum applicants, their families and friends and yet the Extradition Act operates without any confidentiality? Counsel for the respondents did not deal with this point.

[86] South Africa is expressly required by Article 17 of the African Charter on the Rights and Welfare of the Child of 1999 to prohibit the press and public from attending a trial involving juveniles. Section 40(2)(b)(vii) of the Convention on the Rights of the Child of 1989 provides that in cases where a child is accused of having infringed criminal law, the State must protect the privacy of the child at all stages of the proceedings. Counsel for the applicant drew attention to the manner in which South Africa has sought to give effect to its obligations in this regard by way of the Child Justice Act[85] and the Children's Act.[86] In terms of section 63(5) of the Child Justice Act hearings in criminal proceedings involving minors are generally not open to the public but the presiding officer has a discretion to allow access. Section 56 of the Children's Act provides a list of persons who may attend proceedings in a children's court. The list includes "a person who obtained permission to be present from the presiding officer". This shows that the presiding officer in a children's court has a discretion or power to allow a person not falling within the specified categories to attend the proceedings. Furthermore, section 74 precludes the publication of any

[85] 75 of 2008.

[86] 38 of 2005.

information relating to proceedings in a children's court "without the permission of the court". Again, there is no absolute confidentiality.

[87] Counsel for the applicants also drew our attention to other statutes which contain prohibitions on access and publication but which confer a discretion on the court or tribunal. He referred to—

(a) section 10(4) of the Maintenance Act;[87]

(b) sections 153(2), 153(3), 153(3A), 153(5), 154(2), 154(3) and 335A(1) of the Criminal Procedure Act;[88]

(c) section 5(1) of the General Laws Amendment Act;[89]

(d) section 8 of the Protection from Harassment Act;[90] and

(e) section 29 of the Judicial Service Commission Act.[91]

[88] Counsel for the applicants said that section 83(11) of the Income Tax Act[92] was the only statutory provision in our law that they were able to identify which has a blanket and invariable prohibition on access and publication. In fact even this provision is no longer in the Income Tax Act.[93]

[87] 99 of 1998. Section 10(4) reads as follows:

> "No person whose presence is not necessary shall be present at the enquiry, except with the permission of the maintenance court."

[88] 51 of 1977.

[89] 68 of 1957.

[90] 17 of 2011.

[91] 9 of 1994.

[92] 58 of 1962.

[93] Section 83(11) was repealed by section 271 of the Tax Administration Act 28 of 2011.

[89] In *Johncom Media Investments*[94] this Court considered the reasonableness and justifiability of section 12(1) of the Divorce Act[95] as a limitation of the right to freedom of expression. Section 12(1) prohibited the publication of any information emanating from the hearing of a divorce case. This was irrespective of the nature of the information and whether the publication would infringe the rights of the parties to the divorce or the interests of their children. However, it permitted the publication of the names of the parties to a divorce and the fact that a divorce action was pending between the parties.[96]

[90] Writing for a unanimous Court, Jafta AJ took the view that section 12's method of protecting the rights of children, quite apart from going too far, was not particularly efficient in achieving that purpose because there was a less restrictive way of achieving it.[97] That way was to prohibit the publication of the identities of the parties and children in divorce proceedings as well as any material that would tend to reveal the identities of one or other of the people to be protected. This meant that information emanating from divorce proceedings could be published as long as such

[94] *Johncom Media Investments Ltd v M & Others (Media Monitoring Project as Amicus)* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) (*Johncom Media Investments*).

[95] 70 of 1979.

[96] Section 12(1) of the Divorce Act read as follows:

> "Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action."

