IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 136/12

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

SUBMISSIONS OF SOUTHERN AFRICA LITIGATION CENTRE

TABLE OF CONTENTS

INTRODUCTION

1. This case concerns whether the confidentiality requirement applicable to asylum applications in section 21(5) of the Refugees Act 130 of 1998 is constitutionally valid. It poses the difficult questions about how the confidentiality of vulnerable people is to be protected without undermining the integrity of the refugee system and unnecessarily limiting constitutionally entrenched rights or comprising accountability for South Africa's observance of its international obligations.

2. The Southern Africa Litigation Centre (*SALC*) was admitted to these proceedings as *amicus curiae* on 26 April 2013. SALC is a regional human rights NGO that seeks to promote and advance human rights and the rule of law in Southern Africa. Its participation in these proceedings is aimed at two objectives.

3. First, SALC wishes to assist the Court to give content to the State's duties of confidentiality to asylum seekers in a manner that advances the important purposes of refugee law but does not simultaneously compromise South Africa's international law obligations aimed at securing accountability for serious international crimes. It will be contended that while confidentiality serves generally to protect refugees and ensure their wellbeing and safety in their host country, there are circumstances, even if limited, in which

confidentiality is neither justifiable nor reasonable. One of these is where there is reason to believe that an applicant has committed a crime against peace, a war crime or a crime against humanity, as contemplated by section 4(1)(a) of the Refugees Act. At least in these cases, it is submitted, the purposes of refugee law are frustrated rather than served by a blanket confidentiality requirement, which simultaneously undermines the effective protection of the rule of law, accountability, and other rights and societal interests.

4. Secondly, SALC wishes to draw the Court's attention to certain comparative foreign case law,[1] to which the Court is entitled to have regard in terms of section 39(1)(c) of the Constitution in interpreting the Bill of Rights. International law[2] does not determine any confidentiality norm. Rather, states are at liberty to adopt confidentiality rules consistent with domestic constitutional requirements, and thus which guard the interests of refugees as an acutely vulnerable group and also serve other constitutional imperatives such as those underpinned by transparency and accountability. Particular consideration will be given to Canadian and New Zealand case law dealing specifically with confidentiality in asylum applications. It will be submitted that this case law tends to support the argument that while confidentiality should *generally* be

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1 The applicants have referred to relevant *statutory* law in dealing with customary international law.

2 Courts must have regard to international law in terms of section 39(1)(b) when interpreting the Bill of Rights.

strictly observed, blanket confidentiality is not reasonable and justifiable in an open and democratic society.

5. SALC does not seek to advance the interests of any party to these proceedings. However, it must be stated candidly that its submissions tend to support the contentions advanced by the applicants, albeit for different reasons.

SECTION ONE: BLANKET CONFIDENTIALITY IS NOT REASONABLE OR JUSTIFIED IN THE CONTEXT OF SECTION 4(1)(A)

Introduction

6. The parties deal with the rights that are infringed by the confidentiality clause. SALC aligns itself with the submissions of the applicants. In this section, we submit that blanket confidentiality is not reasonable and justifiable as contemplated by section 36(1) of the Constitution in circumstances where section 4(1)(a) of the Refugee Act arises.

7. Section 4(1)(a) provides:

> '*A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –*
>
> *(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.*
> *(b) …'*

The Interplay between Refugee Law and International Criminal Law and the Importance of Accountability

8. When section 4(1)(a) of the Refugees Act is in issue, refugee law and international criminal law intersect. At least in this zone, the case for lifting confidentiality is strong.

South Africa's international criminal law obligations

9. The international community has placed a premium on the punishment of international crimes. This is evidenced by the conclusion of international conventions dealing with international crimes, and the establishment of courts and tribunals to prosecute international crimes including the International Criminal Tribunals for the former Yugoslavia and Rwanda and the first permanent International Criminal Court.

10. South Africa in turn has acknowledged its obligations in this regard. This Court acknowledged these obligations in *S v Basson*.[3]

11. South Africa is party to various international agreements which require South Africa to take action against perpetrators of international crimes. In some instances South Africa has adopted domestic legislation to give effect to these treaty obligations.

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[3] *S v Basson* 2005 (1) SA 171 (CC) at para 37.

11.1. South Africa is party to the Geneva Conventions and protocols.[4] South Africa has also enacted the Implementation of the Geneva Conventions Act[5] incorporating these provisions into South Africa's domestic legal order. The Geneva Conventions require South Africa to '*search for, punish and prosecute perpetrators*' unless '*they hand over such person for prosecution by another state*'.

11.2. South Africa is a party to the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. The Torture Convention incorporates the principle of *aut dedere aut judicare* (extradite or prosecute), requiring signatories to either prosecute perpetrators or extradite them to jurisdictions able and willing to do so.

11.3. South Africa is a party to the Rome Statute of the International Criminal Court. South Africa ratified the Rome Statute in 2000 and adopted implementing legislation in 2002 in terms of the Implementation of the Rome Statute of the International Criminal Court Act.[6] The preamble to the Rome Statute records that '*it is the*

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4 These being the four 1949 Geneva Conventions for the Protection of Victims of War; the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts; and the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts.

5 8 of 2012.

6 27 of 2002

duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. This obligation was confirmed in the South African case of *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others*.[7]

The purposes of refugee law

12. The purpose of the Refugee Act appears from its preamble which provides:

> '*Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.*'

13. Refugee law is a protective framework intended to safeguard persons who, for a variety of reasons, are at risk of persecution and are forced to flee their country of origin for another. It represents an international commitment to the provision of basic entitlements and guarantees that where a person's home state fails to protect these fundamental rights, states granting asylum will do so.

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[7] *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP).

Key provisions and the serious international crimes exclusion

14. The key international and regional conventions governing refugee law are those referred to in the preamble to the Refugees Act, to which South Africa has acceded.[8] In very similar terms, these instruments define, *on the one hand*, persons who qualify as refugees,[9] their rights and the responsibilities of States when considering the grant of asylum, and, *on the other hand*, persons who do not qualify as refugees.

