IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 30123/11

In the matter between:

CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION Third Respondent

MINISTER OF STATE SECURITY Fourth Respondent

DIRECTOR-GENERAL OF THE OFFICE OF THE PRESIDENCY Fifth Respondent

DIRECTOR-GENERAL OF

THE DEPARTMENT HOME AFFAIRS Sixth Respondent

DIRECTOR-GENERAL OF THE
DEPARTMENT OF INTERNATIONAL
RELATIONS AND COOPERATION Seventh Respondent

DIRECTOR- GENERAL OF THE
DEPARTMENT OF STATE SECURITY Eighth Respondent

CENTRE MANAGER FOR THE CROWN
MINES REFUGEE RECEPTION OFFICE Ninth Respondent

THE CHAIRPERSON: THE STANDING
COMMITEE FOR REFUGEE AFFAIRS Tenth Respondent

THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH RESPONDENT Eleventh Respondent

FAUSTIN KAYUMBA NYAMWASA Twelfth Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. This application concerns the proper interpretation and administration of the Refugees Act 130 of 1998 (Refugees Act) in accordance with South Africa's international law and international criminal law obligations.

2. In issue is the decision of the respondents to grant the twelfth respondent refugee status in South Africa despite him being implicated in the commission of war crimes abroad, rendering him ineligible for refugee status (the impugned decision).

3. From the outset it must be stressed that this application stems from a concern that the respondents, individually and collectively, failed to administer and apply South African refugee law, and specifically the exclusion clause, ignoring and frustrating the purpose and objects of the Refugees Act.

4. This application is therefore primarily concerned with the failure of the respondents to adhere to section 4 of the Refugees Act, which deals with excluded persons, in a manner the gives effect to South Africa's international and domestic law obligations.

5. Through various material errors of law, failures to consider relevant considerations and a propensity to take into account irrelevant factors, the respondents have flouted their domestic and international law duties by manifestly failing properly to apply their minds to the decision whether or not to grant the twelfth respondent refugee status.

6. Consequently the respondents have failed to comply with the duties placed upon them under domestic and international law, and the Constitution and the decision stands to be reviewed and set aside.

7. If not corrected this decision will set a dangerous precedent, one that will effectively allow South Africa to use the confidentiality principle in refugee applications to shield perpetrators of international crimes from accountability and its own controversial decisions from scrutiny, sending a signal to war criminals the world over that they will find a safe haven in South Africa, a haven where they might be actively protected as refugees.

OVERVIEW OF THIS APPLICATION

8. The decision to grant or not to grant an individual refugee status is an important exercise of public power, and one with far reaching effects. On the one side such laws provide protection to the vulnerable and persecuted. Also of importance – and central to this application – is that refugee and immigration laws, if administered properly, safeguard a country from becoming home to persons attempting to evade justice for serious international crimes. In this respect exclusion clauses feature in all national laws and international instruments dealing with refugees and prohibit states from granting refugee status to persons accused of war crimes, crimes against humanity and genocide.

9. Porous borders and immigration procedures however are susceptible to abuse and misadministration and may result in countries becoming safe havens for perpetrators of heinous crimes under the guise of being refugees.

10. Refugee law is however intended to prevent this state of affairs. All countries are under a legal duty to ensure that only the vulnerable, and not those who cause vulnerability, are afforded the protections and rights accorded by the grant of refugee status. The overarching importance of-

> *"preserving refugee status for* ***only those who are in genuine need of protection*** *is integral to maintaining the credibility and integrity of the refugee protection regime, if not its sustainability."*[1] (Emphasis added).

11. The capacity for refugee law to fulfil this function, and thereby ensure its own integrity, depends on a number of interrelated factors:

    11.1. The willingness of institutions and persons responsible for evaluating refugee claims scrupulously to assess every refugee application in accordance with the law and procedures stipulated in national legislation and consistent with international law;

    11.2. The willingness of these institutions and persons to revisit decisions made erroneously and, in certain circumstances, to revoke the grant of refugee status; and

    11.3. A commitment to ensuring that decisions relating to the proper administration of the Refugees Act, a vitally important exercise of public power, are susceptible to judicial review, requiring those party to review proceedings to conduct themselves in good faith and cooperate fully in proceedings.

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[1] New Zealand: *Refugee Appeal No 75574* [2009] NZRSAA 31 (Refugee Status Appeals Authority) at para 76.

12. Of primary concern in this matter is the respondents' decision to grant the twelfth respondent refugee status, and their subsequent refusal to revisit this decision despite the serious allegations against the twelfth respondent, and their legal implications, being brought to the attention of the respondents by the applicant.

13. The twelfth respondent, a former general in the Rwandan Army, is implicated in the commission of war crimes committed in the Democratic Republic of Congo and Rwanda between 1994 and 1998 and is the subject of extradition requests from three separate and sovereign states: Rwanda, France and Spain.

14. The impugned decision failed to accord proper weight to the facts when the respondents assessed twelfth respondent's application for refugee status. The respondents failed to demonstrate that they, as required by law, carried out a thorough exclusion analysis, a mandatory component of any refugee status determination, in accordance with internationally accepted best practices and jurisprudence.

15. Relying on a legally flawed assumption that the principle of confidentiality in relation to refugee and asylum claims is absolute, the respondents have refused to provide any evidence that the legal procedures and standards applicable in the determination of exclusion when assessing refugee applications were carried out in respect of the twelfth respondent.

16. The applicant brought an application under Rule 53 to obtain this evidence and the respondents resolutely refused to produce the record. They accordingly chose to oppose the application without producing the record.

17. The respondents consequently refused to justify their decision with reference to any record of decision-making. The answering affidavit consists of bare and unsubstantiated denials bringing into question not only the legality of the

impugned decision but, as will be demonstrated herein, the credibility of South Africa's asylum and refugee regime and the integrity of the respondents who are charged with administering that system.

18. The respondents' submissions demonstrate that a number of considerations and procedures that they were legally obliged to take into account and follow when seized with the twelfth respondent's application were ignored.

19. As we demonstrate herein the respondents have proffered manifestly flawed legal and unsubstantiated factual contentions, in an attempt to explain their decision to grant the twelfth respondent refugee status. Clearly with the shoe pinching, their conduct demonstrates an attempt to ensure controversial decisions are immune from scrutiny. What the respondents have unwittingly or knowingly permitted is to make themselves complicit in the twelfth respondent's attempt to evade justice for the international crimes he is accused of.

20. This is the first time that a court has been seized with a case involving the legal procedures and the correct standard of proof to be applied in exclusion assessments in South Africa, and so the first time these issues will receive judicial attention.

21. The case thus raises an invaluable opportunity for the determination of the issues in a manner that will provide practical and legal content to the obligations imposed on the respondents in terms of the exclusion provisions of the Refugees Act.

22. In these heads of argument we deal in turn with:

22.1. The factual matrix;

22.2. The relevant legal provisions and principles, including:

22.2.1. The purpose, rationale and ambit of the principle of confidentiality of refugee claims in the context of excludability;

22.2.2. The purpose and rationale of excluding persons accused of international crimes and other excludable offences;

22.2.3. The legal procedures, standards of proof applicable and obligations of the respondents when there is reason to believe that an applicant is implicated in the commission of international crimes;

22.3. The relevant review grounds;

22.4. Respondents' *in limine* arguments;

22.5. Conclusion and Remedy

23. This application is opposed by all the respondents. Answering papers have been filed on behalf of the second, sixth, ninth, tenth and eleventh respondents by the sixth respondent and by the twelfth respondent.

24. For the purposes of these submissions:

24.1. The second, sixth, ninth, tenth and eleventh respondents will be referred to collectively as the respondents unless context indicates otherwise.

24.2. The twelfth respondent will be referred to as Nyamwasa.

FACTS GIVING RISE TO THIS APPLICATION

Briefing Paper

25. This application has its genesis in a detailed Briefing Paper submitted by the applicant to the respondents and various other government departments on 6 July 2010.[2]

[2] Founding Affidavit (FA), bundle 1, annexure KR7, p. 46.

26. The Briefing Paper was submitted out of concern for the legal implications of Nyamwasa's presence in South Africa. It was prepared by the applicant in good faith to assist the relevant South African authorities to handle Nyamwasa in a manner that was consistent with South African law, in accordance with South Africa's international law obligations, and with due consideration for Nyamwasa's human rights.

27. On 19 June 2010 Nyamwasa was shot in Johannesburg, South Africa. Following the shooting, on 22 June 2010, Nyamwasa and his family applied for asylum at the Crown Mines Refugee Reception Office in Johannesburg, South Africa. He, and his family, were granted refugee status the same day.[3]

28. On 24 June 2010 the deputy Director-General of the Department of Home Affairs responsible for Immigration, Jackson McKay, revealed to the press that Nyamwasa had indeed been granted refugee status.[4]

29. On 25 June 2010, the applicant addressed a letter to various government departments and officials "*in relation to reports that asylum has been granted to Faustin Kayumba Nyamwasa by South Africa; to ask for clarification in this regard; and to indicate that CoRMSA intends to provide a comprehensive legal briefing on the various dimensions to be weighed in determining the status afforded to Nyamwasa in South Africa*." The letter outlined the allegations against Nyamwasa and recognised that "*were Nyamwasa to be returned to Rwanda he would face serious risk of political persecution, and that South Africa is correspondingly obliged to honour the principle of non-refoulment, we nonetheless maintain that, as an individual against which substantial and credible allegations as to the commission of gross human rights abuses exist, Nyamwasa may not qualify for refugee status under South African law."*

30. Only two responses to this letter were received:

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[3] Notice of Motion (NOM) para 1, bundle 1, page 3; Respondents Answering Affidavit (MainAA), para 45.2, bundle 4, page 436; Applicant's Replying Affidavit (RA), para 67, bundle 6, page 619.

[4] FA, annexure KR4, bundle 1, page 50.

30.1. On 28 June 2010 the Presidency responded expressing its thanks to the applicant and confirmed that the matter was referred to Dr Dlamini Nkosazana Dlamini Zuma, who at that time was the Minister for Home Affairs.[5]

30.2. On 28 June 2010, the Ministry of International Relations and Cooperation responded by way of letter confirming receipt of the applicant's letter.[6]

31. On 6 July 2010 the applicant sent the Briefing Paper to a number of government departments and officials. A letter accompanying the Briefing Paper advised the recipients that "*CoRMSA will continue to closely monitor the decision and steps taken by the South African authorities taken in respect of Nyamwasa".* The applicant also informed the recipients that it "*reserves its right to take appropriate legal action in the event that the authorities fail to comply with their obligations under South African and international law."*[7]

32. The Briefing Paper addressed the following factual and legal issues: [8]

32.1. Nyamwasa's personal history and involvement in the Rwandan military and diplomatic services;

32.2. The political situation in Rwanda;

32.3. The crimes Nyamwasa is accused of committing;

32.4. Foreign indictments and extradition requests issued by the Rwandan, Spanish and French authorities for war crimes, crimes against humanity, terrorism and embezzlement;

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[5] Annexure KR5, bundle 1, p. 52.

[6] Annexure, KR6, bundle 1, p. 53.

[7] Annexure KR7, bundle 1 p.56.

[8] Annexure KR3, bundle1, p. 46.

32.5. Conclusions of the United Nations (UN) that the Rwandan army committed international crimes in the Democratic Republic of Congo (DRC);

32.6. Nyamwasa's eligibility for refugee status;

32.7. The legal framework and obligations of the South African authorities that should have informed the decision of the authorities, including:

32.7.1. Refugee law;
32.7.2. Immigration and asylum law;
32.7.3. International criminal law.

32.8. The fact that Nyamwasa would be likely to be persecuted were he to be returned to Rwanda.

33. The Briefing Paper concluded with a number of recommendations, none of which were followed.

Key Factual Observations made in the Briefing Paper

34. The following facts are apparent from the Briefing Paper.

Nyamwasa

35. Nyamwasa, formerly a close ally of Rwandan president Paul Kagame, was actively involved in the Tutsi rebel group, the Rwandan Patriotic Front (RPF), before it attained power, and later in the RPF government of Rwanda. However, he became increasingly critical of the Kagame administration and fled Rwanda in February 2010.

36. The RPF was formed in 1987 by a group of Rwandan Tutsi refugees living in Uganda. It was established as a successor to the Rwandese Alliance for National Unity (RANU) which had operated as a political refugee organisation for Rwandans in Uganda since 1979. Many Rwandan Tutsis had fled to Uganda following Hutu-led purges of the Tutsi at the time of independence from Belgium and had lived as refugees in the country ever since. However, in the late 1980s nationalist sentiment in Uganda was rising and the Rwandan Tutsis living in that country began to feel increasingly marginalised.

37. The military wing of the RPF, the Rwandan Patriotic Army (RPA), launched an attack and invaded Hutu-controlled Rwanda in 1990. This led to a prolonged civil war officially resolved by the Arusha Accords in 1993 which ushered in a power sharing agreement between the Hutu government and the Tutsi RPF. However, the instability in Rwanda continued and in 1994 the shooting down of President Habyarimana's plane and the genocide that followed reignited the civil war.[9] The RPF gained control of the country later that year and has remained in power ever since.

