IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER: 992/2015

NORTH GAUTENG HIGH COURT CASE NUMBER: 30123/11

In the matter between:

CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Appellant
and	
PRESIDENT OF THE REPUBLIC IN SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
MINISTER FOR INTERNATIONAL RELATIONS AND CO-OPERATION	Third Respondent
MINSTER 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
KAYUMBA NYAMWASA	Twelfth Respondent

APPELLANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION AND BRIEF PROCEDURAL OVERVIEW

1. The appeal 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 (Mr Nyamwasa) 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. The High Court application stemmed 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. Mngqibisa-Thusi J, dismissed the appellant's[1] application, with costs on 26 September 2014.Thereafter she dismissed leave to appeal, again with an adverse costs order, on 15 September 2015.[2] On petition to this Court, leave was granted on 8th December 2015.[3]

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[1] The appellant is the Consortium for Refugees and Migrants in South Africa ('CORMSA'), a registered non-profit organisation, 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 to undertake initiatives which advance the interests and aims of its member organisations by advocating for the recognition and advancement of refugee and migrant rights. For the purposes of these submissions:

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

   b. The twelfth respondent will be referred to as the "twelfth respondent" or " Mr Nyamwasa".

[2] The reasons for leave to appeal – which were received on 24 March 2016, took 7 months to receive from the Judge – and the order in the leave to appeal application, are at record vol 11 pp 1133 - 1137.

[3] The order granting leave is at record vol 11 pp 1133-1137.

4. The appeal 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 that gives effect to South Africa's international and domestic law obligations.

5. We will submit that the decision to grant Mr Nyamwasa refugee status is vitiated through various material errors of law, failures to consider relevant considerations and a propensity to take into account irrelevant factors. In so acting the respondents failed to comply with the duties placed upon them under domestic and international law, and the Constitution.

6. Mr Nyamwasa, is a former general in the Rwandan Army. He is implicated in the commission of war crimes committed in the Democratic Republic of Congo between 1994 and 1998 and at the time at which he was granted refugee status he was the subject of three separate extradition requests from Rwanda, France and Spain.[4]

7. The decision to grant Mr Nyamwasa refugee status was taken despite the provisions of section 4(1)(a) of the Refugees Act, which disqualify a person from being granted refugee status if there is reason to believe that such a person has committed war crimes, crimes against peace or crimes against humanity.

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[4] We note that according to an article from the BBC, Spain has dismissed charges against a number of Rwandans including Nyamwasa in October 2015, but can re-instate them should Nyamwasa be found on Spanish territory http://www.bbc.com/news/world-africa-34477883. Whatever Spain may have done does not affect the appeal, since the appeal is to be adjudged on the basis of the facts as they existed at the time the respondents took the impugned decision. See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* 2010 (5) BCLR 422 (CC) at para 35 where it was held:

> "In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards."

In any event, the French indictment remains in existence, as does the UN report – both referred to below and materially relevant considerations that were ignored by the respondents at the time they took the impugned decision.

8. The respondents' subsequent refusal to revisit this decision was also taken in the face of a Briefing Paper,[5] which the appellant submitted to the respondents, which, in exhaustive detail, set out serious allegations of international crimes committed by Mr Nyamwasa. It sets out each of the salient background facts, and we respectfully request the Court to have regard thereto for that purpose.[6]

9. The appellant's numerous attempts to elicit from the government respondents a meaningful response to its briefing paper concerning Mr Nyamwasa were unsuccessful.[7] The matter was simply referred to another party or ignored.[8]

10. After being rebuffed in this manner and left with no other option, on 27 May 2011 the appellant applied to the North Gauteng High Court for orders inter-alia setting aside the decision to grant Mr Nyamwasa status, remitting the question of his refugee status to the respondents for reconsideration, and related relief.

11. The application was argued before Mngqibisa-Thusi J on 29 and 30 October 2012. It took the High Court two years to hand down a thirteen-page judgment on 26 September 2014.