[97] *Johncom Media Investments* above n 94 at para 30.

information would not disclose the identities of the parties to the divorce and their children.[98]

[91] Since there was a less restrictive manner in which the purpose of section 12 could be achieved other than by way of the absolute prohibition contained in section 12(1), this Court held in *Johncom Media Investments* that the limitation of the right to freedom of expression was not reasonable and justifiable in terms of section 36 of the Constitution and was, therefore, invalid. Jafta AJ put the point in these terms:

> "But the chosen method of protecting the rights of children, quite apart from going too far, is also not particularly efficient in achieving the purpose. The legislature almost 30 years ago chose to allow the publication of the identities of children as well as of parties to a divorce action and, at the same time, prohibited the publication of any evidence at a divorce trial, whether or not the prohibition of publication was necessary to protect the relevant privacy and dignity interests. Yet, as will be shown, another way to protect children and parties would, in my view, be to prohibit publication of the identity of the parties and of the children. If that were to be done, the publication of the evidence would not harm the privacy and dignity interests of the parties or the children, provided that the publication of any evidence that would tend to reveal the identity of any of the parties or any of the children is also prohibited. The purpose could be better achieved by less restrictive means."[99]

[92] I cannot see why the integrity of the asylum system and the safety of the asylum applicants and their families and friends would be threatened by the publication of information in an asylum application that would not tend to disclose the identities of

[98] Id.

[99] Id.

the asylum applicant, his family and friends. However, that is not even what the applicants seek to achieve here. The applicants only want to ensure that the Appeal Board is vested with a discretion to allow access to its hearings in appropriate cases. Obviously, in considering that request for access the Appeal Board would consider all relevant factors including, whether or not prohibiting the publication of information that does not tend to reveal the identity of the asylum applicant or his or her family and friends would not be a sufficient protection. A very important factor in that inquiry would be whether granting access would be in the public interest.

[93] I am satisfied that the legitimate purpose of section 21(5) can be achieved by less restrictive means, namely, by conferring a discretion on the Appeal Board to allow access to its proceedings in appropriate cases under appropriate terms and conditions. In my view absolute confidentiality is not essential. Indeed, as has been shown above, there are countries whose asylum regimes do not include absolute confidentiality.

[94] I conclude that section 21(5) is not a reasonable and justifiable limitation of the right to freedom of expression and that, to the extent that it does not confer a discretion upon the Appeal Board to allow access to its proceedings in appropriate cases, it is inconsistent with section 16 and thus invalid.

Remedy

[95] Section 172(1) of the Constitution provides that, when deciding a constitutional matter within its power, a court—

> "(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[96] Counsel for the applicants submitted that the remedy of reading-in would be a just and equitable remedy in the present case. In the applicants' founding affidavit in the High Court the applicants sought to have read into section 21(5) the following words which were to come immediately after the word "times" in section 21(5) as it presently stands:

> ". . . save that, in proceedings before the Appeal Board, the Appeal Board may on application or of its own accord allow any person or persons to attend a hearing and to publish a report or reports on the hearing, subject to any conditions determined by the Board."

[97] Before us counsel for the applicants proposed a more detailed reading-in. I quote below section 21(5) as it would be read if I were to accept the words which counsel for the applicants submitted before us should be read in. The words he proposed should be read into section 21(5) are in italics:

"The confidentiality of asylum applications and information contained therein must be ensured at all times, *save that in proceedings before the Refugee Appeal Board, the Refugee Appeal Board may on application or of its own accord allow any person or persons to attend a hearing, subject to conditions determined by it.*

a) In determining whether any person or persons are to be allowed to attend a hearing of the Appeal Board, the Appeal Board shall have regard to the following considerations:

(i) the need to balance the interests of the appellant in retaining confidentiality with the public interest in full disclosure of the evidence led at the hearing;

(ii) the need to protect the integrity of the appeal proceedings;

(iii) the identity of the appellant and the extent to which he or she may be considered a public figure;

(iv) the grounds advanced for claiming disclosure or for refusing it;

(v) whether the information is already in the public domain and if so, in what circumstances it reached the public domain (including the role, if any, played by the appellant in placing the information in the public domain) and for how long and to what extent it has been in the public domain; and

(vi) the impact of the disclosure or non-disclosure on the fairness of the proceedings and the rights of the appellant."