38. Nyamwasa held a number of different posts in the RPF. He served as Director of Military Intelligence in Uganda from 1990 to 1994[10] and held senior military positions once the RPF was in power in Rwanda. Nyamwasa was commander of the Rwandan Patriotic Army's Brigade 221 in north-west Rwanda between 1994 and 1998 and served as Deputy Chief of Staff, National Gendermarie.[11] Although Nyamwasa states that it would be impossible to hold both these positions simultaneously he neither explicitly denies that he held the positions nor provides information as to what positions he did hold if the applicant is incorrect in its assertions.[12] More recently Nyamwasa served as Rwandan Ambassador to India

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[9] FA, para 9 – 11, bundle 1, page 61-62.

[10] Annexure KR7, para 9, bundle 1, page 54 (exact reference on page 62).

[11] Annexure KR7, para 10 and 24, bundle 1, page 54 (direct reference on page 62 and page 67); Nyamwasa's Answering Affidavit (NAA), para 11.2, bundle 4, page 471.

[12] Annexure KR7, para 10 and 24, bundle 1, page 54 (direct reference on page 62 and page 67); NAA, para 11.2, bundle 4, page 471.

between 2005 and 2010 and was appointed as Secretary-General of the National Security Services in 2002.

39. The RPA was involved in the two Congo wars and has been linked to the commission of war crimes and crimes against humanity in the Democratic Republic of the Congo and in Rwanda. A United Nations report (UN Report), released in 1998, does not name suspected war criminals but details the crimes they are alleged to have committed. The crimes include attacking a Red Cross facility, killing refugees (including children), and massacres of Hutu refugees in 1997.[13] Nyamwasa's known seniority within the RPA at this time provides reason to believe that he, either directly or by virtue of his command authority, is responsible for these crimes.

Spanish and French Indictments

40. On 6 February 2008, Andreu Merelles, Investigative Judge in the Spanish High Court issued a 180 page indictment[14] charging 40 current or former high ranking Rwandan military officials for crimes including crimes against humanity and war crimes against the civilian population over a period of 12 years between 1990 and 2002.[15] The nature of the crimes identified, and their locations, correspond to the crimes identified in the UN Report.

41. A Spanish indictment implicates Nyamwasa directly in the commission of a number of international crimes in Rwanda and the DRC and, by identifying him as the "*Commanding Officer of all military units of the RPA in the DRC*",[16] attributes responsibility to him of the criminal actions of his subordinates. Investigating Judge Merelles found that *prima facie* evidence exists pointing to Nyamwasa's involvement in the following crimes:

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[13] Annexure KR7, para 26-28, bundle 1, page 68-69.

[14] Annexure KR8, bundle 2, pp. 95 – 280.

[15] For an overview of the indictment and the Spanish courts assertion of jurisdiction of these crimes see *The Spanish Indictment of High- Ranking Rwandan Officials* Journal of International Criminal Justice 6 (2008) p. 1003.

[16] Annexure KR 8, bundle 3, p. 224.

41.1. Massacres committed by himself and/or his subordinates, Colonel Jackson Rwahama Mutabazi, Colonel Dan Munyusa and Captain Joseph Nzambamwita

41.2. The abduction and murder of Spanish priest Joaquim Vallamajo and the murder of Rwandan priests in Byumba in April 1994.

41.3. The murder of three Spanish nationals, Flors Sirera Fortuny, Manuel Mdrazo Osuna and Luis Valutena Gallego.

41.4. Large-scale killings in Ruhengeri, Gisenyi and Cyangugu in Rwanda.

41.5. Attacks on civilian populations in Munyanza, Kiyanza, Rutongo, Kabuye and massacre at Nyacyonga Camp.

41.6. The massacre of 2500 Hutu refugees at the Byumba football stadium.[17]

42. This indictment also serves the basis for a request from the Spanish authorities for his extradition from South Africa.[18]

43. He is also the subject of a French indictment and extradition request relating to the shooting down of President Habyarimana's plane in 1994.[19] In relation to this allegation Nyamwasa refers to the 2012 report by a French judge tasked with further investigations into the incident which concluded that members of the President's own army were responsible for the crash, and which he believes exonerates him.[20]

44. Even if the 2012 French report does make the French indictment obsolete (which we deny) the existence of the UN Report and the Spanish indictment provide reasonable grounds to believe that Nyamwasa has been involved in the commission of war crimes and crimes against humanity – crimes which fall under the categories listed in the exclusion clause in section 4 of South Africa's Refugees Act.

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[17] Annexure KR7, para 30-37, bundle 1, page 54 (exact reference page 70-72).

[18] Annexure KRReply2, bundle 7, p. 648.

[19] Annexure KR9, bundle 3, p. 281-328.

[20] Twelfth Respondent's Opposing affidavit, bundle 4, para 12.7, p. 427.

Nyamwasa's Relationship with Rwanda

45. Despite his long association with the RPF, Nyamwasa became an outspoken critic of the Kagame regime. In early 2010, after being accused of corruption and embezzlement, Nyamwasa fled Rwanda to South Africa. The Rwandan government also allege that Nyamwasa orchestrated fatal grenade attacks in Rwanda's capital, Kigali in February 2010. Nyamwasa claims that these allegations were fabricated by Kagame's government because he is seen as a political threat. In January 2011, Rwanda's Military Court sentenced Nyamwasa, in abstentia, to life imprisonment for his alleged involvement in the grenade attacks.

46. The Rwandan government requested that South Africa extradite Nyamwasa. This request was denied.[21]

Recommendations made in the Briefing Paper

47. The Briefing Paper discusses the legal implications of Nyamwasa presence and these are dealt with in detail herein.

48. A number of recommendations[22] were made, of which the following are relevant for the purposes of these submissions:

    48.1. There is reason to believe that Nyamwasa was involved in crimes against humanity and war crimes and thus Nyamwasa is an excluded person for purposes of section 4 of the Refugees Act and is not eligible for refugee status.

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[21] Annexure KRReply3, bundle 7, p. 655.

[22] Annexure KR7, para 106, bundle 1, page 54 (exact reference at page 93-94).

48.2. The decision to grant Nyamwasa refugee status is therefore unlawful and in conflict with South Africa's international obligations.

48.3. The South African authorities ought to take steps to withdraw Nyamwasa's refugee status so as to comply with the Refugees Act and South Africa's commitment to the principle of non-impunity for international crimes. Any decision on withdrawal of such status must be taken with due regard for Nyamwasa's rights to procedural fairness under the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

48.4. In light of the political climate in Rwanda, and in compliance with the principle of non-refoulement, South Africa should not extradite Nyamwasa to Rwanda if Nyamwasa is able to demonstrate that he has a well-founded fear that he faces a reasonable possibility of persecution or ill-treatment in Rwanda.

The Manner in Which the Respondents Dealt with the Briefing Paper and Prepared their Answering Affidavit

49. The manner in which the government recipients dealt with the briefing paper was disturbing. Not once between the date that the Briefing Paper was sent and the initiation of legal proceedings did any of the government respondents respond to the contents of the Briefing Paper despite numerous attempts on the part of the applicant to solicit a meaningful response. The matter was simply referred to another party or ignored.

50. As explained above, on 15 July 2010 the Department of Home Affairs confirmed receipt of the Briefing Paper and indicated that the matter had been referred to the Deputy Director General: Immigration Services, Mr Jackson Mckay for further

attention. The letter also stated that this "*office will contact you regarding your enquiry*".[23] No one from this office ever contacted the applicant.

51. On 23 July 2012 the Standing Committee for Refugee Affairs confirmed receipt and indicated that matter had been referred to the Chairperson of the Standing Committee of Refugee Affairs.[24] The Chairperson never contacted the applicant.

52. On 28 July 2012 the Chief Directorate: Asylum Seeker Management, on behalf of the Department of Home Affairs (the department responsible for the Refugees Act) confirmed receipt of the Briefing Paper but informed the applicant that this matter is "*being handled by the Department of Justice, South African Police Services and International Relations".* No correspondence has been received from any of these institutions that they were in fact handling this matter.

53. Five months went by and no substantive response was received from any of the recipients. On 17 December 2010 the applicant sent a letter to the respondents signalling its intent to proceed with legal action should the authorities fail to comply with their obligation to revisit the impugned decision. The letter demanded compliance with the respondents' obligations by 22 January 2011.[25]

54. Sometime in early January 2011 the applicant's attorneys received a phone call[26] and, on 20 January 2011, an email from the Office of the Presidency informing the applicant that the Office of the Presidency was engaging other departments and requesting an extension to 26 January 2011 to reply to the applicant's letter.[27]

55. However, none of the respondents contacted the applicant on or before 26 January 2011. As a result, on 31 January 2011 the applicant sent an email to the Office of

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[23] Annexure KR10, bundle 3, p. 329.

[24] Annexure KR11, bundle 3, p. 330.

[25] FA, para 34, bundle 1, page 27; Annexure KR12, Bundle 3, page 333.

[26] FA, para 35, bundle 1, page 27.

[27] FA, para 35, bundle 1, page 27; Annexure KR14, bundle 3, page 337.

the Presidency requesting a response.[28] On 15 February 2011 the applicant faxed a letter to the Office of the Presidency reiterating that the applicant intended to proceed with legal action should the South African authorities not comply with their obligations under South African and international law. The authorities were given until 28 February 2011 to notify the applicant of the steps they were taking in order to comply with these obligations.[29]

56. On 21 February 2011 the applicant received a letter (dated 10 February 2011) from the Minister of State Security informing the applicant that its office has noted the legal briefing and vaguely indicated that it would "*consider the contents when called to consider the matter*".[30]

57. By 28 February 2011 the applicant had still not received any meaningful communication from any of the respondents, despite the date having been given as a deadline by which to inform the applicant what steps were being taken in order to comply with their obligations.[31]

58. Notwithstanding the fact that the respondents had failed to comply with a number of earlier deadlines set by the applicant, on 28 March 2011 the applicant sent a letter to the Office of the Presidency extending the date for compliance with the demand to 13 April 2011. The letter reserved the right to approach the High Court without further notice should the South African authorities fail to initiate proceedings to withdraw the refugee status granted to Nyamwasa.[32]

59. On 13 April 2011 the applicant received something that might be described as communication from the Office of the Presidency, but which amounted to belated and obfuscating buck-passing: a letter indicating that the Departments of Home

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[28] FA, para 36, bundle 1, page 28. The email itself doesn't appear to be part of the record but is referred to in the letter written by Wits Law Clinic to the Office of the Presidency on 15 Febrary 2011; Annexure KR15, bundle 3, page 338 (exact reference on page 339).

[29] FA, para 36, bundle 1, page 28; Annexure KR15, Bundle 3, page 338

[30] FA, para 37, bundle 1, page 28; Annexure KR16, bundle 3, page 340; Annexure KR17, bundle 3, page 341 (exact reference at page 342).

[31] FA, para 36, bundle 1, page 28.

[32] FA, para 38, bundle 1, page 28; Annexure KR17, bundle 3, page 341.

Affairs and International Relations and Cooperation were the relevant departments and that the applicant should deal directly with those two departments.[33] The 28 March 2011 letter had been sent to the Office of the Presidency on the understanding, as previously indicated by the office, that it was in contact with the other governmental Departments.

60. Nevertheless, on 20 April 2011 the applicant hand-delivered a letter to the Ministries of Home Affairs and International Cooperation, and electronically to the Office of the Presidency. The letter requested the respondents to advise on or before 30 April 2011 when they intended to initiate proceedings to withdraw Nyamwasa's refugee status. The letter stated that failure to do so will result in an application to the High Court without further notice.[34]

61. Besides an email received from the Office of the Presidency on 20 April acknowledging receipt of the 20 April 2011 letter[35] and a forwarded email from the Office of the Presidency on 3 May 2011 explaining that the office had received an email from the Business Unit (East Africa-Burundi and Rwanda) of the Department of International Relations and Cooperation which assured the Office of the Presidency that "*the matter would receive its serious attention it deserves*",[36] no other communication was received from the respondents by the applicant.

62. Having received no substantive information relating to the steps the respondents intended taking in respect of the applicant's request to withdraw Nyamwasa's refugee status, despite it having by then being referred to multiple government departments, the only logical conclusion was that nothing had been or would be done and that the impugned decision would not be revisited in light of the contents contained in the Briefing Paper.

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[33] FA, para 39, bundle 1, page 28; Annexure KR18, bundle 3, page 343.

[34] FA, para 41 and 42, bundle 1, page 29; Annexure KR19, bundle 3, page 345.

[35] FA, para 43, bundle 1, page 30; Annexure KR20, bundle 3, page 348.

[36] FA, para 43, bundle 1, page 30; Annexure KR21, bundle 3, page 351.