12. The High Court decided that:

    12.1 Mr Nyamwasa was correctly granted refugee status because he fell within the provisions of section 3 of the Refugees Act;

    12.2 The appellant had failed to establish that there was reason to believe that Mr Nyamwasa was involved in the alleged crimes;

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[5] See annexure "RD4": record at vol 1 pp 54-94

[6] See in particular paragraphs 24 to 37 of the briefing paper: record Vol 1 pp 67-72

[7] See record vol 4 pp 329- 44

[8] Record vol 1 25-30, vol 4 pp 348 - 352

12.3 The fourth respondent must have been aware of the allegations against Mr Nyamwasa and must have communicated them to the other respondents. Accordingly, so the High Court reasoned, the respondents must have taken the allegations against Mr Nyamwasa into consideration when taking the decision to grant him refugee status;

12.4 The information disclosed in Mr Nyamwasa's application for asylum was confidential and there was no reason to justify the disclosure of this information either to the applicant or the court itself.

13. The High Court accordingly dismissed the application. It also ordered the applicant – an NGO which had clearly litigated in good faith and not frivolously – to pay the costs including the costs of two counsel, despite the High Court's acceptance at paragraph 11 of the judgment[9] that the matter was obviously brought in the public interest and despite the *Biowatch*[10] principle being drawn pertinently to the High Court's attention.

14. The appellant timeously applied for leave to appeal. It took 10 months for the application for leave to appeal to be set down, due to the apparent unavailability of the learned judge.[11] Eventually, after several letters including one to the Deputy Judge President, the matter was set down for argument on 25 August 2015.

15. Having heard argument, the High Court there and then dismissed the application for leave with costs, including the costs of two counsel. Reasons would be provided later, said the Court. The High Court only provided reasons pertaining to the dismissal of the applicant's leave to appeal application on 24 March 2016.[12]

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[9] Vol 11 pp 961

[10] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC).

[11] See the supplementary affidavit of Ms Meg McIntyre, from WITS Law Clinic, (the appellant's attorney of record in this matter): record vol 11 pp 1048-1055.

[12] Record vol 11 pp 956

16. We shall show that the High Court was quite wrong to find that Mr Nyamwasa had correctly been granted refugee status and that the serious allegations of his complicity in war crimes had been properly considered by the respondents.

17. That is so, not only because the High Court misconstrued the legal principles relating to the grant of refugee status in cases such as this. It is also because of the rules of pleading and the respondents' failure to provide the requisite evidence necessary, to justify their decision or to sustain the High Court's findings in this regard. In their answering affidavits before the High Court, the respondents contented themselves to assert the vaguest of justifications for the decision to grant Mr Nyamwasa refugee status. When called upon to produce the Rule 53 record of the decision making process which led to Mr Nyamwasa being granted refugee status, the respondents resolutely refused to do so, relying on what they contended to be the absolute confidentiality of asylum applications. Instead, they chose to oppose the application without producing the record.[13]

18. In light of the respondents' failure to justify their decision and their failure to disclose the documents that were before the decision makers and which reflect the reasoning behind the decision to grant the twelfth respondent asylum, the High Court's conclusion that he was correctly granted refugee status, is patently flawed.

19. The High Court held that that the respondents "must have" taken the allegations against Mr Nyamwasa into consideration when taking their decision.[14] This finding, generously assuming, as it does, the probity of the respondents' decision-making processes, is however, entirely unsupported by the facts. The High Court appears to have reached this finding inter-alia on the questionable basis that from the citation of the fourth respondent in the proceedings, it can thereby

[13] Record answering affidavit: vol 5 pp 414-452

[14] Record vol 11 pp 959-960 para 7.

be deduced that the fourth respondent must have communicated the allegations against Mr Nyamwasa to the other respondents. There was simply no evidence to this effect.