[98] Counsel for the second respondent opposed the remedy of reading-in and submitted that this is a case in which this Court should suspend the declaration of invalidity to give Parliament the opportunity to correct the constitutional defect. In support of this submission counsel pointed out that, in so far as the idea is that the Appeal Board should have a discretion to allow access to its proceedings in appropriate cases, there are many ways in which this can be done and this Court should defer to Parliament to choose which one it prefers.

[99] Counsel for the second respondent said that one form of a discretion would be to open Appeal Board hearings to the public but give the Appeal Board a power to close them in certain cases. Another way would be to keep the hearings closed to the public but give the Appeal Board the power to open them to the public in appropriate cases. One can add to this the issue of the basis upon which the Appeal Board would be able to open its hearings to the public in a particular case if, as a general rule, they are closed to the public or the basis upon which the Appeal Board would close its hearings to the public in a particular case if its hearings are normally open to the public.

[100] In other words this relates to what the test must be that should be used to determine a request for access. Must the test be exceptional circumstances? Must the test be if, in the opinion of the Appeal Board, the disclosure is unlikely to pose a threat to the lives and safety of the applicant for asylum and his or her family and friends in his country of origin? Yet another question is whether any one should bear the onus of showing the existence of exceptional circumstances if that is to be the test. All of these are issues on which choices must be made in formulating the test that must be used by the Appeal Board in exercising the discretion. Must this Court make those choices? I think not. It would be more appropriate for Parliament to make such choices. This accords with the doctrine of the separation of powers.

[101] The amicus' position was that, if we were minded to read the suggested words into section 21(5), we should prescribe certain guidelines "to fetter the discretion of

the [Appeal Board]." The guidelines suggested by the amicus included that the disclosure must be in the public interest and that regard must be had to the purpose of the Act, the country's constitutional and international obligations, and the importance of the right to freedom of expression and media access to important governmental functions. However, the amicus also indicated that it may well be that, in the light of the importance and extensive nature of the considerations to be taken into account, the correction of the defect should be left to Parliament.

[102] Counsel for the second respondent referred to the statement by this Court in *National Coalition (1999)*[100] that "it will not be appropriate to read words in, unless in doing so a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution."[101] He also referred to *Fraser*[102] where this Court inter alia said:

> "Having regard to . . . the multifarious and nuanced legislative responses which might be available to the legislature in meeting these issues, it seems to me that this is a proper case to exercise our jurisdiction . . . by requiring Parliament to correct the defects which I have identified in section 18(4)(d) of the Act by an appropriate statutory provision. The applicant is not the only person affected by the impugned provision. There are many others and it is in the interests of justice and good government that there should be proper legislation to regulate [the issue]".[103]

In this case I am inclined to adopt the approach reflected in this passage.

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[100] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition (1999)*).

[101] Id at para 75.

[102] *Fraser v Children's Court, Pretoria North, and Others* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[103] Id at para 50.

[103] I am of the view that a strong case has been made out for the suspension of the declaration of invalidity to afford Parliament an opportunity to correct the constitutional inconsistency. I, therefore, propose to suspend the declaration of invalidity in order to afford Parliament this opportunity.

What is to happen in the interim?

[104] The applicants asked for interim relief that would govern the position during the period of suspension of the order of invalidity. They proposed that the interim relief be granted by way of the reading-in suggested above. In support of the request the applicants' counsel submitted that, if no interim relief was granted, the Appeal Board could continue with Mr Krejcir's appeal without the applicants' journalists being able to attend the proceedings of the Appeal Board. He submitted that that would be seriously prejudicial to the applicants. In this regard he pointed out that it would also be untenable for Mr Krejcir's appeal to be deferred to after Parliament has cured the defect because the appeal has been pending for a long time.