15. Both the 1951 Refugee Convention and the 1969 OAU Convention recognise classes of persons who are not eligible for refugee status even if they satisfy the inclusionary criteria.[10] To this end, both conventions recognise that individuals accused of core international crimes are to be excluded. Thus Article 1F(a) of

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8 This does not mean that other international and regional conventions are not relevant to refugee law. Many others are.

9 Article 1(2) of the Refugee Convention provides that person is to be considered a refugee if-

> '*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*.'

10 Article 1(F)(a) of the Refugees Convention provides that:

> '*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
> *(a) 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.*'

Article 1 (5) of the OAU Convention provides that:

> '*The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that: (a) 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*'.

the 1951 Refugees Convention (materially mirrored in the OAU Convention) provides:

'*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

(a) 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.

(b) …'

16. Section 3 and section 4(1) of the Refugees Act respectively are the principal provisions reflecting the inclusionary and exclusionary requirements mandated by international law. Section 3 defines persons eligible for refugee status. South Africa's exclusion clause is contained in section 4(1) of the Refugees Act. Section 4(1)(a) is referred to above.

17. Exclusion assessments are mandatory under international law and under the Refugees Act.[11] The need to determine whether a person falls under any exclusion clause is not optional: It is an integral part of the refugee determination process.[12]

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[11] In terms of section 4(1), a person '<u>*does not qualify*</u>' as a refugee if the exclusionary circumstances are present.

[12] A helpful consideration of the exclusion provisions can be found in *Indra Gurum v Secretary of State for the Home Department (Gurung)* [2002] UKIAT 04870, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 14 October 2002 at para 26 *et seq*. This decision provides a comprehensive discussion of the exclusion clause, which was undertaken by that forum in order to give guidance to adjudicators even though the matter was remitted. (See para 2) It held: '*A further principle of considerable importance is that the Exclusion Clauses are in mandatory terms. They stipulate that the provision of the Convention 'shall not apply ...' to those who fall within Art 1F. It may be that at present appeals that come before adjudicator raising issues under the Exclusion Clauses are few and far between. Whether they should remain quite as rare as they are is a matter we shall return to below. However it is imperative that*

18. The rationale behind the exclusion clause is two-fold:[13]

    18.1. It protects refugee status from being abused by those who are undeserving; and

    18.2. It ensures that those who have committed grave crimes do not escape prosecution.

19. It is through these provisions, amongst others, that refugee law and the objectives of international criminal law intersect. The inclusionary provisions serve to protect the vulnerable. The exclusionary provisions serve to ensure that the grant of refugee status is not afforded to individuals who are ineligible.

The potential for abuse of refugee systems

20. The potential abuse of any refugee system is a very real concern in any country. The importance of ensuring that the refugee system is not abused to avoid responsibility for international crimes should not be understated. Although the issues have not to date been determined by a South African court (in part

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adjudicators do not confuse the rarity of exclusion cases with the existence of some discretion as to whether to consider them. The mandatory wording admits of no discretion. The question of whether or not a person falls under the Exclusion Clauses is not an optional one: it is an integral part of the refugee determination assessment.'

[13] Geoff Gilbert 'Current issues in the application of the Exclusion Clauses' in Erika Feller et al (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (CUP 2003) 425 at 427-8.*

because of the blanket confidentiality provision)[14] it has received much attention abroad in circumstances where less rigid confidentiality norms apply.

21. As held by the United Kingdom Supreme Court:[15]

> *'The Refugee Convention was drafted for a world scarred by long years of war crimes and other like atrocities. There remain, alas, all too many countries where such crimes continue. Sometimes those committing them flee abroad and claim asylum. It is not intended that the Convention will help them. However clearly in need of protection from persecution an asylum seeker may be, he is not to be recognized as a refugee 'where there are serious reasons for considering that (a) 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.'*

22. Similar sentiments have been expressed by the Canadian Supreme Court, the New Zealand Supreme Court and the Federal Court of Australia.

23. The Canadian Supreme Court has held that '*[w]hen the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.'*[16]

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[14] We deal below with a case pending before the North Gauteng High Court in which these very issues have arisen. The matter is part heard.

[15] *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant) (Case No C4/2008/1229) [2010] UKSC 15 (R v Secretary of State)* judgment of 17 March 2010 at para 1.

[16] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Canada: Supreme Court, 4 June 1998, at para 63, citing *Sivakuma v Canada (Minister of Employment and Immigration)* (CA) [1993] 1 CF 433, Canada: Federal Court at 445.

24. The New Zealand Supreme Court has held (citing leading refugee scholar James Hathaway) that: '*The purpose of the exclusionary provision was to ensure that the Convention was accepted by state parties and to maintain its integrity over time. As Professor Hathaway has put it: "The decision to exclude such persons, even if they are genuinely at risk of persecution in their state of origin, is rooted in both a commitment to the promotion of an international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees."*'[17]

25. The Federal Court of Australia has held that: '*The general objective of the Article 1F exemption, like similar provisions in Article 7(d) of the United Nations High Commission on Refugees Statute and Article 14(2) of the Universal Declaration of Human Rights, is that the rights they create should not be abused by fugitives from justice nor interfere with the law of extradition'.*[18]

26. Indeed, to permit the abuse of the refugee system through a failure rigorously to apply the exemption clauses serves to frustrate the very purpose and objectives of the Refugees Conventions and the Refugees Act, this being to protect people from persecution. It can have the effect of enabling persecution.

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[17] *The Attorney-General (Minister of Immigration) v. Tamil X and Another*, [2010] NZSC 107, New Zealand: Supreme Court, 27 August 2010 at para 33.

[18] *Tenzin Dhayakpa v. The Minister for Immigration and Ethnic Affairs*, FED No. 942/95 , Australia: Federal Court, 25 October 1995 at para 26.

27. This point was well made by the Canadian Supreme Court in *Pushpanthan* when it held:[19] '*What is crucial, in my opinion, is the manner in which the logic of the exclusion in Art 1F(c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees*.' (Emphasis supplied.)

28. Conversely, a rigorous application of the exclusion clauses contributes to efforts to secure accountability for serious international crimes.[20] That in turn is contemplated by the preamble of the Refugees Act which contemplates giving effect both to international refugee law and also to other relevant conventions and international agreements.