20. The High Court's finding that Mr Nyamwasa was correctly granted refugee status because he, in the view of the High Court, falls within the provisions of section 3 of the Refugees Act, cannot be sustained either. The issue before the High Court was not whether Mr Nyamwasa should be returned to Rwanda, a country where he could be at risk of persecution due to his alleged political activities. Indeed, the relief sought by the appellant in the High Court expressly disavowed any decision being taken to withdraw Mr Nyamwasa's refugee status without him being provided with a full and proper hearing by the tenth respondent.[15]

21. The issue before the High Court – and which, with respect, was not dealt with – was whether the rigorous legal and procedural standards required of an exclusion analysis in terms of section 4(1)(a) of the Refugees Act were in fact properly applied by the eleventh respondent in the determination of Mr Nyamwasa's application for refugee status.

22. South Africa is obliged under Article 1F(a) of the 1951 United Nations Convention Relating to the Status of Refugees and section 4(1)(a) of the Refugees Act, not to grant refugee status to a person if there is reason to believe that he or she has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with such crimes. The rationale is to deprive those persons who are suspected of committing a heinous international crime of refugee protection and to ensure that such persons do not abuse the refugee protection system in order to avoid being held legally accountable for their acts. [16]

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[15] Record vol 1 pp 26, 32- 33.

[16] F Khan et al *Refugee Law in South Africa* (2014) 92.

23. The High Court failed to appreciate that irrespective of whether a person would otherwise qualify for refugee status and irrespective of how in need of protection from persecution such a person may be, international and domestic law excludes them from the protection afforded by refugee status. Refugee protection was not envisaged as the entitlement of every person who is genuinely at risk of persecution or harm.[17] Exclusion from refugee status refers to the limited situations in which a decision maker may lawfully reject or bar a person who would otherwise qualify from obtaining refugee status.[18]

24. The decision of the High Court, if not corrected, will set a dangerous precedent. It sends out the insidious message that suspected international criminals may find a safe haven in South Africa by being granted refugee status and that when required to justify the rationality of such decisions, the authorities responsible may simply hide behind bland denials and assertions of blanket confidentiality of asylum applications.

25. For the reasons set out below we submit that the appeal must succeed. The High Court's reasoning is manifestly contrary to South Africa's domestic law, and is wholly inconsistent with the Refugees Act and with South Africa's international criminal law obligations. Against a proper understanding of the relevant legal principles, and the evidence, we respectfully submit that the following conclusions arise:

    a. The indictments issued against Mr Nyamwasa were based on credible investigations providing sufficient reason to believe he was involved in the commission of crimes against humanity and war crimes;

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[17] J Hathaway *Law of Refugee Status* (1991) 133. The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status (1979) para 148 states that: "[A]t the time when the [1951] Convention was drafted, the memory of the trials of war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order."

[18] F Khan et al *Refugee Law in South Africa* (2014) 92.

b. The government respondents failed properly to consider the allegations against the twelfth respondent;

c. The lack of indictments issued against Mr Nyamwasa by the International Criminal Tribunal for Rwanda is irrelevant;

d. Confidentiality of Mr Nyamwasa's asylum application was inaccurately addressed.

THE LAW

Introduction

26. 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 many 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.

27. Porous borders and lax 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.

28. Refugee law is 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."*[19]

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

29.1 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;

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

29.3 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.

30. It is respectfully submitted that in addition, the approach of the High Court to the evidence was:

30.1 contrary to the established tests for solving factual disputes on motion;[20]

30.2 inconsistent with a recognition of the duties of organs of state in litigation;[21] and

30.3 incompatible with the principles of judicial review in relation to the role of the Rule 53 record.[22]

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

[20] *Wightman v Headfour* (Pty) Ltd 2008 (3) SA 371 SCA para 13.

[21] *Kalil N.O and Others v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) paras 30-31.

[22] *Turnball Jackson v Hibiscus Coast Municipality* 2014(6) SA 592 (CC) at para 37.

The relevant legal principles

International conventions

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

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

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

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

33. 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.[23]

34. 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.

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[23] 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.*"

35. Both the Refugee Convention and the OAU Convention recognise classes of persons that are not eligible for refugee status. Article 1(F) of the Refugee 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.