[105] Section 172(2)(b) of the Constitution empowers a court making an order of constitutional invalidity to grant a temporary interdict or other temporary relief to a party. Accordingly, this Court has the power to grant temporary relief. It is true that, if no interim relief is granted, the Appeal Board will be able to proceed with Mr Krejcir's appeal hearing with the applicants' journalists still excluded from the hearing because the Appeal Board will still have no power to allow the applicants'

journalists to attend the proceedings. In my view it is just and equitable that this Court should grant the interim relief which will not only afford the applicants an effective remedy but that will also govern the position during the suspension of the order of constitutional invalidity.

[106] What form must the interim relief take? The applicants submitted in effect that the words that they had submitted should be read into section 21(5) as a remedy should be read into that section as interim relief. The other parties and amicus did not suggest any other way to address the applicants' problem. I have taken the view above that it would not be appropriate to resort to the remedy of reading-in as a permanent remedy in this matter. However, it seems to me that, for purposes of a temporary remedy, the remedy of reading-in would be appropriate. I propose to read in the words suggested by the applicants subject to such amendments as I may deem appropriate.

[107] This will ensure that the Appeal Board has a discretion to allow a member of the public or the media access to its hearings in appropriate cases during the period of the suspension of the order of constitutional invalidity pending the correction of the constitutional defect by Parliament. However, I will limit the discretion of the Appeal Board in such a way that confidentiality remains the norm but that it may be relaxed in appropriate cases.

[108] In terms of the order that I propose, the Appeal Board is to have an additional function during the period of the suspension of the order of constitutional invalidity. It will decide applications that may be made to it for access to its appeal hearings in certain cases. Those applications will be decided in accordance with the test as reflected in the order of this Court.

[109] I have considered the issue of whether during the period of the suspension the discretion to allow access to proceedings of the Appeal Board should be conferred on a court of law rather than the Appeal Board so that the exercise of that discretion would be judicially controlled. In my view we should not do so because that would be granting relief that was not requested by the applicants or by any of the parties which this Court has said should not be done. In *Bel Porto* this Court refused to grant a litigant relief that it had not asked for. Chaskalson CJ said:

> "I am therefore unable to agree with Ngcobo J that the appellants are entitled to relief in the form proposed by him. This was not the relief sought by the appellants in the High Court or in this Court, and it is inconsistent with the attitude adopted by the appellants throughout the litigation."[104]

[110] The only body that the applicants have sought to be vested with the discretion is the Appeal Board. That can be seen even in the words that they proposed for reading into section 21(5). They never at any stage asked that the discretion be conferred upon a court of law. In any event, since they seek access to proceedings of the Appeal Board, the Appeal Board is the right body to have the first opportunity to decide to

[104] *Bel Porto* above n 14 at para 115.

grant or refuse such access. Once it has made its decision, then anyone aggrieved by that decision may take it on review to the High Court if there are grounds to follow that route. It is at that stage that a court of competent jurisdiction may deal with the matter.

[111] If we thought that such a discretion should be conferred upon a court of law to exercise at first instance, it would mean that we do not have confidence that the Appeal Board could exercise that discretion properly. There would have to be proper reasons upon which such lack of confidence in the Appeal Board would be based. On the papers before us there are no such reasons. Accordingly, this is not an option legitimately open to us. Nevertheless, given the importance of the need for that discretion to be exercised properly before access may be given, it will be important that, in those cases where the Appeal Board decides to grant access, it ensures that before access is had to its proceedings, it satisfies itself that no review proceedings are intended to be instituted to have its decision to grant access reviewed and set aside. In other words a situation should not be allowed where the Appeal Board decides to grant access and a member of the public or the media exercises that right of access before the asylum applicant concerned or an interested organisation takes that decision on review. This is because in that case the exercise of the right of access before a decision has been made to take the Appeal Board's decision on review would defeat the purpose of any review that may be sought to be instituted.