The intersection of refugee law and international criminal law: a case for lifting confidentiality

29. It is thus at the point where there is reason to believe that an asylum applicant may fall within the exclusion provisions (SALC's emphasis being section 4(1)(a)) that the purposes of refugee law intersect with the purposes of international criminal law.[21] In this zone, we submit below, the demands for

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19 Supra, at para 63.

20 J Rikhoff *International Journal of Refugee Law* (2009) 21(3).

21 Jennifer Bond '*Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law and 'Guilty' Asylum Seekers'* International Journal of Refugee Law (2012) 24 (1): 37-59 states: '*Exclusion*

lifting confidentiality and insisting on transparency measures – including at times, media access – have great force as it is here where one is concerned not only with the vulnerability of refugees but with the very integrity of the refugee system and its vulnerability to abuse.

30. This point of intersection has been commented upon by the New Zealand Supreme Courts when it held: '*In a Convention negotiated in the years following the Second World War, [the Exclusion Clause] was intended to ensure that war criminals could not escape extradition and prosecution by claiming refugee status. That principle remains relevant as does the associated maxim aut dedere aut judicare, which imposes an obligation to extradite or prosecute.*''[22]

Impact of Confidentiality on the Asylum Process

31. The parties have dealt with the important purposes served by a general requirement of confidentiality in asylum applications. SALC associates itself with these submissions. It is clearly vital that confidentiality is generally observed. It is vital at least to protect the dignity, privacy, safety, and

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assessments are complicated and require application of not only refugee law, but also international law, humanitarian law, and criminal law.'

22 *Attorney General v X* [2008] 2 NZLR 579 at para 15.

sometimes the lives of asylum applicants and their families and associates. It also serves certain State interests.

32. Confidentiality does not, however, come without costs and in assessing whether and in what circumstances confidentiality is constitutionally justifiable it is necessary to bear these costs in mind. That is acutely so when one considers the impact of confidentiality in the zone where refugee law and international criminal law intersect.

33. These observations are made in light of the fact that immigration and refugee authorities are often the first government institutions to which individuals coming to South Africa turn. Confidentiality needs to be assessed within the framework within which it occurs: the fewer the internal checks the greater the scope for abuses of confidentiality.

34. First, confidentiality enhances the likelihood that South Africa can become a safe haven for those responsible for international crimes or seeking to avoid prosecution elsewhere. It stands to reason that early detection and prevention of entry of human rights abusers is a key means to prevent South Africa from becoming a safe haven. Confidentiality inherently limits the likelihood of early detection and prevention of entry of those responsible for section 4(1)(a) crime.

35. Secondly, confidentiality means that status determination is an internal and closed system. It depends for its efficacy on internal oversight and monitoring.

Under the Refugees Act, it depends on the resources and capacity of the Standing Committee on Refugees and voluntary liaison with the UN High Commission for Refugees. The current confidentiality system thus precludes any external scrutiny with its attendant benefits. Where the appeal process protects applicants against incorrect refusals of refugee status, decisions *granting* refugee status, even where there may be reason to believe section 4(1) is applicable, are immune from challenge. They can only be withdrawn by the Standing Committee for Refugee Affairs if a grant is made erroneously or fraudulently.[23]

36. Thirdly, and consequently, confidentiality limits the scope for meaningful judicial oversight of the erroneous grant of asylum where the exclusion clause may be applicable through the mechanism of judicial review. Cases will be extremely rare. Even where judicial review is instituted by external parties, it will be extremely difficult. These issues have arisen in a case pending before the North Gauteng High Court, *Consortium for Refugees and Migrants in South Africa v the President and others*.[24] It is a judicial review of a decision to grant refugee status to a person believed to fall within the requirements of section 4(1)(a). Various issues arise including the scope of confidentiality in section 21(5) in a review context and more particularly whether it permits the

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[23] The dangers of relying on this mechanism are illustrated by the case pending before the North Gauteng High Court referred to below.

[24] Case number 30123/11. The matter was argued in part in October 2012 but has been postponed.

withholding of a Rule 53 Record. The case starkly illustrates how the potentially incorrect application of the exclusion clause may be shielded from scrutiny to the detriment of the obligation to investigate and prosecute those accused of war crimes.

37. In short, while confidentiality serves the important purpose of facilitating the reception of refugees in need of protection, it removes a safeguard against the incorrect acceptance of individuals who fall within the ambit of the exclusion clause due to involvement in international crimes. Decision making is behind closed doors, and controversial decisions are shielded from external scrutiny and accountability. That in turn precludes assessment of whether South Africa is in fact complying with its international and indeed domestic human rights obligations and limits the ability of the refugee system to ensure that incorrect decisions are corrected.

38. These remarks are apposite to confidentiality that serves to exclude media access. However, it must be acknowledged that section 21(5) is drafted in very wide terms: its reach is potentially very extensive. It can serve to limit not only media access but may also limit access by organizations with a legitimate interesting in monitoring these decisions, it may limit discussions between different organs of the South African State[25] and it may limit discussions

[25] This issue is dealt with in the regulations.

between the South African state and states other than a state of origin. It will limit communications with a state of origin. It may even have implications for the ability of courts to publish their decisions. Different considerations arise in each of these contexts.

39. Furthermore, the clause is framed in a manner that reaches further than media access and beyond appeal hearings.[26] How far it reaches is a matter for some debate but the clause is drafted in very wide terms.

40. It is in this context that the validity of a blanket confidentiality requirement must be assessed and that the Court must exercise its jurisdiction.[27]

A blanket confidentiality requirement is unreasonable and unjustified in context of section 4(1)(a) assessments

41. SALC submits that in context of evaluating whether a section 4(1)(a) exclusion is applicable in any particular case, blanket confidentiality requirements are unjustified and unreasonable in an open and democratic society based on human dignity, equality and freedom. At least in this sphere, the costs are, simply, too high and the means of protection is disproportionate to the ends sought to be protected.

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[26] Notably the applicants seek to limit the scope of the case to appeal hearings where the other parties see its reach beyond this context although in varying degrees. It is not clear how far its reach extends.