36. Article 1(F)(a) of the Refugee Convention[24], mirrored in the OAU Convention, provides that:

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

37. The United Kingdom Supreme Court aptly captures the purpose and objectives of the Refugee 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****.'"*[25]

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[24] See in this regard *Pushpanathan v. Canada (Minister of Citizenship and Immigration) (Pushpanathan) [1998] 1 SCR 982* Case Number 25173 "*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.

[25] *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, emphasis added.

38. The rationale therefore is to deprive those suspected or guilty of heinous acts, 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.

39. 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.

40. 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."***[26]

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

42. 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.[27]

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

[27] *See Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 61.

The Refugees Act 130 of 1998

43. 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:

> *"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".*

44. 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).*

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

46. It is notable that while the Refugee 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.

47. 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.

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

49. The only case in South Africa to deal, albeit briefly, with the "*reason to believe"* threshold is *Tantoush.*[28] 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."*[29]

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[28] *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T).

[29] *Tantoush* at para 111.

50. 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.

51. 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.[30]

52. 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.[31]

53. 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.[32]

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[30] See in this regard *Kanyamibwa v. Canada* (Minister of Public Safety and Emergency Preparedness), [2010] F.C IMM-500-08. 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 v. Secretary of State for the Home Department (United Nations High Commissioner for Refugees Intervening)([2009] EWCA Civ 222) 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)*"; The Attorney-General (Minister of Immigration) v Tamil X and the Refugee Status Appeals Authority[2010] NZSC 107 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*."

[31] Sivakumar v. Canada (Minister of Employment and Immigration) (C.A.), [1994] 1 F.C. 433, 1993-11-0 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.*

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

54. 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*."[33] The New Zealand High Court in Auckland and the Australian Federal Court have come to the same conclusion.[34]

55. 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*."[35]

56. Hathaway succinctly captures this approach opining that it "*is enough that the determination authority have sufficient proof warranting the assumption of the claimants guilt"*[36]

57. 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.*
>
> *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*

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

[34] *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).

[35] *Mugesera* at para 114.

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

> *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."*[37]

58. Accordingly, at issue is whether the evidence implicating Mr 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 Mr Nyamwasa and whether it amounts to more than a "*mere suspicion*" and warrants the "*assumption*" of his guilt.

59. The respondents in the High Court contended – as an ex post facto rationalisation – that the evidence constitutes hearsay[38] and therefore 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. Refugee authorities are not courts of law and are not bound by the same evidential rules that apply to courts.

60. As demonstrated by the New Zealand Supreme Court[39] and the Court of Appeal of England and Wales[40] 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*

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

[38] Respondents' answering affidavit para 49.3 record vol 5 pp 438.

[39] *Tamil X* at para 44.

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

nature in which claims arise and the serious consequences that may occur if a wrong decision is reached."[41]

61. 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 appropriate weight to those sources. 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. All the same, it is not unusual in human rights and refugee cases 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) 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.'*[42]

62. The respondents' unwillingness to consider evidence that may constitute hearsay evidence itself confirmed that their decision was motivated by a material error of law. This material error of law resulted in the respondents not taking relevant information and factors into consideration.

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

[42] *Tantoush* at para 19.

63. Appropriate weight should have been accorded to the United Nations Report provided by the respondents.

64. And obviously in respect of the indictments and extradition requests implicating Mr 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.

65. The specific question of the role of a foreign indictment and/or extradition request has been addressed by the courts in comparative jurisdictions. The UNHCR's background note on the application of the exclusion clause also provides some (non-binding) insight and yet another perspective.

66. The Canadian Court of Appeal in *Xie v. Minister of Citizenship and Immigration* (*Xie*) [43] 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.'*[44]

67. 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:

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[43] [2004] FCA 250 (Can. Ont.).

[44] *Xie*, at para 20.

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.[45]

68. 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*."[46] The UNHCR urges that an inquiry 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.[47]

69. In this case, no such enquiry was undertaken. 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 Mr Nyamwasa's application.