63. Left with no other choice by the respondents, the applicant launched this application on 27 May 2011 to review and set aside the decision to grant Nyamwasa refugee status by the ninth and/or tenth respondents acting under the supervision and control of the second and sixth respondents. Additionally under Rule 53(1)(b) of the Uniform Rules of Court the notice of motion required the respondents to provide the applicant with all documents and evidence that were used in coming to the impugned decision.[37] This record would have to have been supplied by 1 July 2011 at the latest.

64. On 14 June 2011 the seventh respondent filed a notice to abide and on 29 June 2011 the fourth and eighth respondents filed notices to oppose.

65. Despite repeated requests for the respondents to comply with Rule 53(1)(b) and submit the record of the decision the respondents failed to provide the applicant with any of the documents that were used in reaching the decision to grant Nyamwasa asylum. In late August 2011 the applicant informed the respondents that should they not comply with their obligations under Rule 53(1)(b) the applicant intended approaching the court for an order compelling them to do so.[38]

66. It must be noted that by this stage the respondents had not yet filed their answering affidavits, and, aside from a couple of letters acknowledging receipt of the applicant's documents and letters and requesting extensions to the deadline for compliance with Rule 53(1)(b), there had been no formal legal communication from the respondents in response to the applicant's notice of motion and founding affidavit.

67. On 13 September 2011 the applicant launched interlocutory proceedings under Rule 30A to compel the respondents to comply with their obligations under Rule 53(1)(b) to provide the applicant with the record of the impugned decision.[39]

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[37] Bundle 1, page 1; JSA, para 30, bundle 3, page 375.

[38] Rule 30A Affidavit (JSA), para 42, bundle 3, page 378; JS5, Notice in terms of Rule 30A, bundle 4, page 389; Annexure JS5, Notice in terms of Rule 30A, bundle 4, page 389 (date stamp can be seen on page 393); JSA, para 44, bundle 3, page 379; JS6, bundle 4, page 394.

[39] Bundle 3, page 367; Annexure A, bundle 6, page 540.

Immediately after this, and for the first time (and despite previously simply requesting extensions to file the record), the respondents now informed the applicant in writing that they objected to providing the record as required on the grounds that doing so would violate Nyamwasa's confidentiality.[40]

68. In an attempt to ensure that the main application proceeded despite the refusal of the respondents to provide the record the applicant informed the respondents that their reliance on the grounds of confidentiality would not prevent the applicant from proceeding with the main application to have the impugned decision reviewed and set aside.[41] The applicant, acting in good faith, was of the view that despite not providing the record, the respondents would at least attempt to demonstrate that the impugned decision was justified and in accordance with the law. It had after all been four months since the applicant had filed its notice of motion, and fifteen months since the applicant had first alerted the respondents to the fact that the decision to grant Nyamwasa refugee status was unlawful.

69. On 27 October 2011, as a result of the extraordinary delays and the fact that the respondents still had not filed any answering affidavits, the applicant set the matter down on the unopposed motion roll.[42] That seemingly spurred the respondents into action, since shortly thereafter Mr Mkuseli Apleni deposed to an answering affidavit on behalf of the second, sixth, ninth, tenth and eleventh respondents.[43] A supporting affidavit was also filed by the tenth respondent, the RSDO responsible for assessing Nyamwasa's application, associating himself with the affidavit of Mr Apeleni.

70. Having eventually received the answering affidavit the applicant then withdrew the matter from the unopposed roll[44] and later received Nyamwasa's separate answering affidavit.[45]

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[40] Bundle 6, page 581; RA, para 5, bundle 6, page 600; Annexure KRReply1, bundle 7, page 646.

[41] Annexure C, bundle 6, page 583.

[42] Bundle 4, page 410.

[43] RA, Bundle 4, page 416 (date stamp to be found on page 448).

[44] Bundle 5, page 499; DiscoverAA, para 5, bundle 6, page 525; Annexure D, bundle 6,page 584.

71. Notwithstanding all the previous delays, the respondents' answering affidavits disappointingly consisted of nothing more than bare and unsubstantiated denials. In order to provide the respondents with yet another opportunity to justify the impugned decision the applicant filed a notice in terms of Rule 35(12) requesting the respondents to discover a number of documents that they had made reference to in their affidavits.[46]

72. The respondents filed an answering affidavit to this discovery application denying that there was reference to any documents in a manner that required discovery of those documents, and alternatively that the confidentiality of the asylum process precluded them from producing the documents in any event.[47]

73. It was by this stage abundantly clear that the respondents had adopted a strategy – heavily criticised by our courts – of foot-dragging and playing possum.

74. We submit that the respondents' strategy is improper:

    74.1. The Constitutional Court has repeatedly confirmed that organs of state (like the respondents) have a duty to respect, protect and promote the rights and values contained in the Constitution, and to assist the Courts. Their conduct in litigation – and the decision whether to advance a particular defence – must be informed by the values of the Constitution and must seek to promote (rather than frustrate) the just determination of legal disputes.[48]

    74.2. It is therefore improper for an organ of state to take an unfounded, technical point to defeat a valid claim. As the Supreme Court of Appeal

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[45] Bundle 4, page 460 (date to be found on page 476).

[46] Bundle 5, page 518; DiscoverAA, para 9, bundle 6, page 526.

[47] Bundle 6, page 523.

[48] See *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) at para 49; *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at para 78-80.

held in the *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others*:

> "*when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.*"[49]

74.3. The respondents' evasiveness in this regard is fundamentally at odds with their duties as organs of state.

74.4. The Constitution imposes a range of positive duties on organs of state. In the context of litigation, section 165(4) is explicit. It provides:

> "*Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*"

74.5. Courts can only function effectively if they are in possession of all material evidence. Section 165(4) imposes a duty on the respondents to assist the Courts to ensure, *inter alia,* their effectiveness. This involves a positive obligation to place relevant and material evidence before a court of law. The matter was put explicitly by Sachs J in his concurring

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[49] *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at para 15.

judgment in *Matatiele Municipality v President of the Republic of South Africa and others*. He stated:

> "*[107] ... the Constitution requires candour on the part of Government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as Section 165(4) of the Constitution requires.*
>
> ...
>
> *[109] The notion that 'government knows best, end of enquiry', might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution. ...*
>
> *[110] As this case demonstrates, far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by parliament comes not from awe, but from openness.*" See also: Ngcobo J at para 84

74.6. There is a further independent basis which imposes a duty upon organs of state to act ethically and openly. Section 195 of the Constitution deals with the "***basic values and principles governing public administration***". These principles include:

74.6.1. "***a high standard of professional ethics must be promoted and maintained***" – Section 195(1)(a);

74.6.2. "***services must be provided impartially, fairly, equitably and without bias***" – Section 195(1)(d);

74.6.3. "***public administration must be accountable***" – Section 195(1)(f);

74.6.4. "***transparency must be fostered by providing the public with timely, accessible and accurate information***" – Section 195(1)(g).

74.6.5. These principles apply to organs of state. In *Van der Merwe and Another v Taylor NO and Others* Mokgoro J (albeit in the minority) observed:

> "*[71] Section 1 of the Constitution, read with section 195, indeed sets high standards of professional public service as applicants submit. It requires ethical, open and accountable conduct towards the public by all organs of State. These are basic values for achieving a public service envisaged by our Constitution, which requires the State to lead by example. In this case, the State has failed to do so.*
>
> *[72] The remissness on the part of the respondents should not be countenanced. Correctly so, none of the respondents attempted to defend it. In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as envisaged in the Constitution and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past. Section 195 envisions that a public service reminiscent of that era has no place in our constitutional democracy. The remissness on the part of the respondents is not conducive to the current efforts of public service transformation. It must certainly be discouraged. In that context the conduct of the respondents is indeed contrary to sections 1 and 195 of the Constitution, as the applicants submit. Although the applicants submitted that the respondents' conduct was inconsistent with sections 1 and 195 of the Constitution, they did not claim that it*

constitutes a basis for a self-standing cause of action. I will therefore not determine that question."[50]

74.7. In cases concerning attacks upon the constitutional validity of legislation, the Constitutional Court has frequently stressed that the State bears a duty "***to ensure that the relevant evidence is placed before the court***".[51]

74.8. In principle, the same must apply to cases where conduct is impugned.

74.9. The matter must also be considered in the context of the right of access to information contained in Section 32 of the Constitution. In *Van Niekerk v City Council of Pretoria* Cameron J, commenting on Section 23 of the Interim Constitution stated:

> "*In my view Section 23 entails that public authorities are no longer permitted to play possum with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution as manifested in Section 23, is to subordinate the organs of state, including municipal authorities, to a new regimen of openness and fair dealing with the public.*"[52]

74.10. Finally, in terms of section 7(2) of the Constitution, the State "***must respect, protect, promote and fulfil the rights in the Bill of Rights***". The applicant is entitled to a fair hearing in terms of section 34 of the

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[50] *Van der Merwe and another v Taylor NO and others* 2008 (1) SA 1 (CC) at paras 71 and 72.

[51] *Khosa and others v Minister of Social Development and others* 2004 (6) SA 505 (CC) at para 19; see also: *Gory v Kolver NO and others (Starke and others intervening)* 2007 (4) SA 97 (CC) at para **64.**

[52] *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T); See also, *Ekuphumleni Resort (Pty) Limited and another v Gambling and Betting Board, Eastern Cape and others* 2010 (1) SA 228 (E) at paras 10 and 20.

Constitution. The respondents are obliged to respect, protect, promote and fulfil that right. There is an obligation upon them to do so by ensuring that the matter is adjudicated upon the correct facts.

75. It follows, therefore, that the respondents' conduct is improper, evasive, and ultimately at odds with the Constitution's values of openness, transparency and accountability.

76. Nevertheless, in the interests of bringing this matter to finality the applicant filed its replying affidavit on 29 May 2012.

77. It must be stressed this application must be decided on the papers before the court. The respondents have refused to provide the record or any information justifying their decision despite the numerous opportunities provided by the applicant.

78. This application is therefore not concerned with the interlocutory applications filed by the applicant to solicit further information. The only relevance they bear for the purposes of this application is that they demonstrate that the respondents have laboured under an incorrect assumption that confidentiality of refugee applications is absolute, a point raised in their answering affidavit and addressed in these submissions.

RELEVANT LAW

International and Regional Refugee Conventions

79. 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 for the provision of certain basic entitlements, and guarantees that where an individual's home state fails to protect these fundamental rights, states granting asylum will do so.

80. The Supreme Court of Canada captured this objective in the case of *Canada (Attorney General) v. Ward* (*Ward*) where the Court found that:

> *"International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p. 135."*[53]

81. At the international level, two principal conventions govern refugee law matters:

81.1. The United Nations Convention relating to the Status of Refugees, 1951 (Refugee Convention); and

81.2. The United Nations Protocol Relating to the Status of Refugees, 1967 Protocol (Additional Protocol).

82. Regionally the principal legal instrument is the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention).

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[53] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993

83. These instruments define, in very similar terms, which persons qualify as refugees, and set out the rights of individuals who are granted asylum and the responsibilities of countries when considering the grant of asylum.[54]

84. The instruments also set out which people do not qualify as refugees, and it is this aspect of refugee law that is relevant for the determination of this application.

85. Both the Refugees Convention and the OAU Convention recognise classes of persons that are not eligible for refugee status. Article 1(F) of the Refugees Convention and Article 1(5) of the OAU Convention oblige states to deny the benefits of refugee status to certain persons who satisfy the criteria in the provision, but who would otherwise qualify for qualify for refugee status.

86. Article 1(F)(a) of the Refugees Convention[55], mirrored in the OAU Convention, provides that:

> *"The provisions of this Convention shall not apply to any person with respect to whom there <u>are serious reasons for considering</u> that:*

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[54]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*."

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

> "*For the purposes of this Convention, the term "refugee" shall mean every person who, 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*."

[55] See in this regard *Pushpanathan v. Canada (Minister of Citizenship and Immigration) (Pushpanathan)* "*The purpose of Article 1 is to define who is a refugee. Article 1F then establishes categories of persons who are specifically excluded from that definition*." At para 58.

(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" (Emphasis added).

87. The United Kingdom Supreme Court aptly captures the purpose and objectives of the Refugees Convention:

"*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 recognised 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***"[56] (Emphasis added)

88. The rationale therefore 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.

89. As emphasized by the Supreme Court Canada, when faced with questions around the exclusion clause, *"[w]hat is crucial … is the manner in which the logic of the exclusion in Article 1F generally, and Article 1F(c) in particular, is related to the purpose of the Convention as a whole*." The exclusion clause must therefore be interpreted and applied in a manner that ensures that the overall purpose of the Refugee Convention is achieved.