[27] We submit below that these considerations may tend in favour of the Court asserting only a narrow jurisdiction in this case.

42. The above analysis shows that the Refugees Act and the Convention envisage a firm distinction between *bona fide* refugees and those who must not be given asylum and the protections consequent to asylum. However, section 21(5) of the Refugees Act does not draw this distinction. Instead the absolute ambit of section 21(5) frustrates the purposes of refugee law by also affording protection to the very individuals excluded by the Refugees Act and the Convention.

43. This can result too easily, and without accountability, in the grant of asylum status to those who are responsible for creating the very persecution from which refugees flee their home states. It creates too great a scope for abuse of the refugee system.

44. By immunizing section 4(1)(a) exclusion evaluations from all external scrutiny, at least the following costs eventuate:

    44.1. There is no accountability to the South African public for the enforcement of section 4(1)(a). This in turn undermines accountability regarding observance of South Africa's international (and indeed domestic) criminal law obligations. These are not abstract international obligations – when states do not bring the perpetrators of human rights abuses and war crimes to justice, the victims of those crimes are left without ever having their rights vindicated.

44.2. The scope for South Africa becoming a safe haven for individuals seeking to avoid responsibility for international crimes is enhanced.

44.3. The scope for correcting error in the system of adjudicating section 4(1)(a) exclusions is reduced, whether through the internal appeal systems or through judicial review.

45. There are alternative approaches that can ensure that confidentiality in the refugee evaluation process is generally preserved but at times lifted so as to avoid these consequences. These means are less restrictive of the various rights limited by confidentiality and serve to ensure that the refugee system is not abused and rather serves its intended purposes. They include permitting discretionary lifting of confidentiality in appropriate cases or the legislature carving out carefully crafted circumstances and contexts in which confidentiality may be lifted. The processes would imbue the decision makers who have to determine whether a person is subject to the exclusion clause with greater flexibility. This is required to deal with changing circumstances both in refugee law and international criminal law.[28]

46. SALC accepts that the State is not duty-bound always to adopt the least restrictive means to limit rights. However, it cannot reasonably adopt a means that has the effect of subverting the very purpose sought to be achieved by the

[28] For this point, see *Indra Gurung v. Secretary of State for the Home Department* [2002] UKIAT 04870 para 35.

legislative scheme and indeed by the limitation in question. Nor can it reasonably adopt a means that is so intrusive that it unnecessarily undermines other important rights and societal objectives, such as observance of South Africa's international criminal law obligations and accountability to the South African public for its actions in that regard.

47. These considerations show that as it is currently framed, the benefits generated by section 21(5) extend to inappropriate circumstances and individuals. A less restrictive means could be adopted that not only limits rights less but that is simultaneously better fashioned to achieve the purpose the legislature sought to achieve in adopting section 21(5). Accordingly, when consideration is had to the provisions of section 36 of the Constitution and more particularly sub-sections 36(1)(b),(c),(d) and (e) which require courts to take into account the purpose of the limitation, its extent, the relation between the limitation and its purpose and less restrictive means to achieve the purpose it is clear that section 21(5) must be declared invalid.

48. At this juncture it is necessary to respond to a submission advanced on behalf of the second respondent in respect of the approach of the UNHCR to confidentiality. SALC does not intend to enter the fray about what new material relied upon by the second respondent is admissible or inadmissible, whether referred to first in the application for leave to appeal or the heads of argument

submitted to this Court. These are matters for the parties. However, it is and should be acknowledged that the UNHCR does promote very strong protection of confidentiality, even in context of exclusion provisions. [Whether the body promotes blanket confidentiality in all contexts and circumstances is – it is submitted – not established on the papers.]

49. SALC submits that due and serious recognition must be given to the views of the UNHCR. However, the views must be accorded appropriate weight when evaluating the requirements of the South Africa Constitution. It is submitted that it would not be appropriate to regard the UNHCR statements placed before the Court either as comprehensive or definitive either of what that body regards to be reasonable in a domestic legal context or what is reasonable in domestic contexts. In this regard:

    49.1. The UNHCR is the agency responsible for the refugee conventions. It is not responsible for the implementation of conventions relating to enforcement of international criminal justice obligations and so the implications its pronouncements might have for the criminal justice obligations must be cautiously considered.

    49.2. The 1951 Convention and the 1969 Protocol do not deal with or refer to confidentiality. Confidentiality is not prescribed by international refugee law. These are matters for domestic law since the

circumstances that must be used to determine what procedural protections are to be afforded to asylum seekers and refugees are often unique to the circumstances and history of that country.

49.3. The recommendations should not lightly be viewed in isolation from other requirements relating to best practice especially in context of exclusion crimes. The additional checks proposed by the UNHRC in this context may ameliorate the dangers of confidentiality but have no equivalent in South African law or practice. UNHRC proposals should thus be viewed holistically and their interplay understood. The court is not in a position to conduct this assessment on the material before it.

49.4. The comments before the Court do not purport to propose the contours of domestic laws but refer in effect to proposals about good practice at a high level of generality. This is appropriate given their nature, source and context and given that international refugee law does not deal with procedural protections such as confidentiality.

49.5. The comments are, on their own terms, not as absolute as the second respondent suggests. At times they focus on communication with a state of origin rather than other communications such as with other states or other access. At times they focus on information of a

particularly private nature. That being said, at times the comments are more general and absolute in nature and it strict confidentiality is promoted.

50. While the views of the UNHCR are thus important, they do not define what is reasonable and justifiable under South African domestic law nor do they purport to define the contours of domestic law. They are general in nature and do not purport to deal with confidentiality in any comprehensive or definitive manner.

51. The question is and must be what the South African Constitution requires, viewed in light of other rights protected in the Constitution and its limitation clause. While confidentiality in asylum applications is, clearly, desirable as a general and overarching principle, it is should yield in certain circumstances, even if narrowly defined. One of these is where section 4(1)(a) exclusions are at play. To the extent that blanket confidentiality applies to applications in which section 4(1)(a) is a live issue, SALC submits it is unconstitutional.