70. The indictments against Mr Nyamwasa are very specific and contain extensive information regarding the crimes he is believed to have committed. Both indictments name Mr Nyamwasa personally and this information has been communicated to the South African authorities. The indictments emanate from respected members of the international community.

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

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[45] *Xie* at para 22.

[46] *UNHCR Guidelines* at para 107.

[47] *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. . .*"

72. 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 contended that indictments do not provide concrete proof of the allegations and that there is no acceptable evidence to believe that Mr 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 the wrong standard of proof.

73. In failing to appreciate the legal principles applicable to section 4(1)(a) 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.

GROUNDS OF APPEAL

74. Against those legal principles, we respectfully submit that the following grounds of appeal arise.

The indictments issued against Mr Nywamwasa were based on credible investigations providing sufficient reason to believe he was involved in the commission of crimes against humanity and war crimes

75. The High Court at paragraph 20 of the judgment[48] held that it was "*common cause*" that the initial investigation by French Judge Jean-Louis Bruguire, which led to the first indictment being issued against Mr Nyamwasa "*has been discredited by Trevedic's conclusion that the Habyanimara's* **[plane]** (sic) *was shot down by members of his own army*".

[48] Record vol 8 pp 711

76. This finding related to an allegation by Mr Nyamwasa in his opposing affidavit[49] that a 2012 report by a French judge (Trevedic) tasked with further investigations into the incident concluded that members of the President's own army were responsible for the crash, and that this report exonerated him.

77. It plainly was **not** common cause on the papers that the first indictment issued against Mr Nyawmasa had been discredited and the High Court was wrong in concluding otherwise. In addition, even if a 2012 report discredited the investigation, that report was written after the decision was made to grant Mr Nyamwasa refugee status, and hence cannot be used subsequently to justify the decision, which was made on the evidence available to the respondents at the time.

78. The High Court however went further and found erroneously, that the second indictment issued against the Mr Nyamwasa by Andreu Merelles, an investigative judge in the Spanish High Court, "*was based on the discredited indictment*". The latter finding by the High Court too is not sustainable on the evidence. The first indictment issued against Mr Nyamwasa by French Judge Bruguiere related to his alleged involvement in the shooting down of President Habyarimana's aircraft in 1994, an event which served as the trigger for the genocide which then engulfed Rwanda.[50]

79. The second indictment, issued by Spanish Judge Merelles in February 2008,[51] instead relates to entirely different crimes and implicates Mr Nyamwasa directly in violent killings of civilians in

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[49] At paragraph 117, record vol 12 pp 1176

[50] The first indictment is at record vol 1 pp 70

[51] Record vol 1 pp 70

Rwanda and the DRC, allegedly orchestrated by RPA generals under his direct command. The briefing paper[52] details the specific war crimes in which Mr Nyamwasa is alleged to have directly participated and/or be responsible for by virtue of the international criminal law doctrine of command responsibility – and these facts were drawn to the attention of the High Court.[53]

80. The existence of the 1998 United Nations (UN) Report[54] and the Spanish and French indictments provide reasonable grounds to believe that Mr 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 the Refugees Act.[55]

81. The Constitutional Court in *Basson*[56] emphasised the duty of courts to give proper weight and attention to charges of crimes against international law, and said the following:

> *"As was pointed out in Nuremburg, crimes against international law are committed by people, not abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given 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."*

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[52] At paragraphs 30 to 37: record vol 1 pp 70-72

[53] In its High Court heads of argument: paragraphs 40-44.

[54] Record vol 1 pp 68

[55] Highlighted in detail for the Court below in the appellant's High Court heads of argument: paragraphs 93-95.

[56] *S v Basson* 2005 (1) SA 171 (CC) at para 184

82. The High Court's terse dismissal of the detailed allegations in the Spanish indictment and its failure to address in its judgment, the appellant's arguments concerning the probability of Mr Nyamwasa's complicity in the war crimes detailed in the 1998 United Nations report and the Spanish and French indictments was inconsistent with its duty to give appropriate and considered attention to the serious charges of multiple war crimes and other violations of international humanitarian law against him.