[112] The applicants have also asked this Court to make an order allowing them to attend the appeal hearing relating to the second respondent before the Appeal Board. I do not think that we should accede to this request. The applicants elected not to appeal against the decision of the High Court upholding the Appeal Board's refusal to allow their journalists to attend the Appeal Board's hearing of the second respondent's appeal. The Appeal Board reached that conclusion under a statutory regime which did not give it a discretion to relax the requirement of confidentiality. After this Court's judgment and pending the curing of the defect by Parliament, the Appeal Board will have a discretion to relax the requirement of confidentiality in proceedings before it in an appropriate case. It is only proper that it be given an opportunity to exercise its discretion if it is approached again before a court of law may deal with the matter, if necessary. The Appeal Board's decision will be subject to review by the High Court in a case where appropriate grounds of review exist.

Order of confidentiality

[113] The applicants applied to this Court for an order that the Registrar keep a certain part of the record in this case confidential. In the High Court the parties had agreed that the High Court make an order to this effect and the High Court made such an order. We made an interim order to that effect pending this Court taking a final decision on the matter. I am satisfied that we should make a final order to the same effect to apply for as long as the confidential part of the record remains with the Registrar of this Court. I shall include an appropriate order to this effect.

Costs

[114] The applicants have indicated that there is an agreement between them and the second respondent that the successful one between them would not seek costs against the other. However, the applicants do seek costs against the first and third respondents. There is no reason why costs should not follow the result against the first and third respondents, both of whom are organs of state.

Order

[115] In the result I make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The declaration by the North Gauteng High Court, Pretoria, that section 21(5) of the Refugees Act 130 of 1998 is a reasonable and justifiable limitation of the right to freedom of expression in section 16 of the Constitution, is set aside.
4. It is declared that section 21(5) of the Refugees Act 130 of 1998 is inconsistent with section 16(1)(a) and (b) of the Constitution to the extent that it precludes members of the public or the media from attending proceedings of the Refugee Appeal Board in all cases and fails to confer a discretion upon the Refugee Appeal Board to allow the public and media access to its proceedings in an appropriate case.

5. The declaration of invalidity in paragraph 4 is suspended for a period of two years from the date of this order to enable Parliament to correct the constitutional defect in section 21(5) of the Refugees Act 130 of 1998.

6. Pending the correction of the defect, or the expiry of the two-year period, whichever occurs first, section 21(5) of the Refugees Act 130 of 1998 is to be read as providing as follows:

> "The confidentiality of asylum applications and the information contained therein must be ensured at all times, except that the Refugee Appeal Board may, on application and on conditions it deems fit, allow any person or the media to attend or report on its hearing if—
>
> (a) the asylum seeker gives consent; or
>
> (b) the Refugee Appeal Board concludes that it is in the public interest to allow any person or the media to attend or report on its hearing, after taking into account all relevant factors including—
>
> (i) the interests of the asylum seeker in retaining confidentiality;
>
> (ii) the need to protect the integrity of the asylum process;
>
> (iii) the need to protect the identity and dignity of the asylum seeker;

(iv) whether the information is already in the public domain;

(v) the likely impact of the disclosure on the fairness of the proceedings and the rights of the asylum seeker; and

(vi) whether allowing any person or the media access to its proceedings or allowing the media to report thereon would pose a credible risk to the life or safety of the asylum seeker or of his or her family, friends or associates."

7. The Registrar of this Court is directed to ensure that no one has access to the volumes of the record marked "confidential" for as long as the Registrar has under her control or custody the volumes of the record marked "confidential".

8. The first and third respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

For the Applicants:	Advocate G Budlender SC and Advocate A Friedman instructed by Webber Wentzel.
For the First and Third Respondents:	Advocate G Bofilatos SC and Advocate N Manaka instructed by the State Attorney.
For the Second Respondent:	Advocate G Marcus SC, Advocate S Budlender and Advocate D Smit instructed by Chris Watters Attorneys.
For the Amicus Curiae:	Advocate S Cowen instructed by Wits Law Clinic.