SECTION TWO: INTERNATIONAL AND FOREIGN LAW

52. Section 39(1) of the Constitution provides that the Court must consider international law and may consider foreign law when interpreting the Bill of Rights.

53. Under international refugee law, questions of confidentiality are regarded as matters for domestic law. Leading international refugee law scholar Guy Goodwin-Gill, in his textbook *The Refugee in International Law*[29] when dealing with due process in the determination of refugee status explains that '*[i]nternational law has little to say with respect to the procedural aspects of due process ...*' and '*[p]rocedural rights nevertheless remain very much within the area of "choice of means" among State parties to the Convention and Protocol: national procedures vary considerably, drawing mostly on local legal culture and due process traditions.*'[30]

54. Within this framework and on the specific question of issue of confidentiality, he writes:

> *"An important related issue, both for claimants and for States, is that of confidentiality of proceedings. Again, the interest of the asylum seeker, including the necessity to protect friends and family in the country of origin, will often run counter to legal traditions of public hearings and open courts. Many jurisdictions provide for confidentiality in matrimonial cases, however, and in proceedings involving juveniles or sexual assault. Where the principle of open court has constitutional status, a balance between the advantages of confidentiality and the public interest may yet be achieved. This might be done, for example by legislating a presumption in favour of in camera proceedings, save that where a member of the public seeks to attend, the claimant would have the onus of showing that the life, liberty and security of any person might be endangered if the hearing were held open court."*

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[29] Goodwin-Gill, G. S. & McAdam, J., *The Refugee in International Law*, Oxford: Oxford University Press, 3rd edition, 2007 and more particularly pp534-5 of Chapter 10, 'Treaty Standards and their Implementation in National Law'.

[30] At page 533

55. Thus, as the parties themselves have demonstrated, the maintenance of confidentiality of asylum applications, while an accepted component of refugee law in many jurisdictions (even if not absolute) does not have its source in the 1951 Refugee Convention or the OAU Convention. Nor is it contended that absolute confidentiality is a requirement of customary international law. Rather, the manner in which confidentiality is mediated and regulated is a matter for domestic law. As the applicants explain, practice varies from country to country and there are many examples where confidentiality is not regarded as absolute.

56. Where the applicants have referred the Court to legislation,[31] there is also a body of case law that has been accessed by SALC and which casts light on how the Court might balance the rights of refugees with other rights and societal interests in a manner that is consistent with the proportionality exercise contemplated by section 36 of the South African Constitution.

57. This case law comes from Canada and New Zealand and, viewed together with other legislation, illustrates that:

    57.1. There is no uniform state practise that confidentiality in asylum applications is or should be absolute;

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31 The applicants haven't drawn attention to the detail of the legislation. Consideration of that legislation is a worthwhile exercise since it shows how states have delineated discretion and constrained decisions makers who have to determine whether to allow disclosure.

57.2. Although confidentiality is the norm, exceptions may be permitted either by way of a general discretionary power vested in the refugee authority or in accordance with specific statutory exceptions;

57.3. When confidentiality is limited, it is normally done to protect constitutional rights or values and interests of a comparable nature;

57.4. In determining whether to permit disclosure of confidential information, it will frequently be the case that the potential adverse consequences of disclosure are weighed against the intended benefits of disclosure; and,

57.5. In both Canada and New Zealand, courts do not consider it to be inappropriate for the authority making the refugee determination to exercise a discretion whether there should be disclosure or not.

Canadian Law

58. The Canadian case law on point concerns the now-repealed section 29 of the Immigration Act.[32] All immigration hearings in terms of that Act, not only refugee hearings, commenced with an inquiry under this section. During this inquiry the authority in question had to determine the validity of a refugee application. Section 29 read:

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[32] R.S.C. 1985, c.I-2 subsequently amended. The current legislation has been referred to by the applicants.

> *'29. (1) An inquiry by an adjudicator shall be held in the presence of the person with respect to whom the inquiry is to be held wherever practicable.*
>
> *(2) At the request or with the permission of the person with respect to whom an inquiry is to be held, an adjudicator shall allow any person to attend an inquiry if such attendance is not likely to impede the inquiry.*
>
> *(3) Except as provided in subsection (2), an inquiry by an adjudicator shall be held in camera unless it is established to the satisfaction of the adjudicator, on application by a member of the public, that the conduct of the inquiry in public would not impede the inquiry and that the person with respect to whom the inquiry is to be held or any member of that person's family would not be adversely affected if the inquiry were to be conducted in public.'*

59. Prior to 1985, this provision only permitted members of the public to attend such hearings at the request of or with permission of the affected person.[33] However, in 1985 the Canadian Parliament took the view that such a narrow basis for access would offend section 2(b) of the Canadian Charter of Rights and Freedoms ('Canadian Charter')[34] since section 2(b) had been interpreted to include free access to judicial and quasi-judicial hearings.[35] The Canadian Parliament took the view that an automatic exclusion which did not depend on

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[33] For the legislative history of this provision see *Toronto Star Newspapers Ltd. v. Canada (Adjudicator, Immigration Act)* [1990] F.C.J. No. 140 (Federal Court of Canada – Trial Division) Ottawa, Ontario at p 7-8. See also *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)* [1990] FCJ No 46 at 4-5.

[34] Section 2 of the Canadian Charter of Rights and Freedoms reads:

> *2. Everyone has the following fundamental freedoms:*
> *(a) freedom of conscience and religion;*
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
> *(c) freedom of peaceful assembly; and*
> *(d) freedom of association.*

[35] In *Re Southam Inc. and The Queen (No. 1),* 41 O.R. (2d) 113.

individual circumstances would have to meet a very high constitutional onus.[36] Accordingly it sought to amend this section. It felt that the early draft amendments did not give adequate protection to the refugee claimant or his or her family.[37] When section 29(3) was finally passed, it was seen as striking a balance between the need to allow access to judicial and quasi-judicial hearings and the need to protect refugees and their families.