90. All states are therefore bound to ensure that they carry out a thorough exclusion assessment when considering refugee applications. This was stressed by the United Nations High Commission for Refugees (UNHCR) Executive Committee as it emphasised the-

> "*…need to apply scrupulously the exclusion clauses stipulated in Article 1 F of the 1951 Convention and in other relevant international instruments, to ensure that the integrity of the asylum institution is not abused by the extension of protection to those* ***who are not entitled to it***"[57]
> (Emphasis added)

91. In 1996 South Africa acceded to the Refugee Convention, the Additional Protocol and the OAU Convention.

92. Thereafter the Refugees Act was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law and the international instruments have thus been incorporated into South African law.[58]

The Refugees Act 130 of 1998

93. Section 3 of the Refugees Act, reflecting the internationally accepted construction of persons that qualify for refugee status, is the operative provision in determining refugee status. It reads:

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[56] *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 15 *(R v Secretary of State)*, judgment of 17 March 2010, at para 1

[57] UN High Commissioner for Refugees, *Safeguarding Asylum,* 17 October 1997, No. 82 (XLVIII).

[58] *Ibrahim Ali Abubaker Tantoush v Refugee Appeal Board and Others* (13182/06) [2007] ZAGPHC 19 *(Tantoush*) at para 61.

"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".

94. Section 4(1) of the Refugees Act designates persons that do not qualify for refugee status and provides that:

"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; or*

(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." (Emphasis added).

95. The present application is concerned with section 4(1)(a) of the Refugees Act.

96. It is notable that while the Refugees Convention requires for exclusion that there be "*serious reasons for considering*" that the person concerned has committed an

excludable offence, the Refugees Act merely requires there to be "*reason to believe*" that such an offence has been committed.

97. Section 6 of the Refugees Act deals with the interpretation, application and administration of the Act and which requires that due regard be had to the Refugees Convention, the Additional Protocol, the OAU Convention, the Universal Declaration of Human Rights and any other relevant convention or international agreement to which South Africa is or becomes party to.

98. In addition to this explicit requirement, constitutional provisions relating to the application of international law are also relevant. Specifically:

98.1. Section 232 of the Constitution which incorporates customary international law into South African law, including the recognition of certain core international crimes, such as war crimes, crimes against humanity and genocide and the concomitant duty to combat impunity for their commission.[59]

98.2. Section 39 of the Constitution which mandates consideration of international law and permits the use of foreign case law, the consideration of which is germane to this application.[60]

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[59] See in this regard *S v Basson* 2005 (1) SA 171 (CC) where the Constitutional Court noted:

> *"[I]nternational law obliges the state to punish crimes against humanity and war crimes. It is… clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes. We do not have all the details before us but it does appear that the crimes for which the accused was charged may well fall within the terms of this international law obligation. In the circumstances, it may constitute an added obligation upon the state."* At para 37.

The Court went onto say that:

> *"[G]iven the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges."* At para 184.

[60] There is extensive comparative law on the issues raised in this application. In light of the absence of comprehensive South African jurisprudence on these issues guidance must be sought from other

99. These provisions provide the parameters in which all refugee applications must be assessed and they must inform all decisions to grant or deny refugee status.

100. In addition to the aforementioned provisions it is also necessary to outline the procedural obligations of persons and bodies responsible for refugee status determinations and the oversight of these decisions.

101. Chapter 3 of the Refugees Act deals with applications for asylum. All applicants must present themselves to a Refugee Reception Office at which a Refugee Reception Officer (RRO) conducts a preliminary enquiry.

102. In terms of section 21(2)(c) the RRO is entitled to conduct ***any*** enquiry he or she deems necessary in "*order to verify the information furnished in the application*".

103. The RRO then refers the application to a Refugee Status Determination Officer (RSDO). In the present matter the RSDO is the eleventh respondent.

104. Once an RSDO is in possession of the application he or she assesses the application. The obligations of the RSDO are found in section 24 of the Refugees Act.

104.1. Section 24(1)(b) permits the RSDO to consult with the UNHCR and entitles the RSDO to request any further information deemed necessary for a proper status determination. The need for such a consultation will depend on the complexity of the application.

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jurisdictions and regional fora to inform this Court's decision – and we have attempted to assist this Court by collating and referring to that jurisprudence in these submissions where appropriate.

104.2. In terms of section 24(3)(d) of the Refugees Act the RSDO *must* refer questions of law to the Standing Committee. In the present matter the Standing Committee is the tenth respondent. An RSDO is therefore legally required to refer questions of law to the Standing Committee if an asylum application has legal implications.

105. In terms of section 11(g) the Standing Committee is also required to monitor the decisions of RSDOs.

106. These obligations are not limited solely to determinations in terms of section 3 of the Refugees Act (inclusion) but must also be followed during the exclusion assessment required by section 4. A refugee status determination is not complete until both assessments are fully carried out, and both require the due diligence and good faith of the responsible RSDO. The UNCHR endorses a holistic approach to status determinations:

> "*In principle, in particular given the exceptional nature of the exclusion clauses, the applicability of the exclusion clauses should be examined within the regular refugee status determination procedure … **This holistic approach facilitates a full assessment of the factual and legal issues of the case and is necessary in exclusion cases, which are often complex, require an evaluation of the nature of the alleged crime and the applicant's role in it on the one hand, and of the nature of the persecution feared on the other**."*[61] (Emphasis added).

107. It is beyond doubt that an exclusion assessment is mandatory. In the very detailed discussion of exclusion in the decision of the United Kingdom Asylum and

[61] UN High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003 at paras 99 and 100.

Immigration Tribunal/Immigration Appellate Authority in *Indra Gurung v. Secretary of State for the Home Department* (*Gurung*)[62] the Tribunal found that:

> *"A further principle of considerable importance is that the Exclusion Clauses are in mandatory terms. They stipulate that the provisions of the Convention "shall not apply…" to those who fall within Art 1F. It may be that at present appeals that come before adjudicators 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 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****."*[63](Emphasis added)

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[62] *Indra Gurung v. Secretary of State for the Home Department** (*Gurung)* [2002] UKIAT 04870, United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 14 October 2002. This decision is one of the most thorough discussions of the exclusion clause. See in this regard paras 2-3 where the Tribunal states:

> "*2.Although deciding to remit this appeal we have starred it for the purpose of giving guidance to adjudicators on the proper approach to the Refugee Convention`s Exclusion Clauses at Art 1F …*
>
> *3. we have been able to consider the relevant issues in the light of a very considerable body of material including: The Exclusion Clauses: Guidelines on their Application, UNHCR, Geneva, December 1996; Lisbon Expert Roundtable, Global Consultations on International Protection May 2001 – Summary Conclusions: Exclusion from Refugee Status; articles from the Special Supplementary Issue of the International Journal of Refugee Law, Vol 12, 2000 on Exclusion from Protection; the EU Commission Working Document on the Relationship between Safeguarding Internal Security and complying with International Protection Obligations and Instruments, COM (2001) 743 final, Brussels, 5.12.2001; UNHCR`s, ECRE`s and Amnesty International`s comments on the same; the Proposed Council Directive on minimum standards for the qualification and status of third country nationals and stateless person as refugees or as persons who otherwise need international protection COM (2001) 510 final Brussels 12 September 2001; and ECRE Position on The Interpretation of Art 1 of the Refugee Convention, September 2000. In addition to UK court and Tribunal cases dealing with Art 1F-related issues, we were also referred to leading cases from Canada, the Netherlands, New Zealand, the United States and a very recent Australian High Court judgment.*" (Footnotes omitted).

[63] *Gurung* at para 38. *Gurung* was described by the Court in *JS v Secretary of State*, as "*[t]he leading domestic authority*" on exclusion in the United Kingdom, at para 59.

108. Section 36 of the Refugee Act regulates the withdrawal of refugee status and provides that:

> *"(1) if a person has been recognized as a refugee erroneously on an application which contains any materially incorrect or false information, or was so recognized due to fraud, forgery or misleading representation of a material or substantial nature in relation to the application or if such a person ceases to qualify for refugee status in terms of section 5 –*
>
> *(a) the Standing Committee must inform such a person of its intention of withdrawing his or her classification as a refugee and the reasons therefor; and*
>
> *(b) such a person may, within the prescribed period, make a written submission with regard thereto.*
>
> *(2) After consideration of all material facts and with due regard for the rights set out in Section 33 of the Constitution, the Standing Committee may withdraw such recognition and such a person may be dealt with as a prohibited person under the Aliens Control Act.*
>
> *(3) Any refugee whose recognition as such is withdrawn in terms of subsection 10 may be arrested and detained pending being dealt with in terms of the Aliens Control Act, 1991."*

109. A positive finding that a person applying for asylum meets the requirements under section 3 is of no consequence if that person is found to be excludable, even if such a finding is only made at a later stage.[64]

110. As we indicate below, the respondents failed in their duty – integral to the refugee determination assessment – to properly consider the facts regarding Nyamwasa's

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[64] Section 36 of the Refugees Act. See also Guy S. Goodwin Gill 'The Refugee in International Law' 2nd ed (Oxford University Press, 1998) where the author states that: "*Being integral to the refugee definition, if the exclusion applies, the claimant cannot be a refugee, whatever the other merits of his or her claim."* At p. 97; *The Attorney-General (Minister of Immigration) v. Tamil X and Anor (Tamil X)* [2010] NZSC 107 where the New Zealand Supreme Court held that:

> *"The provisions of the Convention do not apply to a claimant who comes within the exclusionary terms of art 1F. Whatever the merits of the claim under art 1A(2), such a claimant cannot be recognised as a refugee"* at para 13.

application for asylum, or to appreciate the legal questions presented by his application or to seek assistance in properly answering those questions.

111. Had they performed their functions properly and constitutionally, they would have come to the only conclusion open on the facts: that Nyamwasa is not a refugee for the purposes of South African refugee law; and that whatever the other merits might have been of his application, he could not and should not have been recognised as a refugee under the law.

THE PROPER INTERPRETATION AND APPLICATION OF THE PRINCIPLE OF CONFIDENTIALITY OF REFUGEE APPLICATIONS

112. Because of the respondents' attitude to this application, a question for consideration involves the distracting issue of confidentiality.

113. The respondents have frustrated this application by purporting to justify their submissions, and the lack of substantiation, on the basis that refugee applications are confidential. As will be demonstrated herein the respondents have throughout these proceedings pressed into service a legally incorrect and impermissible construction of the confidentiality provision in the Refugees Act.

114. Section 21(5) of the Refugees Act provides that:

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

115. The respondents have incorrectly interpreted this provision as providing for blanket confidentiality – thereby denying the opportunity for a proper ventilation of their impugned decision, and without any consideration for the established

means by which that confidentiality might be maintained before this Court through appropriate safeguards.

116. For at least three reasons the respondents' attempt to hide behind confidentiality is flawed and leads to conclusions damaging to the respondents' case:

116.1. *First*, the public interest and the rule of law demand openness and accountability from the Government; and the respondents' bland refusal to comply with those constitutional prescripts mean that they have elected not to put a version before Court;

116.2. *Second*, the respondents have failed to appreciate – as the case law and authorities detailed above indicate – that Nyamwasa is not a refugee for the purposes of South African refugee law; and that because he could not and should not have been recognised as a refugee under the law there is no basis for an assertion of confidentiality in respect of his application;

116.3. *Third*, even if the respondents could assert confidentiality in respect of his application, the constitutional right of access to court and a fair hearing required consideration of appropriate means of allowing access to the documentation whilst respecting the Nyamwasa's confidentiality.

117. This application concerns matters of compelling public interest, including just administrative action and accountable public administration in relation to the Government's grant of asylum and the application of the international and domestic law rules around exclusion of suspected international criminals from the grant of refugee status.

118. There is a manifest need to ensure that matters are properly ventilated in these review proceedings in order for this Honourable Court to scrutinise whether the respondents properly acted lawfully in the process of granting Nyamwasa refugee status. The public interest demands that the truth be discovered. As Lord Denning MR put it in *Riddick v Thames Board Mills Ltd*:

"*The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure*".[65]

119. The public interest in discovering the truth in this case goes beyond ensuring that justice is done between the parties – it also involves the real question of ensuring that justice is done for the victims in respect of the crimes that Nyamwasa is alleged to have committed.

120. It must furthermore be recalled that any claims for confidentiality are only to be advanced in respect of someone that is in law entitled to refugee status at all. As we have pointed out above (and elaborate on further below), there is every reason to believe that Nyamwasa did not qualify for refugee status at all – and hence that he is not entitled to claim confidentiality or to have it asserted on his behalf.

121. The simple point is that the rule of law and the public interest in transparent and open government demand that the applicant and this Court should have been afforded proper access to the relevant documentation and reasoning behind the respondents' decision to grant Nyamwasa refugee status in this case.

122. The respondents' failure to entrust such information to the Court must mean that on their sanitised version, bald as it is, they have effectively put up no justification for their decision. They have foreclosed debate on the very issue that is at the heart of this case, and by having made that election, consequences follow for them.[66]

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[65] *Riddick v Thames Board Mills Ltd* (1977) 3 All ER 677 (CA) at 687.

[66] See Kriegler J in *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623:

"[94] Litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and

123. The Plascon-Evans rule and the exceptions thereto are of particular significance for purposes of the relief that is sought in this application.

124. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* the Appellate Division held as follows:

> "*... where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court … and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks….*
>
> *Moreover, there may be <u>exceptions</u> to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers …*"[67] (Emphasis added).

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the defence in our largely adversary system of criminal justice. An accused, ideally assisted by competent counsel, conducts the defence substantially independently and has to take many key decisions whether to speak or to keep silent: Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral and/or written evidence and if so by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the basis of the defence under s 115 of the CPA? Does one adduce evidence, one's own or that of others? Each and every one of those choices can have decisive consequences and therefore poses difficult decisions."

[67] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A)

125. The general rule in *Plascon-Evans* is that final relief in motion proceedings may only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of such relief.[68]

126. There are however two exceptions to this general rule.[69]

126.1. The first exception is where the denial by a respondent of a fact alleged by the applicant is not such as to raise a real, genuine or *bona fide* dispute of fact.

126.2. The second exception is where the allegations or denials of the respondent are so clearly untenable that the court is justified in rejecting them on the papers. If the respondent's version is "*so improbable and unrealistic that it can be considered to be fanciful and untenable*",[70] then it may be rejected on the papers by adopting a "*robust, common-sense approach*".[71] We shall request this Court to apply the second exception to the Plascon-Evans rule below.

127. The key averments by the applicant have drawn from the respondents an answer that is evasive and bald.

128. Indeed, the applicant alerted the respondents to the fact that in respect of key averments there was a response from the respondents that was so flimsy that it fell into the second exception of the Plascon-Evans rule.

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[68] *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892H-J; *Townsend Productions (Pty) Ltd v Leech* 2001 4 SA 33 (C) at 40E-H.

[69] The two exceptions are explained by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 152-153, in a passage that was endorsed by the SCA in *Wightman v Headfour (Pty)* Ltd 2008 (3) SA 371 (SCA) at para [12], and particularly at para [13].

[70] *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 2 SA 689 (W) at 699F-G.

[71] *Soffiantini v Mould* 1956 4 SA 150 (E) read with *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 2 SA 689 (W) at 698I.

129. We reiterate that the respondents are no ordinary litigants. They represent the Government in these proceedings and the "what" and "how" of their impugned decision and the Government's true stance in respect of the grant of refugee status to Nyamwasa is an issue in respect of which they have peculiar knowledge.[72]

130. As part of the executive arm of the State, the respondents have a duty to "*assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*" – section 165(4) of the Constitution.

131. The norm of accountability[73] further demands that the respondents had to place sufficient evidence before this Court in answer in order to satisfy this Court that the impugned decision meets the principle of legality, the requirements of PAJA, and the dictates of our domestic and international refugee legal obligations. By failing to do so the respondents have rendered their own decision incapable of justification.

132. Even if the documents could be construed as confidential, the respondents furthermore by their absolutist position on confidentiality failed to consider or propose alternatives that would have allowed a balance to be struck between the asserted confidentiality rights of Nyamwasa and the requirements of openness, transparency and accountability on the other.

133. It is now well accepted in our law that a Court might be asked to fashion such a balancing order – for instance, by limiting access to the Court and the parties' legal representatives, subject to the conclusion of applicable confidentiality agreements.

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[72] See the dictum of Ngcobo J (as he then was) in *Minister of Health and Others v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para [543] that it is the [respondents], "*within whose peculiar knowledge the calculation [of the fees are]*", who must give a rational explanation therefore. Justice Ngcobo stressed that "*[t]his is more so here, where the fees have been challenged on the ground that they are not appropriate*" (emphasis added).

134. We refer in this regard to the orders made in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W),[74] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W)[75] and *Competition Commission v Unilever plc and others* 2004 3 SA 23 (CAC).[76]

135. The important point is that "*[i]t does not follow … that, because the respondents require protection [in regard to purportedly confidential documentation], the applicant is to be denied relief.*"[77]

136. As the Supreme Court of Appeal explained in *Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others* 2008 (1) SA 438 (SCA)

> *"[14] The appellant contended that the respondents had not made out a case for reliance on confidentiality: if there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd, where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the*

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[73] On the norm of accountability generally see *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para [83].

[74] Per Schutz AJ (as he then was) at 1103: *"… although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access*".

[75] Per Botha J (as he then was) at 465: "*It seems to me that the position is as reflected in [Horner Lambert Co v Elaxo Laboratories 1975 RPC 354], that the Court should endeavour to impose suitable conditions relative to the inspection of documents and machinery in the possession of the respondents, so as to protect the respondents as far as may be practicable, whilst at the same time affording the applicant a reasonable opportunity of achieving its purpose*".

[76] The order of the Competition Appeal Court may be found at 26H-27C.

[77] See *Moulded Components* at 466E.

applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other".[78]

137. By proposing such an order of limited access the respondents could have protected the confidentiality of Nyamwasa whilst allowing the applicant's legal representatives to interrogate the relevant documents. It would have avoided a situation where the applicant's legal representatives are required to argue the application and this Court is required to decide the case behind a "*veil of ignorance*" by virtue of being denied access to important documents that were before the decisions makers and which reflect the reasoning behind the decision to grant Nyamwasa asylum.[79]

138. The respondents have chosen – another election by them – not to adopt such an ameliorative approach in this litigation. Again, that is evidence of their unwillingness to have their decisions properly scrutinised by this Court, and is sadly reminiscent of the type of evasive and high-handed approach that was reminiscent of the pre-democratic Government in South Africa. Indeed, the respondents' approach amounts to an effective ouster of this Court's power to properly investigate the decision impugned in this application.

139. We are confirmed in our submissions above by a consideration of the international and comparative manner in which confidentiality has been dealt with in respect of exclusion cases.

140. In this regard it is important to highlight that contrary to the respondents' contention that confidentiality is absolute, international practice demonstrates that

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[78] At para 14.

[79] *Competition Commission v Unilever plc* 2004 3 SA 23 (CAC) at 30H

there is no uniform state practice in relation to confidentiality, and as such states are at liberty to determine the parameters in which confidentiality should operate. What the respondents have failed to understand is that in determining the ambit of confidentiality a state cannot frustrate the purpose and objectives of the Refugees Convention.

141. In establishing the parameters and limits of confidentiality due regard must therefore also be had for the Refugees Convention and the complementary obligations found under other international instruments. This includes obligations assumed by states in terms of international instruments such as the Rome Statute of the International Criminal Court, the Genocide Convention, the Convention Against Torture and the Geneva Conventions to name a few, which seek to ensure that international criminals do not escape justice.

142. Proper administration and enforcement of the Refugees Act is a vitally important exercise of public power. Decisions made pursuant to the Act not only directly affect the lives of thousands of refugees that turn to South Africa for protection; these decisions also have the potential to ensure that undesirable persons (such as those that have committed international crimes) do not benefit from these protections.

143. Common law jurisdictions such as New Zealand, Canada, Australia and the United Kingdom explicitly prescribe exceptions to the absolute maintenance of confidentiality. These exceptions recognise that refugee law does not cloak refugee claims with absolute confidentiality. Rather they demonstrate the need to strike a balance between competing interests and recognise that in certain circumstances a state must, within circumscribed limits, be permitted to disclose details of the refugee or protection claims. As to when 'certain circumstances' arise, there is no closed list, and each claim must be dealt with on a case-by-case basis.

144. As to instances when disclosure is deemed necessary the UNHCR recognises that while the maintenance of confidentiality is important it:

> *"also recognizes that the appropriate sharing of some personal data in line with data protection principles can assist States to combat fraud, to address irregular movements of refugees and asylum-seekers, and to identify those not entitled to international protection under the 1951 Convention and/or 1967 Protocol."*[80]

145. The breadth of the exceptions vary, but generally the government may disclose confidential information to facilitate investigations into criminal conduct, to protect national security, to determine refugee claims (including related extradition/prosecution requests), and for similar activities of national importance.

146. South African courts have not had the opportunity to deal with confidentiality in the context of refugee applications when excludability is in issue. It is essential that content be provided to this provision. In the context of persons accused of core international crimes blanket confidentiality could, as the present case demonstrates, shield the authorities from accountability for decisions that perpetuate impunity for international crimes.

147. This risk has already been appreciated by other courts elsewhere. Thus in *Attorney General: New Zealand v X* the importance of ensuring that confidentiality is not absolute was stressed in the following terms:

> "*In a Convention negotiated in the years following the Second World War, this provision 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***

[80] UNHCR *Application of the Exclusion Clauses* (2003) (*Exclusion Guidelines*) at para 8.

[confidentiality] were interpreted so as to exclude disclosure to officers and employees considering extradition or prosecution."[81]

148. It should furthermore be noted that in Canada the record of an individual's refugee claim qualifies as personal information that is protected under the Privacy Act 1985.[82] The information can however be disclosed in terms of section 8(2):

"(e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;
(f) under an agreement or arrangement between the Government of Canada or an institution thereof and [another government or international organization], for the purpose of administering or enforcing any law or carrying out a lawful investigation;
"(m) for any purpose where, in the opinion of the head of the institution[83] *[. . .] (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or (ii) disclosure would clearly benefit the individual to whom the information relates."*

149. New Zealand permits, in terms of its section 151(2) of its Immigration Act the disclosure of information:

"(a) for the purposes of determining the claim or matter, administering this Act, or determining any obligations, requirements, or entitlements of the claimant or other person concerned under any other enactment; or
(b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; or

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[81] *New Zealand: Attorney General v. X* [2008] NZSC 48 at para 15.

[82] R.S.C., 1985, c. P-21; *AB v. Canada (Minister of Citizenship and Immigration) (T.D.)*, [2003] 1 F.C 3, at para 60.

[83] 'The head of the institution is a defined term in the Privacy Act in the context of refugee affairs it refers to the Minister of Citizenship and Immigration.'*AB v. Canada* at para at para 67.

(e) if, in the circumstances of the particular case, there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information."

150. In terms of section 151(5) of the same act of disclosure is also permitted "*for the purposes of determining a claim, or cancelling the recognition of, or ceasing to recognise, a person as a refugee or a protected person*".

151. It is finally highly relevant that South Africa's own domestic law regarding refugees also recognises instances in which disclosure is permitted. It is unfortunate that the respondents have at no point brought these to the attention of the applicant or the court – or sought to invoke those provisions in, for example, proposing a form of limited access to the information that is at the heart of this case.

152. In the regulations made pursuant to section 38 of the Refugees Act regulation 6 provides for the disclosure of information and documents relating to asylum claims. Sub-regulation 6(2) reads:

"Pursuant to section 21 (5) of the Act, the information contained in an asylum application and elicited at the hearing, and other records that indicate an individual has applied for asylum, shall not be disclosed without the written consent of the applicant, except as provided in sub-regulation 6 (3)."

153. Sub-regulation 6(3) provides that:

"Sub-regulation 6 (2) does not apply to disclosures to a government official or employee of the Republic <u>who has need to examine</u> the information in connection with-
(a) the adjudication of the asylum application;
(b) <u>the defence of any legal action arising from the adjudication or failure to adjudicate the asylum application</u>;

(c) the defence of any legal action of which the asylum application or continuing eligibility for refugee status is a part;
(d) or any investigation concerning any criminal or civil matter."

154. Whether disclosure is statutorily provided for or judicially endorsed the approach must be one that maintains the integrity of the asylum and refugee system and one that recognises the overarching importance of accountable administration and decision making remembering that *"preserving refugee status for only those who are in genuine need of protection is integral to maintaining the credibility and integrity of the refugee protection regime, if not its sustainability."*[84]

155. For the reasons given above the respondents have failed comprehensively even to attempt such a balancing exercise – and their election in this case has undermined the integrity and credibility of the refugee protection regime in South Africa, aside from being inconsistent with the Constitution's commitment to accountability, transparency and openness.

REVIEWABILITY OF THE DECISION TO GRANT NYAMWASA REFUGEE STATUS

Introduction

156. Given the respondents' stance in their answering affidavits, there is a paucity of any evidence that justifies the respondents' decisions impugned in this application. There is, put differently, nothing which demonstrates that they assessed Nyamwasa's application in a manner consistent with the Refugees Act and relevant international law.

[84] *New Zealand: Refugee Appeal No 75574* at para 76.

157. It is disturbing to see from their answer that the respondents do not appreciate the legal procedures and standards applicable in the determination of excludability when assessing refugee applications. In this regard:

157.1. The respondents make no mention of the legal thresholds and standards applicable to the exclusion clause contained in section 4(1)(a) of the Refugees Act.

157.2. The respondents are apparently not familiar with international best practices that have developed in relation to the application of the exclusion clauses in foreign jurisdictions.

157.3. The respondents failed to demonstrate that they assessed the information made available to them against section 4(1)(a) of the Refugees Act or why they concluded that there was no reason to believe that Nyamwasa was involved in the commission of the international crimes, notwithstanding very comprehensive evidence provided by the applicant constituting reason to believe that the Nyamwasa has committed international crimes.

157.4. The respondents are not familiar with the purpose and rationale of the exclusion clause as a fundamental component of refugee and international criminal law.