The respondents failed to properly consider the applicable law and the allegations against Mr Nyamwasa

83. At paragraph 20 of the judgment,[57] the High Court recorded that the deponent to the government respondents' answering affidavit had "*deposed to the fact that when the twelfth respondent's application was considered, they were aware of the serious allegations as mentioned by the applicant and as required had considered them in assessing whether the twelfth respondent and his family should be granted refugee status*".

84. The High Court's findings in this regard are unsustainable on the evidence. Aside from this bald assertion, there was no supporting evidence by the government and no Rule 53 record documentation to confirm the say-so of the deponent. The government respondent's answering affidavits were replete with vague and unsubstantiated denials, generalities and a failure to fully explain what specific allegations against Mr Nyamwasa were taken into account, the weight, if any, accorded to these allegations and how the decision to grant Mr Nyamwasa refugee status was arrived at.[58]

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[57] Record vol 8 pp 711.

[58] See paragraphs 44 - 67 of their answering affidavit: record vol 5 pp 434 – 446.

85. The High Court's failure is all the more material when it is recalled that the respondents refused to comply with the provisions of Rule 53 and chose to oppose the review application without filing a single document relating to the process by which the decision to grant the twelfth respondent's refugee status was arrived at.

86. It is wholly insufficient for a respondent in a review application to be permitted to justify his decision by simply asserting, without anything more, that he applied his mind and considered all relevant factors. Were that to be so, the powers of the court to review the exercise of administrative decision-making would be defeated and rendered effectively redundant. It is trite that a decision maker whose decision is being challenged on review may not justify his decision by mere assertion, and may not attempt to raise ex post facto justifications (which are not corroborated by anything in the record of decision-making). To borrow the language of this Court in National Lotteries Board, the respondents' new reasons are an "*ex post facto* rationalisation of a bad decision".[59] There is no place in our law for hindsight as an administrative cure-all.[60]

87. In these circumstances, the High Court's finding, based as it was on the mere say so of the government respondents that they had properly considered the allegations against Mr Nyamwasa when assessing his application for asylum, simply cannot be sustained.

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[59] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27.

[60] *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) at 486F-H. See also *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at para 11 where Cleaver J held that it is impermissible for an administrator to rely on an ex post facto reason for a decision.

88. Had the respondents correctly applied section 4(1) of the Refugees Act, and considered the allegations made against Mr Nyamwasa, then he would not have been awarded refugee status. The respondents' vague statements to the contrary, without any primary or contemporaneous evidence to support their decision-making, ought to have been rejected by the High Court.

89. Furthermore, as we now show, had the High Court properly applied the correct legal test and scrutinised the evidence, then it would have found that the twelfth respondent's refugee status was unlawfully granted.

90. Proper consideration of the allegations made against the twelfth respondent would involve consideration of the Refugees Act which requires only that there be "reason to believe"[61] that the excludable offence has been committed.

91. Furthermore, proper consideration would involve the application of section 6 of the Refugees Act which deals with the interpretation, application and administration of the Act and 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.

92. Proper consideration would also involve the application of constitutional provisions relating to the application of international law. Specifically:

    a. Section 232 of the Constitution which incorporates customary international law into South African law, including the recognition of certain core international crimes, such as

[61] We have set out the applicable standard for ascertaining whether there is "reason to believe" previously at paragraphs 51- 65 in these heads of argument.

war crimes, crimes against humanity and genocide and the concomitant duty to combat impunity for their commission.[62]

b. 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.[63]

93. 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. In this case it is clear that the respondents did not properly consider the allegations made against Mr Nyamwasa or the applicable law. Had they performed their functions properly and constitutionally, they would have come to the only conclusion open on the facts: that Mr 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.

94. The High Court accordingly erred in not finding that the decision to grant Mr Nyamwasa refugee status is not in accordance with the applicable legal principles, and is irrational, arbitrary, unreasonable and hence reviewable under PAJA.