60. *Toronto Star Newspapers Ltd. v. Canada (Adjudicator, Immigration Act)*[38] (*Toronto Star*) concerned whether The Toronto Star had satisfied the adjudicator that its access to a refugee hearing would not impede the hearing or endanger the affected person or his family. After setting out the legislative history just sketched, the Court commented that a literal interpretation of the section would create an impossible burden for a newspaper to discharge since whether public access would impede the hearing or endanger the asylum seeker or his family was generally in the exclusive knowledge of the asylum seeker. If this was the case the section would be unconstitutional since it would fail to allow for media access to such hearings. Instead, the Court followed *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*[39] (*Pacific Press 1*) and

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36 Parliamentary debate cited in *Toronto Star* supra note 33 at p 8.

37 Ibid.

38 *Supra* note 33.

39 [1990] FCJ No 46.

found that an evidentiary ground had to be laid in order to justify denying the media access to a hearing.

61. In *Pacific Press 1* the Federal Court of Appeal was asked to determine whether section 29(3) of the Immigration Act was constitutional since it limited section 2(b) [40] of the Canadian Charter. The Court found that the constitutional challenge was premature. However, it commented that the section appeared to create an onus on the media to establish two negatives – that the inquiry wouldn't be impeded by media access and that the affected person and his family would not be adversely affected thereby. The Court commented that this onus might be constitutionally misplaced and that it was likely that the assertion of the right to access to a judicial or quasi-judicial proceeding would be sufficient to satisfy that burden and shift the onus to the person seeking to exclude the press. The Court also noted that '[w]hatever freedom of the press entails, there must surely be an evidentiary basis to support its lawful impairment in a judicial or quasi-judicial proceeding.' The Court remitted the decision in order to allow McVey, the affected person, the opportunity to lead evidence as to why the press should not be admitted.

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[40] Quoted above at fn 34.

62. In the follow-up case, *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*[41] (*Pacific Press 2*), the Court had to determine whether McVey had succeeded in establishing a basis on which the press could be excluded and also had to consider whether section 29(3) was constitutional. The Court held that the decision of constitutionality was now ripe. It reasoned as follows:

62.1. Section 29(3) unjustifiably limited the media's right to access to judicial and quasi-judicial proceedings. In reaching this conclusion, the Court expressly considered the extent to which inquiries under the Immigration Act were analogous to judicial proceedings. The Court adopted[42] the reasoning of Rouleau J. in *Southam Inc. v. Minister of Employment and Immigration*[43] that—

> *'it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.'*[44]

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41 [1991] F.C.J. No. 313

42 Ibid at p 9.

43 [1987] 3 F.C. 329.

44 Ibid at 336.

62.2. The Court adopted Cory J's argument in *Edmonton Journal v. Alberta (Attorney General)*[45] that access to proceedings is to ensure 'the penetrating light of public scrutiny'. The Court found that this 'penetrating light' was equally required in respect of inquiries under the Immigration Act.

62.3. The limitation of section 2(b) of the Canadian Charter did not pass muster under the limitation standard set in *R v Oakes*.[46] The purpose of confidentiality, to protect refugees and their relatives, warranted overriding freedom of expression. However, the legislation failed on the proportionality leg of the *Oakes* test. In the case, the affected person, McVey, had not claimed Convention refugee status during the initial immigration inquiry. Accordingly, the purpose of protecting refugees or their families was not being served by protecting McVey's confidentiality. The confidentiality guaranteed by section 29(3) was overbroad and thus not rationally connected to the purpose of the limitation. Furthermore, the reverse onus of section 29(3) meant that there was not a minimal impact on the right to freedom of expression and a proportionality of effect.

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45 [1989] S.C.J. No. 124.

46 [1986] 1 S.C.R. 103.

62.4. In light of these considerations, the Court declared the section unconstitutional and gave the Canadian Parliament a year to remedy the defects.

63. In a different state in Canada, Jerome A.C.J. in *Blackwood v. Canada (Minister of Employment and Immigration)*[47] had to interpret a materially identical provision to that considered in the above Canadian cases. However, the provision was not challenged so Jerome A.C.J. used *Toronto Star* and the two *Pacific Press* cases to interpret how to apply the provision. He found that those cases established the principle that—

> *'freedom of the press cannot be impaired in a judicial or quasi-judicial proceeding without an evidentiary basis and that once the s. 2(b) right of access is asserted the onus shifts to the person seeking to exclude the press.'*[48]

64. On the facts, that burden had not been met and so media access by the Refugee Board had been appropriately granted.

Canadian Case Law Analysis

65. The Canadian case law is clear that confidentiality is vitally important. But it is not absolute. It is and must be balanced against Canadian Charter provisions,

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47 [1991] F.C.J. No. 407 (Federal Court of Canada - Trial Division Toronto, Ontario).

48 Ibid at 7.

including freedom of speech and the media's right to access judicial and quasi-judicial proceedings.

66. The interaction between the media's right to access and refugees' rights occurs at two levels. First, at determining whether the broad rules bestowing confidentiality on persons claiming refugee status are valid. Second, at determining who has to establish whether confidentiality is justified in the circumstances of a specific case.

67. The Canadian case law shows that in both such instances presumptive priority is given to media access rather than to confidentiality. However, when a there is a real danger to an affected person or her family then media access may be limited.

New Zealand Law

68. The New Zealand case law on point concerns the now repealed section 129T of the Immigration Act 74 of 1987[49] which read as follows:

> ***129T Confidentiality to be maintained***
>
> *(1) Subject to this section, confidentiality as to the identity of the claimant or other person whose status is being considered under this Part, and as to the particulars of their case, must at all times, both during and subsequent to the determination of the claim or other matter, be maintained by refugee status officers, the Authority,*

[49] This Act was repealed in 2010 by section 4 of the Immigration Act 51 of 2009. The new legislation is referred to by the applicants at para 36.3 of their heads.

other persons involved in the administration of this Act, and persons to whom particulars are disclosed under subsection (3)(a) or (b).

(2) Compliance with subsection (1) may in an appropriate case require confidentiality as to the very fact or existence of a claim or case, if disclosure of its fact or existence would tend to identify the person concerned, or be likely to endanger any person.