158. This application for review was brought in terms of PAJA.[85] The decision to grant a person refugee status falls within the ambit of the PAJA, as Murphy J in *Tantoush* confirmed.

> *In terms of section 8(1) of the Constitution the duties imposed by the Bill of Rights are binding on the RSDO and the RAB, both being organs of state exercising public power and performing a public function. By the same token, their decisions are administrative action as defined in section*

[85] FA, bundle 1, at para 51, p. 32.

1(i) of PAJA. Likewise, to the extent that they are obliged to interpret legislation and the Bill of Rights they must promote the spirit, purport and objects of the Bill of Rights and consider international law, in terms of section 39 of the Constitution.[86] (Emphasis added).

159. The impugned decision has far reaching effects and it is in the public interest that it is corrected. In this regard the SCA has confirmed that:

"Whether a review should succeed in a matter such as the present will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interests of the person in whose favour a decision has been made. Ultimately, a value judgment, balancing all the relevant factors, will be required."[87] (Emphasis added).

160. We now turn to explain the multiple grounds on which the decision falls to be reviewed and set aside.

The Decision is Based on Material Errors of Law

161. The decision to grant Nyamwasa refugee status is vitiated by material errors of law, the result of which led the respondents to ignore relevant considerations and to take into account irrelevant consideration, thus further rendering the decision irrational, unreasonable and arbitrary. The decision is therefore unlawful and falls to be reviewed and set aside.

162. Specifically:

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[86] *Tantoush* at para 65.

[87] *Pepcor* at para 47. See also *Government Employees Pension Fund & another v Buitendag & others* 2007 (4) SA 2 (SCA) at para 49.

162.1. The respondents applied the wrong standard of proof in assessing whether Nyamwasa's conduct brings him within the purview of section 4(1) of the Refugees Act.

162.1.1. The respondents incorrectly classified the information and incorrectly assumed that the evidence is inadmissible in their assessment of Nyamwasa's application.

162.1.2. The respondents did not accord sufficient weight to the indictments and extradition requests implicating Nyamwasa in the commission of international crimes.

162.2. The respondents justified their decision on the basis that were he to be returned to Rwanda he would face persecution thereby not properly considering the mandatory applicability of the exclusion clause.

162.3. The respondents ignored the numerous questions of law that Nyamwasa's presence in South Africa raised and in doing so failed to act in accordance with chapter 3 of the Refugees Act.

162.4. The respondents' decision does not give effect to the purpose and objectives of the Refugees Convention, the Refugees Act and fails to give proper consideration to South Africa's concomitant international criminal law obligations.

163. In terms of section 6(2)(d) of PAJA, a court is empowered to judicially review an administrative action which was materially influenced by an error of law.

164. The exercise of discretion conferred on an administrator by legislation must be performed in terms of a correct understanding of the empowering legislation. As

Straford JA in *Union Government*[88] explained, a failure to do so constitutes an error of law and is subject to judicial review:

"*If a discretion is conferred by statute upon an individual and he fails to appreciate the nature of that discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question which has been left to his decision."*[89]

165. The Constitutional Court in *City of Johannesburg Metropolitan Municipality* discussed the requirement of materiality and held that:

Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is "materially influenced by an error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law.[90](Footnotes omitted)

166. The seminal case on the reviewability of errors of law, *Hira v Booysen* provided examples of when an error of law would amount to a material error of law.

"Whether or not an erroneous interpretation of a statutory criterion . . . renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a

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[88] *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa)* Ltd 1928 AD 220 (*Union Government*).

[89] *Union Government* at 234 - 235

[90] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at para 91

correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute" and that as a result its decision should be set aside on review.[91]

167. In ascertaining the parameters of his or her discretion the administrator must therefore have due regard to the empowering legislation and its purpose. In the present case this requires a thorough understanding of the country's obligations in terms of international criminal and refugee law.

168. The preamble to the Refugees Act confirms that South Africa "*assumed certain obligations to receive and treat in its territory refugees* ***in accordance with the standards and principles established in international law***".

169. When read in conjunction with section 6 of the Refugees Act, it is undeniable that South Africa has committed itself to implementing a refugee system that abides by international law principles relating to both the treatment of refugees and the granting of asylum. Actions that are contrary to these international principles are therefore incompatible with the legislation and its purpose and fall to be reviewed on the ground that they are unlawful. The respondents' failure to adhere to these obligations renders their conduct liable to review on a number of grounds under PAJA.

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[91] *Hira v Booysen 1992 (4) SA 69 (A)* at 93G – I. In the refugee context, and also involving the application of the wrong test, see more recently the decision of Murphy J in *Tantoush*.

Respondents' Failure to Appreciate the Purpose and Rationale of the Exclusion Clause and Applicable Legal Principles

170. The answering affidavit of the respondents demonstrates a thorough misunderstanding and lack of appreciation for the purpose and rationale of the exclusion clause contained in section 4(1)(c).

171. This failure represents an abrogation of their duty to apply their minds to the decision to grant Nyamwasa refugee status in accordance with the purpose of the Refugees Act and relevant international obligations.

172. As such the decision is based on a further material error of law.

173. The *travaux préparatoires* to the Refugee Convention indicates that the exclusion provision has two central aims:

173.1. First, to protect refugee status from being abused by those who are undeserving;

173.2. Second, to ensure that those who have committed grave crimes do not escape prosecution.[92]

174. The Canadian Supreme Court, per Bastarache, held that:

"What is crucial, in my opinion, is the manner in which the logic of the exclusion in Art 1F generally, and Art 1F (c) in particular, is related to

[92] See 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.

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. As La Forest J observes in Ward, above at 66E, `actions which deny human rights in any key way` and `the sustained or systemic denial of core human rights… se[t] the boundaries for many of the elements of the definition of "Convention refugee"[93].(Emphasis added).

175. The Court in *Pushpanthan* also cited with approval the finding of the Canadian Federal Court of Appeal in *Sivakumar v. Canada (Minister of Employment and Immigration)* that:

"When 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"[94].

176. Other jurisdictions have emphasised this importance in similar terms. In the New Zealand Supreme Court, citing Hathaway with approval, the Court held:

"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*

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[93] *Pushpanathan* above note 5 at para 63. See also *Gurung* above note

[94] *Sivakumar v. Canada (Minister of Employment and Immigration) (CA.)*, [1994] 1 C.F. 433, Canada: Federal Court at 445 (*Sivakumar)*. Cited with approval in *Pushpanathar* at para 63.

pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees.'"[95]

177. Similarly, in the Federal Court of Australia in *Tenzin Dhayakpa v. The Minister for Immigration and Ethnic Affairs* the Court held that:

"The general objective of 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"[96]

178. Exclusion assessments are therefore an important and, as indicated above, a mandatory component of refugee status determinations. The importance and purpose of the exclusion clause, as confirmed by judicial pronouncements from across the world, cannot be understated and must be afforded similar weight in South Africa. To ignore this would frustrate the purpose and objectives of the Refugees Convention and the Refugees Act.

179. As discussed elsewhere the interpretation of the exclusion clauses in refugee law must be informed by international law. The respondents have made no mention in their answer to indicate an appreciation of the purpose and rationale of the exclusion clause and the Refugees Convention and Refugees Act generally. This failure to see these clauses in their correct context – that is, in light of their

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[95] *Tamil X* at para 33. See also the New Zealand Supreme Court decision in *Attorney-General v X* [2008] 2 NZLR 579 where the Court, at para 15, observed that:

"In a Convention negotiated in the years following the Second World War, [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".

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

purpose and relationship to international criminal justice – constitutes an error of law.

Respondents did not Apply the Correct Standard of Proof and Accorded insufficient Weight to the Evidence Before them

180. The respondents submit that the indictments and United Nations Reports do not amount to "*concrete information*"[97] and that there is no "*acceptable evidence*"[98] to conclude that Nyamwasa has committed international crimes. The respondents also characterised the evidence against Nyamwasa as "*hearsay*" and therefore "*inadmissible*".[99]

181. These submissions, which were not substantiated, demonstrate a further basis for concluding that the respondents had no appreciation for the established principles and best practices applicable to exclusion assessments.

182. As soon as the refugee authorities become aware that an applicant for asylum may have committed an offence contained in Article 1F of the Refugees Convention and section 4 of the Refugees Act a thorough determination into the allegations must be made.

183. Where excludability is being assessed in the context of serious international crimes, such as war crimes and crimes and crimes against humanity, a thorough assessment is even more important given the gravity of these offences and their status in international customary law.

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[97] MainAA, bundle 4, para 52.3, p. 439.

[98] MainAA, bundle 4, para 39.2, p 432.

184. The respondents further submit that the presumption of innocence is relevant to Nyamwasa's determination procedure.[100] This is legally incorrect and irrelevant in excludability assessments.

185. A refugee status determination is not a criminal enquiry that seeks to attribute guilt or innocence to an applicant. Exclusion proceedings do not amount to a full criminal trial and consequently the standard of proof as applied in criminal proceedings, proof beyond reasonable doubt, need not be met in refugee status determinations. Exclusion does not require a determination of guilt in the criminal justice sense.

186. Hathaway notes that exclusion can be established even if a person has not been formally charged or convicted.[101] In *Gurung* the Tribunal noted that:

> *"Given that in an examination under the Exclusion Clauses there is much that is akin to a criminal examination, such an approach could be said, by analogy, to ensure that there is a presumption of innocence. <u>But by the same token an examination under the Refugee Convention is not a criminal examination and its purpose is not as such to establish an appellant`s guilt or innocence</u>, although assessment must be made of whether acts or crimes have been committed. <u>It would be obvious to any subsequent prosecution process</u> that was brought against the appellant (whether in the country of origin, the country of asylum or before an international court) that what an adjudicator had found within the context of a refugee determination was neither binding nor necessarily conclusive of whether the appellant had committed an offence for their purposes."*[102]

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[99] MainAA, bundle 4, para 49.3, p. 438.

[100] MainAA, bundle 4, para 39.3, p. 432.

[101] Hathaway, *The Law of Refugee Status* at p. 215.

[102] *Gurung* at para 94. See also *Al-Sirri v. Secretary of State for the Home Department* [2009] EWCA Civ 222 at para 25 (*Al-Sirri).*

187. The respondents' contentions in this regard therefore amount to a material error of law and led the respondents to take into account irrelevant considerations.

188. The standard of proof required in exclusion proceedings in terms of section 4(1)(a) of the Refugees Act is "*reason to believe*".

189. The only case in South Africa to deal, albeit briefly, with the "*reason to believe"* threshold is *Tantoush.* In this case however exclusion was being assessed in terms of section 4(1)(b) – serious non-political crime – and the focus of the court's enquiry was whether the crime in question was serious enough to fall within the ambit of section 4(1)(b). In deciding whether there is "*reason to believe"* that an objective state of affairs exists, Murphy J found:

> "*The reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice … The phrase thus imposes a jurisdictional pre-condition that there must exist a reasonable basis for the factual conclusion that the applicant committed a crime before the discretion to exclude can be exercised."*[103]

190. The Court however did not provide any explicit guidance as to when a "*reasonable basis*" will exist and it is necessary to look to the pronouncements of other jurisdictions that have developed a persuasive body of jurisprudence in this regard.

191. Extensive case law from Canada, New Zealand, Australia and the United Kingdom support the interpretation that "*reason to believe"* standard requires less

certainty on the part of the decision-maker than the standard of beyond a reasonable doubt applicable to criminal proceedings.[104]

192. The rationale behind a standard that is unique to refugee law is that that the international community intended a lower standard of proof to ensure that war criminals and others undeserving of refugee protection are denied safe haven under the Convention.[105]

193. The lower standard also appreciates that there are inherent evidentiary difficulties in the fact-finding aspects of the exclusion and it is thus a calculated policy choice in the face of real procedural hurdles.[106]

194. There is also broad agreement that this standard is below the civil standard of proof (balance of probabilities). Indeed, Canada's Supreme Court has explicitly stated that 'reasonable grounds to believe' is "*less than the standard applicable in civil matters of proof on the balance of probabilities*."[107] The New Zealand High

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[103] *Tantoush* at para 111.

[104] See in this regard *Kanyamibwa v. Canada* (Minister of Public Safety and Emergency Preparedness), [2010] F.C. at 66 (Canada): "*At the hearing, counsel for the Respondent stressed that Parliament did not require proof beyond a reasonable doubt, or even proof on a balance of probabilities, but merely reasonable grounds to believe. This is no doubt true at the stage of determining whether a person should be declared inadmissible*."; *Al-Sirri* at para 33 (United Kingdom): *It is part of Mr Nicol's case that the standard of proof set by art. 1F is cognate with the criminal standard, that is to say proof beyond reasonable doubt or such that the tribunal is sure of guilt. This is manifestly not right*."); *Refugee Appeal No. 76505*, [2010] NZRSAA 69 at para 79 (New Zealand: "*The 'serious reasons for considering' standard is well below that required under criminal law (beyond a reasonable doubt) and civil law (on the balance of probabilities)*"; *Tamil X* at para 39 (New Zealand): "*Standards of persuasion that apply to ordinary judicial proceedings do not provide helpful comparisons or analogies in applying the standard*."; *Arquita v Minister for Immigration and Multicultural Affairs* [2000] 106 FCR 465, para 54 (Australia): "*It is sufficient, in my view, if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement the evidence must be capable of being regarded as 'strong'. It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant*.".