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[62] 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 on to 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.

[63] There is extensive comparative law on the issues raised in this application and the applicant accordingly attempted to assist the court a quo by collating and referring to that jurisprudence in its submissions in the applicant's High Court heads of argument.

The lack of indictments issued against Mr Nyamwasa by the International Criminal Tribunal for Rwanda is irrelevant

95. The High Court at paragraph 20[64] of its judgment stated that Mr Nyamwasa was not cited in indictments issued by the "*International Criminal Court for Rwanda*". The correct name of the entity referred to by the learned judge is the United Nations International Criminal Tribunal for Rwanda ('the ICTR').[65]

96. Whilst no indictments have been issued against the Mr Nyamwasa by the ICTR, the jurisdiction of the ICTR was limited to crimes committed on the territory of Rwanda between 1 January 1994 and 31 December 1994.[66] The Tribunal "*may"* also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period. A number[67] of the allegations made against the twelfth respondent fall outside the jurisdiction of the ICTR both as a matter of *ratione temporis* and *ratione loci.* Thus, it is unsurprising that the twelfth respondent is not cited by the ICTR.

97. What is germane – and which was not considered by the High Court – is that two indictments have been issued against the twelfth respondent and his extradition is sought by two sovereign states:

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[64] Record vol 8 pp 711

[65] In the written reasons for denying leave to appeal, at para 6 (record vol 11 pp 959), the High Court repeats the same error by stating that: "if there was any substance in the information upon which these indictments [the Spanish and French] were based, nothing could have stopped the International Criminal Tribunal for Rwanda from proffering charges against Mr Nyamwasa".

[66] As stated on the official website of the ICTR.

[67] Including the crimes documented in the United Nations Report of the Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo - S/1998/581 (the UN Report), referred to in para 39 of the applicant's High Court heads of argument.

France and Spain. The questions before the High Court were inter-alia whether the respondents had demonstrated that the two indictments issued against Mr Nyamwasa, do not show that there is "reason to believe" that he has been involved in the commission of excludable offences.

98. The only conclusion that could be reached on the evidence, and having regard to the correct legal test – that there was "reason to believe" that My Nyamwasa had been involved in the commission of such offences.

Confidentiality of Mr Nywamasa's asylum application was incorrectly addressed

99. The High Court at paragraphs 24 to 26 of the judgment,[68] concluded that there was no basis for the information disclosed in Mr Nyamwasa's asylum application to be disclosed to either the applicant or the court. The respondents in the High Court justified their submissions, and their lack of substantiation, on the basis that refugee applications are confidential. The High Court incorrectly accepted the respondents' reliance on the confidentiality provisions of the Refugees Act.

100. 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.*" The question was how this provision could be reconciled with the requirements of judicial review of the decision in question.

101. The respondents 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 the courts through appropriate safeguards. We submit that this approach was incorrect. It

[68] Record vol 8 pp 712- 713

nevertheless carries the consequence that by their election, the respondents have not been able to justify their decision.

102. The High Court's sole explanation for its findings (based on the respondent's incorrect reliance on the alleged blanket confidentiality of asylum applications) is the statement in paragraph 26 of the judgment[69] – without referencing any supporting authority – that "*public interest does not demand that openness and accountability should surpass the safety of a vulnerable person*".

103. The application before the High Court concerned 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. The High Court erred by accepting an evasive, and vague answer from the respondents, without interrogating whether their purported reliance on confidentiality of asylum applications was legally sustainable.

104. We submit that the rule of law and the public interest in a transparent and open government demanded that the applicant and the High Court should have been afforded proper access to the relevant documentation and reasoning behind the respondents' decision to grant the twelfth respondent refugee status. The High Court in these circumstances was wrong to find that the respondents' decision to grant Mr Nyamwasa refugee status was rationally justifiable and that the confidentiality of asylum applications was peremptory and a proper justification for the conduct of the government respondents.

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[69] Record vol 8 pp 714.