(3) Subsection (1) does not apply to prevent the disclosure of particulars—

(a) To a person necessarily involved in determining the relevant claim or matters; or

(b) To an officer or employee of a Government department or other Crown agency whose functions in relation to the claimant or other person require knowledge of those particulars; or

(c) To the United Nations High Commissioner for Refugees or a representative of the High Commissioner; or

(d) In dealings with other countries for the purpose of determining the matters specified in section 129L(d) and (e) (whether at first instance or on any appeal); or

(e) To the extent that the particulars are published in a manner allow identification of the person concerned, whether in a published decision of the Authority under clause 12 of Schedule 3C or otherwise; or

(f) If there is no serious possibility that the safety of the other person would be endangered by the disclosure in the particular circumstances of the case.

(4) Nor does subsection (1) apply to prevent the disclosure of particulars in relation to a particular claimant or other person to the extent that the claimant or person has, whether expressly or impliedly by their words or actions, waived his or her right to confidentiality under this section.

(5) A person who without reasonable excuse contravenes subsection (1), and any person who without reasonable excuse publishes information released in contravention of subsection (1), commits an offence.

69. A number of cases have considered this legislation and how the exceptions to confidentiality are to be interpreted.

70. The applicants in this matter have already brought the case of *Attorney General v X*[50] to the attention of the Court, albeit for a narrow purpose. For the purposes of SALC's intervention, it is worth highlighting the following from that case:

70.1. The matter concerned whether section 129T(3)(b) permitted those subject to a duty of confidence to disclose confidential matters to a government official for the purposes of possible extradition of X to Rwanda or for the possible prosecution of X under the International Crimes and International Criminal Court Act 2000.

70.2. The New Zealand Supreme Court found that such confidential information could be disclosed.

70.3. The Supreme Court found that Article 1F of the Convention Relating to the Status of Refugees positively supported its interpretation:

> *'In a Convention negotiated in the years following the Second World War, this provision [Article 1F] was intended to ensure that war criminals could not escape extradition and prosecution by claiming refugee status. That principle remains relevant, as does the associated maxim aut dedere aut judicare, which imposes an obligation to extradite or prosecute. The ability of this country to give effect to Article 1F(a) would be prejudiced if s 129T(3)(b) were interpreted so as to exclude disclosure to officers and employees considering extradition or prosecution.'*[51]

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50 *Attorney General v X* [2008] NZSC 48.

51 Ibid para 15.

70.4. Nevertheless, the Supreme Court noted that its finding should not detract from the importance of treating in strict confidence information provided in support of an asylum application. It commented that:

> *'It is entirely understandable that statutory confidentiality should attach to the information, much of it likely to be of a personal and sensitive nature, which an applicant provides. The right to confidentiality should be modified only to the extent strictly necessary to give effect to the limited disclosure which s 129T permits.'*[52]

71. In *Refugee Appeal No 76299 and Refugee Appeal No 16297*[53] the Refugee Status Appeals Authority of New Zealand had to decide whether or not to release its decision and reasons in *Refugee Appeal No 76204* ('*TD* decision') to the public. The applicants in Appeal 76299 and 16297 filed an application for the release of the *TD* decision on the grounds that media reports of the decision strongly suggested that it would have direct relevance to an appeal. The Authority granted the application, reasoning as follows:

71.1. As a general principle, a claim to be recognised as a refugee and information provided in support of that claim should be kept confidential.[54]

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52 Ibid para 18.

53 *Refugee Appeal Nos. 76299 & 76297*, Nos. 76299 & 76297, New Zealand: Refugee Status Appeals Authority, 17 July 2009, available at: http://www.refworld.org/docid/4a76b43a2.html [accessed 1 May 2013].

54 Ibid para 16.

71.2. However, the Immigration Act does not cloak refugee claims with absolute confidentiality. Rather, it strikes a balance between competing interests including the need for the Authority to publish its decisions. It also stipulates circumstances in which the confidentiality obligation does not apply.[55]

71.3. With regard to the need for the Authority to publish its decisions, the Authority noted that 129T(3)(e) of the Immigration Act permitted the public of decisions by the Authority in a form sufficiently redacted so as to make it unlikely that the particular refugee claimant will be identified. The Authority noted this exemption was clearly within the spirit of the Convention:

> *'Responsibility for the implementation of the Refugee Convention rests primarily with States party. Those States must ensure that refugee claimants, their representatives and those working in the refugee status determination process are aware of "refugee law". The promotion and dissemination of refugee law is an integral part of the international protection of refugees. The statutory provisions relating to publication of decisions are clearly within the spirit of the Convention.'*[56]

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55 Ibid.

56 Ibid para 23.

71.4. Beyond promoting the Convention, the publication of decisions also promoted the rule of law by ensuring accountability,[57] equal treatment[58] and the rules of fairness.[59]

71.5. The Authority noted strongly that:

> *'Refugee claimants are entitled to know how the Authority determines refugee status and in particular how it interprets the Refugee Convention. The application of the Convention to specific fact and country circumstances is also of critical importance to claimants.'*[60]

71.6. In the circumstances of the *TD* appeal, it was impossible to publish a redacted decision since TD's three refugee claims and appeals had already received considerably publicity.[61]

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[57] For this claim the Authority quotes *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258, 262 (CA):

"Before we consider the particular alleged failure to give reasons, there is value in recalling the rationale for requiring reasons. They include:
(1) The discipline on the decision maker itself: it is commonplace that preliminary views can be changed when the process of thinking through the reasons and writing them down is undertaken.
(2) Assurance to those affected that their evidence and arguments have been assessed in accordance with the law, a matter relating to the next two points.
(3) Assistance to those affected in deciding whether to challenge the decision, for instance by appeal, review or other complaint mechanism - since the statement of reasons may satisfy them that they have no real prospect of a successful challenge.
(4) If a review is mounted, assistance to the parties, counsel and deciders engaged in the review.
(5) The establishment, where appropriate, of a body of precedent or at least of guidance, governing or affecting the exercise of the particular power.
(6) Assurance to the wider public of the legitimacy, openness and accessibility of the exercise of the power - an aspect of accountability."