[105] *Sivakumar* at p. 445: "*This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When 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.*

[106] [2010] NZSC 107 at para [38]McGrath J for the Court (N.Z.).

[107] *Mugesera v. Canada (Minister of Citizenship and Immigration) (Mugesera),* 2005 SCC 40, para. 114.

Court in Auckland and the Australian Federal Court have come to the same conclusion.[108]

195. As to when a "reason to believe" exists, the jurisprudence from Canada, the United Kingdom and New Zealand demonstrates that this determination is made on a case by case basis. However the following *dicta* indicate when there will be a "reason to believe" and the determination will therefore depend on the type of evidence available.

195.1. The Canadian Supreme Court found that "*reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information*."[109]

195.2. In the United Kingdom the Supreme Court observed that: "*[reason to believe] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.* "[110]

195.3. The New Zealand Supreme Court, approving the United Kingdom Supreme Court, held that: "*the 'serious reasons to consider' standard must be applied on its own terms read in the Convention context. As Sedley LJ has observed, in a passage approved by the United Kingdom Supreme Court, art 1F: '... clearly sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward*

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[108] *Garate (Gabriel Sequeiros) v Refugee Status Appeals Authority*, [1998] NZAR 241 at para 38 (New Zealand.); *Arquita*, [2000] FCA at paras 54 and 64 (Australia).

[109] *Mugesera* at para 114.

[110] *JS (Sri Lanka) v. Secretary of State for the Home Department* [2010] UKSC 15 at para 39 quoting *Al-Sirri*, para 33.

language of the Convention: it has to be treated as meaning what it says."[111]

195.4. In the Australian Federal Court it was observed that: "*It is sufficient, in my view, if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement the evidence must be capable of being regarded as "strong". It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant. Nor need it be of such weight as to do so on the balance of probabilities. Evidence may properly be characterised as "strong" without meeting either of these requirements.*"[112]

196. Hathaway succinctly captures this approach opining that it "*is enough that the determination authority have sufficient proof warranting the assumption of the claimants guilt*"[113]

197. When information is sufficient to give rise to "*the assumption of guilt*" will depend on the nature of the evidence. In *Arquita* the Federal Court of Australia explored this aspect:

"If there is no evidence capable of supporting a conclusion that the applicant has committed an offence of the type specified, Art 1F(b) will not be applicable.

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[111] *Tamil X* at para 39.

[112] *Arquita* at para 55.

[113] Hathaway *The Law of Refugee Status* at p. 215.

If there is some evidence capable of supporting such a conclusion, but that evidence is so tenuous or inherently weak or vague that no trier of fact, acting properly, could be satisfied beyond reasonable doubt of the guilt of the applicant, then again Art 1F(b) will not be applicable: Doney v The Queen (1990) 171 CLR 207 at 212-214. A case which is built around nothing but suspicion will not be sufficient to meet the requirements of that Article.

"Suspicion", as Lord Devlin said in Hussien v Chong Fook Kam [1970] AC 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove"." The objective circumstances necessary to demonstrate a reason to believe something, or to consider it to be so, need to point clearly to the subject matter of the belief. That is not to say that those objective circumstances must establish on the balance of probabilities, let alone beyond reasonable doubt, that the subject matter in fact occurred or exists. A fact may be considered to be true on more slender evidence than proof: George v Rockett (1990) 170 CLR 104 at 115-116."[114]

198. Accordingly, at issue in these proceedings is whether the evidence implicating Nyamwasa is sufficient to meet the threshold embodied in section 4(1) of the Refugees Act. This is to be determined according proper weight to the evidence against Nyamwasa and whether it amounts to more than a "*mere suspicion*" and warrants the "*assumption*" of Nyamwasa's guilt.

199. The respondents' contention that evidence constitutes hearsay is unsustainable and legally incorrect. Even if it found that it does constitute hearsay this would in no way render it inadmissible for the purposes of an exclusion determination.

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[114] *Arquita* at paras 62-64.

200. It is widely accepted by the New Zealand Supreme Court[115] and the Court of Appeal of England and Wales[116] that the traditional rules of evidence are not applicable to refugee status determinations. In *LP v. Secretary of State for the Home Department* for example, the Tribunal found that:

> *"We of course recognise that in this Tribunal, in dealing with asylum and protection issues, the rules of evidence, applicable in most other parts of the law, are not strictly applied [. . .] Refugee and Protection law has developed over the last 30-40 years and, for entirely logical reasons, as noted, the rules of evidence that are applicable in other fields of civil law are not applicable here. Those reasons relate to the unique nature in which claims arise and the serious consequences that may occur if a wrong decision is reached."*[117]

201. As such a responsible RSDO is at liberty, and in some circumstances, required to consider a wide variety of evidence and is entrusted to accord sufficient weight to those sources depending on their source. This approach has been sanctioned by *Tantoush*, citing the Constitutional Court jurisprudence, where Murphy J held that:

> *"Courts are generally reluctant to rely upon the opinion or findings of a court in a foreign jurisdiction about factual issues not ventilated, tried or tested before them. <u>All the same, it is not unusual in human rights and refugee cases</u> for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights. In Kaunda and others v President of the Republic of South Africa and others 2005 (4) SA 235 (CC) (at para 123)*

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[115] *Tamil X* at para 44.

[116] *Al-Sirri* at para 53.

[117] *LP v. Secretary of State for the Home Department*, [2007] UKAIT 00076 (Asylum & Immigration Tribunal) at para 21.

Chaskalson CJ, commenting on reports by Amnesty International and the International Bar Association on the human rights situation in Equatorial Guinea, said as follows:

> *'Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.'*[118]

202. The respondents' unwillingness to consider evidence that may constitute hearsay evidence is a further instance of their being motivated by a material error of law. This material error of law resulted in the respondents not taking relevant information and factors into consideration.

203. Furthermore, sufficient weight should have been accorded to the United Nations Report provided by the respondents.

204. And obviously in respect of the indictments and extradition requests implicating Nyamwasa in international crimes due regard had to be given to the fact that the indictments were issued after a preliminary investigation by the Spanish and French authorities.

205. The specific question of the role of a foreign indictment and/or extradition request has been addressed by the Court of Appeal of England and Wales and the Federal Court of Appeal in Canada. The UNHCR's background note on

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[118] *Tantoush* at para 19.

the application of the exclusion clause also provides some (non-binding) insight and yet another perspective.

206. The Canadian Court of Appeal in *Xie v. Minister of Citizenship and Immigration* (*Xie*) [119] was faced with a Chinese refugee applicant who was wanted under an international arrest warrant for embezzlement, an article 1F(b) crime. The court found that there is no presumption of innocence in article 1F exclusion proceedings, and that the immigration board was entitled to "presume" that the arrest warrant was issued in the belief that Xie was guilty:

> '*the presumption of innocence would apply to the proof of that misconduct, but it does not apply so as to prevent the Board from taking the Chinese state's belief in her guilt into account in deciding if there are serious reasons to consider that she committed the crime with which she is charged.*'[120]

207. In determining the probative value of the warrant, the court pointed to the following factors as details that could reasonably lead the immigration board to regard it as being of some importance: it named the applicant; it referred to a specific criminal offence; it specified the time and date when the offence was alleged to have been committed; and it stipulated a maximum sentence.[121]

208. The UNHCR Guidelines also speak to the weight to be accorded to indictments. The guidelines state that indictments by international criminal tribunals will satisfy the standard of article 1F proof because they are put together in a "*rigorous manner*," and "*[d]epending on the legal system, this may also be the case for certain individual indictments*."[122] The UNHCR urges that an inquiry

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[119] [2004] FCA 250 (Can. Ont.).

[120] *Xie*, at para 20.

[121] *Xie* at para 22.

[122] *UNHCR Guidelines* at para 107.

must be made into the processes behind indictments and extradition requests on a country-by-country basis to determine what weight they should be afforded in the exclusion process.[123]

209. The simple fact in this case is that no such enquiry was undertaken and given the seriousness of the crimes in question the respondents should have fully assessed the indictments before refusing to consider them in their assessment of Nyamwasa's application.

210. The indictments against Nyamwasa are very specific and contain extensive information regarding the crimes he is believed to have committed. Both indictments name Nyamwasa personally and this information has been communicated to the South African authorities.

211. There is no legal basis upon which the respondents can assert that the indictments do not show that there is "*reason to believe"* that Nyamwasa has been involved in the commission of excludable offences.

212. Furthermore they were considered to be of sufficient importance to form the basis of extradition requests from the Spanish and French authorities. Additionally the respondents, without justification, inexplicably state that indictments do not provide concrete proof of the allegations and that there is no acceptable evidence to believe that Nyamwasa was implicated in international crimes. This, coupled with the respondents' concern about the presumption of innocence and the admission of hearsay evidence, informed their assessment and clearly indicate that the respondents were labouring under an error of law by applying too high a standard of proof.

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[123] *UNHCR Guidelines* at para 108. See also UK Border Agency, EXCLUSION: ARTICLES 1F AND 33(2) OF THE REFUGEE CONVENTION: "*Where an individual is subject to an extradition request from a country in which he/she stands accused or convicted of a criminal offence, the evidence submitted in support of that request may be enough to show that there are "serious reasons for considering" a crime has been committed which would fall under Article 1F. . .*"

213. In failing to appreciate the legal principles applicable to section 4(1)(c) the decision was based on a material error of law, resulted in relevant factors being ignored and irrelevant factors being considered and accordingly should be set aside.

Abuse of Discretion: Taking into Account Irrelevant Considerations and Failing to Consider Relevant Considerations

214. Section 6(2)(e)(iii) of PAJA stipulates that a decision also falls to be set aside if it was taken because irrelevant considerations were taken into account or relevant considerations were not considered.

215. The mistake of fact that this constitutes renders the decision reviewable, as explained by Cloete JA in *Pepcor:*

> *"[I]t is relevant to note in passing that s 6(2)(e)(iii) provides that a court has the power to review an administrative action inter alia if 'relevant considerations were not considered'. It is possible for that section to be interpreted as restating the existing common law: it is equally possible for the section to bear the extended meaning that material mistake of fact renders a decision reviewable."*[124]

216. In a matter such as the present one, in which the public has a significant interest in the decision reached by the administrator, it is imperative that the decision is made on the basis of all the relevant facts available. As Cloete JA stated in *Pepcor:*

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[124] *Pepcor* at para 47.

"In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. <u>If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made</u>. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable … The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires."[125]

217. In the absence of the empowering provision stipulating what considerations should, and should not, be taken into account, the administrator has the discretion to determine what considerations are relevant to the decision. However, this discretion is not unlimited.

218. As Ngcobo J (as he then was) confirmed in *Affordable Medicines:*[126]

"*The exercise of discretion by the Director-General is subject to certain constraints, apart from the constitutional constraints. In the exercise of his or her discretion, the Director-General must have regard to all relevant considerations and disregard improper considerations. The conditions that he or she is permitted to impose are those that are*

[125] *Pepcor* at para 47.

[126] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) (*Affordable Medicines*').

rationally related to the purpose for which his or her discretionary powers were given."[127]

219. An administrator's discretionary power is therefore limited by the requirement that he or she act rationally, and must take into account only, and all, relevant considerations.

220. For the reasons given above we submit that the respondents' decision falls to be set aside on the basis that all relevant considerations were not considered and improper considerations were taken into account.

Failure of the Tenth and Eleventh Respondents to Act in Accordance With the Obligations imposed in terms of Chapter 3 of the Refugees Act

221. Chapter 3 of the Refugees Act regulates the conduct of the tenth and eleventh respondent.

222. These provisions require the respondents to perform certain procedures when assessing refugee applications. As will be demonstrated below these procedures were not adhered to.

223. In terms of section 24(3)(d) of the Refugees Act the eleventh respondent ***must*** refer questions of law to the tenth respondent.

224. It is abundantly clear that Nyamwasa's application raises numerous questions of law. Furthermore South Africa has not yet had the opportunity to deal with exclusion in the detail that other jurisdictions have and therefore established

[127] *Affordable Medicines* at para 35.

practices are yet to be developed. It is not possible for the respondents to argue that Nyamwasa's application did not raise a number of questions of law.

225. Section 24(3)(d) is couched in mandatory terms. The eleventh respondent, in his supporting affidavit,[128] makes no mention of referring any questions of law to the tenth respondent. The fact that Nyamwasa is the subject of indictments and extradition requests would inevitably raise legal questions – and these questions were brought to the fore in the applicant's Briefing Paper. These questions could not lawfully be dealt with by the eleventh respondent and as such a determination by the eleventh respondent could not have been completed until the assistance of the tenth respondent was sought.