105. 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 Mr Nyamwasa and the requirements of openness, transparency and accountability on the other. The High Court was shown that 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.[70]

106. 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*,[71] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*[72] and *Competition Commission v Unilever plc and others*[73] – all drawn to the court a quo's attention.

107. 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.*"[74]

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[70] See for example *Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others* 2008 (1) SA 438 (SCA) at para 14; *Bridon International GmbH v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) paras 31 to 32

[71] 1980 (3) SA 1093 (W), 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*".

[72] 1979 (2) SA 457 (W), 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*".

[73] 2004 3 SA 23 (CAC), the order of the Competition Appeal Court may be found at 26H-27C.

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

108. By proposing such an order of limited access, the respondents could have protected the confidentiality of the Mr Nyamwasa whilst allowing the appellant's legal representatives to interrogate the relevant documents. It would have avoided a situation where the appellant'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 decision makers and which reflect the reasoning behind the decision to grant the twelfth respondent asylum.[75]

109. The High Court failed to appreciate that the respondents had chosen not to adopt such an ameliorative approach in this matter. It thus failed to find that the respondents' approach amounts to an effective ouster of this Court's power to properly investigate the decision impugned in this application – and it failed to impose a confidentiality regime if indeed it thought that the matter raised questions of confidentiality.

110. The 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.

111. Decisions of common law jurisdictions such as New Zealand, Canada, Australia and the United Kingdom – all drawn to the High Court's attention –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

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

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.

112. Hence the United Nations High Commissioner for Refugees ("UNHCR") recognises that while the maintenance of confidentiality is important it:[76]

> *"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."*[77]

112. It was, in those circumstances, incumbent on the High Court – assuming it believed that the documentation was confidential – to have imposed a sufficient confidentiality regime to make a proper assessment of Mr Nwamyasa's claim for refugee status.

113. Its failure to do so was not only inconsistent with South African domestic law, its findings are furthermore contrary to the established limits of confidentiality under regional and international law. However having adopted an absolutist stance on confidentiality, the respondents must bear the consequences of the resultant failure to justify the decision in question.

Costs order against the appellant

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

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

114. Remarkably, the High Court ordered the appellant to pay the costs of the proceedings including the costs of two counsel.

115. There was no basis for it to do so. In accordance with the principles enunciated in *Biowatch,*[78] costs should be determined with regard to the "way in which a costs order would hinder or promote the advancement of constitutional justice".[79] The application instituted by the appellant clearly raised an important constitutional issue relating to the obligations of the state when considering an application for refugee status from an individual who is alleged to be complicit in the commission of international crimes, and the application raised novel questions of law pertaining to the maintenance of the integrity of refugee status in South Africa. There can be no suggestion that the appellant acted in bad faith or vexatiously, or brought the application wantonly – and the High Court never found so.

116. The High Court thus materially misdirected itself in ordering costs against the appellant. In addition, the appellant turned to litigation as last resort, having engaged in correspondence with the respondents to no avail. This hardly represents inappropriate behaviour that warrants an adverse cost order.

117. In *Biowatch* the Constitutional Court held that if a court decides to make a cost order that could hinder the advancement of constitutional justice (as did the court a quo) then, "a court should set out reasons that are carefully articulated and convincing."[80] The High Court failed to do so: it gave no explanation whatsoever for the costs order and referenced no conduct on the part of the applicant that might justify a departure from the Constitutional Court's clear precedent on costs.[81]

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[78] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC).

[79] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC para 16.

[80] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC) para 25.

[81] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC Para 29.

118. The High Court's decision on costs is particularly startling in light of the fact that it accepted at paragraph 14 of the judgment[82] that the determination of the issues in the application were in the public interest and that the applicant had *locus standi* to bring the application in the public interest. Its decision to award costs against the appellant in dismissing the leave to appeal application is similarly surprising and wrong.

CONCLUSION

119. For these reasons we submit that the appeal should succeed with the costs of two counsel, including the costs in the High Court (inclusive of the application for leave to appeal).

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14 June 2016

[82] Record vol 8 pp 708