[58] *Refugee Appeal Nos. 76299 & 76297*, Nos. 76299 & 76297 para 27.

[59] Ibid para 29.

[60] Ibid para 26.

[61] Ibid para 32.

71.7. However, that did not matter since TD had impliedly waived the confidentiality that would otherwise have attached to his claim.[62]

71.8. Furthermore, section 129T(3)(f) applied in the circumstances since there was no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the particular circumstances of the case.[63]

71.9. Accordingly, the Authority ordered the publication of its decision in *TD*.

72. In the case of *MA v. Attorney-General*[64], the Supreme Court had to consider whether the communications between MA and the person who aided him in his asylum application were subject to privilege after these documents were seized during a police raid. The documents showed that MA had actively abused the

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62 The Authority gives three reasons for this at para 40:
'(a) A refugee claimant who puts his refugee claim into the public arena by disclosing in some detail the basis of his claim, significant aspects of the evidence and the outcome must impliedly waive also the findings of fact and credibility made on those claims and on that evidence. This much is the necessary corollary of the statutory provisions which stipulate that waiver can occur "impliedly by ... words or actions...."
(b) Where an individual (such as TD) discloses the basis of his refugee claim, releases into the public a significant (false) document and also makes much of the ultimate recognition of refugee status, he must impliedly waive confidentiality in relation to the findings of credibility and of fact. It cannot have been intended that a selective waiver of this kind could be allowed to perpetuate the very deceit which ultimately led to the recognition of refugee status.
(c) The argument that there must be a waiver which can be attached to a "particular" requires a waiver so clear and precise that only an express waiver would likely meet the claimed requirements. This would amend subs (4) by either removing the implied waiver provision or by reducing it to rare application, if not to surplusage.'

63 *Refugee Appeal Nos. 76299 & 76297,* Nos. 76299 & 76297 para 49.

64 [2010] NZSC 33.

asylum process by misleading the immigration authorities. One of the grounds the Supreme Court raised for the absence of such privilege was that New Zealand's ability to give effect to the Refugee Convention would be compromised if the Immigration Act was interpreted as permitting privilege in the circumstances.[65]

Analysis of New Zealand Case Law

73. The New Zealand case law is useful to this Court in a number of respects:

73.1. It shows that confidentiality can, in a number of different circumstances, serve to frustrate the purposes of the Convention. In such instances, it can be appropriate to limit confidentiality.

73.2. Confidentiality is appropriately lifted when doing so promotes the rule of law, particularly the values of accountability, equality, and the need for fair procedures.

73.3. Enquiries into whether disclosure should occur must always consider the dangers of disclosure.

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[65] Ibid para 23. The High Court, *MA v. Attorney-General*, CIV 2006-404-1371, New Zealand: High Court, 21 September 2007, put the matter more strongly at para 67:

'In short, the overarching policy of confidentiality is for the protection of bona fide claimants, their families, and their associates from ongoing persecution in their country of origin. It is not a policy designed to assist people whose refugee claims are fabricated or false. Nor is it sensible to suggest that the provisions of s 129T should impede or trump the efforts of relevant New Zealand agencies to ensure refugee claims are not exploited by terrorists, perpetrators of genocide, war criminals, or people who simply wish to by-pass immigration policy and procedures.'

73.4. It demonstrates the application of a rule that permits confidentiality to be waived.

IMPLICATIONS OF SALC'S SUBMISSIONS FOR REMEDY

74. In this section, we proceed on the assumption that the Court finds that blanket confidentiality is unconstitutional. The Court will then consider whether section 21(5) can reasonably be interpreted to permit of discretion. If it finds that it does not, or that an unbounded discretion would not save it from unconstitutionality, the question of remedy arises under section 172 of the Constitution. In concluding, we set out the implications of SALC's submissions on this question.

75. If the Court is minded to read-in as suggested by the applicants, it submitted that the Court should prescribe the following guidelines to fetter the discretion of the Refugee Appeals Board:

75.1. Requests for disclosure must be assessed on a case by case basis with regard to the refugee claimant, the circumstances prevailing in their country of origin, and the existing publicity the application has already received;

75.2. Confidentiality is the norm and disclosures should not be made lightly;

75.3. Disclosures must not place refugee claimants, their families, or their associates in danger;

75.4. The party to whom disclosure is to be made (and to whom they in turn may make disclosures) must be considered. So, for instance, the state of origin should never be given information while a South African prosecutor investigating war crimes should normally be given access;

75.5. Whether the information can be given in a redacted form or not;

75.6. The purposes of the Convention and the Refugees Act;

75.7. The importance of freedom of expression and media access to important governmental functions;

75.8. Other constitutional and international obligations including the importance of combating crimes against humanity, war crimes, and genocide;

75.9. Whether disclosure is in the public interest;

76. However, as these extensive and important considerations illustrate, it might be that the question of remedy is more appropriately directed to parliament. This would enable parliament carefully to delineate the scope of any exceptions and

cater for how, procedurally, they must be mediated. In the interim, a general discretion, on the grounds set out above, could vest with the Appeal Board.

77. If the Court finds against the applicants, SALC submits that it should expressly narrow its findings in the following ways:

77.1. The Court does not decide whether applications that implicate section 4(1)(a) warrant a lifting of confidentiality in any circumstances or at any stage of the proceedings.

77.2. The Court does not decide how confidentiality operates in other parts of the asylum process besides at the Refugee Appeal Board stage.

77.3. The Court leaves open whether the record of a refugee decision may be discoverable or must be produced in litigation under the rules of court. Issues of this nature arise in the *Consortium for Refugees* matter discussed above in a review context after the appeal process has run its course.

77.4. The Court limits its finding to media access and leaves aside other potential persons who might seek access including other government agencies, prosecutors, those involved in extradition requests, non-origin states including those seeking extraditions, asylum seekers and refugees (in respect of processes other than their own), their legal

representatives, and government and non-governmental organizations or groups working within the refugee sector.

CONCLUSION

78. According to the directions issued on 29 April 2013, SALC has been requested to make written submissions. It thanks the Court for the opportunity to do so. It awaits the Court's decision as to whether SALC may make brief oral submissions at the hearing.

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