226. Had the eleventh respondent sought the assistance of the tenth respondent, as required in law, the legal issues raised in this application may have been addressed at the correct time.

227. In terms of section 11(g) of the Refugees Act the tenth respondent is required to exercise an oversight of the decision of RSDOs. Given the high profile of Nyamwasa and the complexity of his application and seriousness of the allegations levelled against him, the impugned decision should have been closely monitored by the eleventh respondent. There is no indication on the papers that this oversight role was carried out, or that the applicant's Briefing Paper was even considered.

228. What is more is that on the respondents' version Nyamwasa's application was decided in the space of one day.[129] Given the complexities of Nyamwasa's case, involving competing extradition requests and the multitude of excludable offences requiring attention and investigation, it is apparent on the respondents' own version that the respondents could not have conducted a thorough

[128] Confirmatory Affidavit of the eleventh respondent, bundle 4, p. 449.

assessment, as required by law, and reached a conclusion in such a short space of time.

229. Furthermore, the respondents failed to reassess the twelfth respondent's refugee status once in possession of extensive evidence provided by the applicant prior to the launch of these proceedings and do not explain why the respondents did not exercise their powers under the Refugees Act to withdraw the twelfth respondent's refugee status once they had sight of that evidence.

230. In light of the fact that the tenth and eleventh respondent failed to make the decision in accordance with requirements stipulated in the Refugees Act a number of relevant considerations were ignored and the respondents did not consider the questions of law that required determination before Nyamwasa could be granted refugee status.

231. This conduct confirms that the decision to grant Nyamwasa refugee status is vitiated by a further material error of law, which led to the consideration of irrelevant factors. The decision stands to be set aside on this basis too.

The Decision is Irrational Arbitrary and Unreasonable

232. Section 6(2)(h) of PAJA allows for a review of the decision if:

"the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function"

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[129] MainAA, bundle 4, para 45.2, 436.

233. Although the term "*reasonable"* is not defined in PAJA it is accepted that, under this inquiry, a court is required to assess whether the decision was made within the limits of reason.

234. The Constitutional Court, in *Bato Star*[130], confirmed that this provision of PAJA stipulates that a decision is reviewable if "*it is one that a reasonable decision-maker could not reach*."[131]

235. The impugned decision was taken by the respondents who were in possession of a UN Report detailing war crimes and crimes against humanity committed by forces under Nyamwasa's control and two European indictments linking Nyamwasa to the commission of these, and other, international crimes – and the applicant's Briefing Paper.

236. In light of the requirements in section 4 of the Refugees Act that refugee status should be withheld from persons for whom there are reasons to believe have committed war crimes and crimes against humanity it is submitted that no reasonable person, in possession of the UN Report and indictments, could come to the conclusion that section 4 did not apply to the twelfth respondent. The respondents have failed to provide any information to the contrary.

237. The impugned decision therefore falls to be reviewed and set aside on the basis that it was unreasonable.

238. In terms of section 6(2)(d) of PAJA, a court is empowered to judicially review a decision that is not rationally connected to:

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[130] *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) (*Bato Star*)

[131] *Bato Star* at para 44.

238.1. the purpose for which it was taken

238.2. the purpose of the empowering provision

238.3. the information before the administrator

238.4. the reasons given for it by the administrator

239. In *Carephone v Marcus*[132] the court explained that the question to be asked is where there is a rational objective basis justifying the conclusion between the material properly available to the decision maker and the conclusion arrived at.

240. These submissions have dealt in great detail with the rationale and purpose of section 4 of the Refugees Act and the nature of the material available to the respondents. The respondents have failed to demonstrate that the material before them led or could lead them to conclude that Nyamwasa does not fall within the ambit of the exclusion clause of the Refugees Act.

241. In *Rustenburg Platinum Mines*[133] Cameron JA highlighted that a number of reasons may be given for a decision but *"[o]nce the bad reasons played an appreciable or significant role in the outcome, it is in my view impossible to say that the reasons given provide a rational connection to it*."[134]

242. The impugned decision was not rationally connected to the purpose of the Refugees Act which is to ensure that only those who are truly deserving of the protection afforded by refugee status are granted it.

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[132] 1999 (3) SA 304 (LAC)

[133] *Rustenburg Platinum Mines v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) (*Rustenburg Platinum Mines*).

[134] *Rustenburg Platinum Mines* at para 34

243. The decision therefore also stands to be set aside on the basis that it was arbitrary, irrational and unreasonable.

RESPONDENTS' POINTS IN LIMINE

Standing

244. The respondents raise, as a *point in limine*, the lack of standing of the applicant.[135] They contend that the applicant cannot institute proceedings in its own interest as there is no allegation that a right in the Bill of Rights has been infringed, and that there is "*no relationship between the applicant, its constitution and the relief sought*".[136] Further the respondents contend that the applicant has no standing to bring this matter in terms of section 38(d) of the Constitution as it "*has not demonstrated that the public has sufficient interest in the relief sought*".[137]

245. This attack on the applicant's standing is unfortunate – and appears to be a trend on the part of government litigants which has been deprecated by our courts.

246. The applicant brings this application in accordance with section 38 of the Constitution which governs the rules of standing in constitutional matters. Section 38 states:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:*
>
> *(a) anyone acting in their own interest;*

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[135] MainAA, bundle 4, para 2-7, page 419-420.

[136] MainAA, bundle 4, para 4.1, page 420.

[137] MainAA, bundle4, para 5, page 420.

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest;

(e) an association acting in the interest of its members."

247. This application concerns a review in terms of PAJA. As this legislation was enacted in order to give effect to the constitutionally protected right to administrative justice, protected in section 33 of the Constitution, section 38's provisions regarding standing should be read into PAJA.[138]

248. The applicant is a non-profit organisation registered in terms of the Non-Profit Organisation Act 71 of 1997, under registration number 010-387-NPO.[139]

249. The applicant is comprised of a number of member organisations including legal practitioners, research units and refugee and migrant communities. Its mandate is to promote and protect refugee and migrant rights and represents its member organisations' interests in a way which advances the interests and aims of those organisations by advocating for the recognition and advancement of refugee and migrant rights.[140]

250. The applicant's mandate is not only limited to advancing the rights of refugees in South Africa, but extends to ensuring the integrity and sustainability of the refugee system in the country. The applicant therefore is concerned not only with ensuring that the refugee system works in such a way that those who meet the

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[138] Hoexter C, Administrative Law in South Africa, Juta, 2007 ("Hoexter") at 483; De Ville J, Judicial Review of Administrative Law in South Africa, LexisNexus/Butterworths, 2005, p. 441.

[139] FA, bundle 1, para 3.1, p. 11.

[140] FA, para 3.2, bundle 1, p. 12.

criteria are granted asylum but also that asylum is not granted to those persons undeserving of it. The aim of ensuring due protection of refugee and migrant rights will be unattainable if the system as a whole is disrespected and corrupted.

251. It has been accepted by our courts that in light of the need to give effect to the Constitution's values, and because section 38 of the Constitution has created new and different grounds of *locus standi*, the approach to standing when dealing with constitutional issues must be broader than the traditional approach under the common law.

252. The oft-quoted passage of O'Regan J in *Ferreira*[141] encapsulates this:

> *"Section 7(4) [the Interim Constitution's standing provision] is a recognition too of the particular role played by the courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact*."[142]

253. Importantly, the court's approach in *Ferreira* emphasises that the new broad approach to standing is not restricted to the new grounds introduced in section 36 of the Constitution, but also to the traditional ground of a party acting in its own interest. O'Regan explained that "*it was not necessary to interpret 'a person*

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[141] *Ferreira v Levin* 1996 (1) SA 984 (CC) (*Ferreira*).

[142] *Ferreira* at para 230.

acting in his or her own interest' as requiring the complainant's own constitutional right to have been infringed or threatened."[143] She also stated that:

> *"There are many circumstances where it may be alleged that an individual has an interest in the infringement or threatened infringement of the right of another. Several such cases have come before the Canadian courts. The Canadian jurisprudence on standing is not directly comparable to ours, however, for their constitutional provisions governing standing are different, but the fact that situations of this nature arise is instructive of the need for a broad approach to standing."*[144]

254. The applicant is therefore entitled to bring this application in its own interest. Its mandate is to ensure that the application of the country's refugee law is done in such a way so as to maintain the integrity of the refugee system to protect only and all the refugees and migrants it is designed to. It acted in its own interest by bringing to the authorities' attention that the granting of asylum to the twelfth respondent was an infringement of the domestic legislation and the country's international obligations.

255. The applicant also brings this application in the public interest, in terms of section 36(d) of the Constitution. The courts have demonstrated numerous times that the generous approach to standing in constitutional matters is also to be applied to matters brought specifically under section 38 (d).

256. Yacoob J in *Lawyers for Human Rights*[145] explained that the nature of the standing conferred by this public interest provision must, logically, be broad.

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[143] *Ferreira* at para 445.

[144] Ferreira at para 227.

[145] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) (*Lawyers for Human Rights*).

"*Subsection (d) expressly allows court proceedings by individuals or organisations acting in the public interest. Public interest standing is given in addition to those provisions that allow for actions to be instituted on behalf of other persons and on behalf of a class. Subsection (d) therefore connotes an action on behalf of people on a basis wider than the class actions contemplated in the section. The meaning and reach of the standing conferred by this paragraph must be determined against this background*."[146]

257. Yacoob J set out the criteria to be met when courts are seized with the question of whether a party does, in fact, act in the public interest. The enquiry would examine whether the application involves a live, rather than abstract issue; the nature of the infringed right and the consequences of the infringement; relief sought and whether it would be of general and prospective application; the range of persons who may be affected by a court order, their vulnerability and whether they had opportunity to present evidence and argument to the Court; and whether there is an alternative, reasonable and effective manner in which the challenge could be brought.

258. Of particular relevance to the present application are two recent Constitutional Court decisions. *Kruger*[147] confirmed that the generous approach should be adopted irrespective of whether the constitutional challenge is mounted under the Bill of Rights or under the Constitution more generally. Although the matter did not concern a right under the Bill of Rights the Court allowed Mr Kruger to bring an application which did not affect him directly but in which he had a professional interest.

259. In *Albutt*[148] Ngcobo CJ related the application of section 35(d) directly to NGOs litigating in areas of their organisational concern and acknowledged that when

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[146] *Lawyers for Human Rights* at para 15.

[147] *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC).

[148] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) (*Albutt*).

NGOs litigate in the public interest they have an interest in ensuring "*compliance with the Constitution and the rule of law*"[149] in areas in which their organisations are concerned.

260. This matter concerns the proper interpretation of the Refugees Act in light of South Africa's international obligations. It is in the public interest that South Africa comports itself in a manner befitting the country's status as a responsible member of the international community. International criminal law and international refugee law makes it clear that suspected war criminals should not be afforded the protection conferred by refugee status, and South Africa has obligations to ensure that this does not happen in our refugee systems. The public will always have an interest in ensuring that South Africa complies with its international obligations.

261. As Fabricius J highlighted in *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others (SALC v NDPP)*[150] (another case in which the government litigants misguidedly sought to challenge an NGO's standing), when a case concerns legislation requiring government officials to act in adherence to their international obligations a broad approach to standing should be adopted:

"*It is my view that the Applicants are entitled to act in their own interest in the present context, and also in the public interest in particular. They do not have to be the "holders" of any human rights themselves. They certainly have the right, given their attributes, to request the state, in the present context, to comply with its international obligations on behalf of*

[149] Albutt at para 34.

[150] *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61 (8 May 2012)

those who cannot do so, and who are the victims of crimes against humanity."[151]

262. Fabricius J went on to conclude:

"The Applicants' rights to have the decision made lawfully and in accordance with constitutional and statutory obligations has been infringed, the victims of the torture who had been denied the opportunity to see justice done, and the general South African public who deserve to be served by a public administration that abides by its national and international obligations. The public clearly has an interest in a challenge to the manner in which public officials discharge their duties under the relevant legislation."[152]

263. The applicant meets the criteria established in *Lawyers for Human Rights* and has demonstrated that its mandate in ensuring refugee authorities' compliance with their Constitutional and international obligations justifies it acting in the public interest.

264. The effect of the impugned decision granting asylum to the twelfth respondent is that South Africa's refugee law has been used to grant safe harbour to a suspected war criminal. This action threatens national security and sets an unacceptable precedent that effectively enables South Africa to utilise the Refugees Act to host perpetrators of international crimes and assist them in avoiding accountability for their crimes. It is indisputably in the public interest that the applicant should be

[151] *SALC v NDPP* para 13.4.

[152] *SALC v NDPP* at para 15.2.

able to bring this application to ensure that this dangerous precedent is not created.

CONCLUSION

265. For all these reasons the application should succeed and the order sought in the notice of motion should be granted.

266. The applicant should furthermore be awarded the costs of two counsel.

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10 September 2012