THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

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
THE MINISTER OF HOME AFFAIRS	Second Respondent
THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Third Respondent
THE MINISTER OF STATE SECURITY	Fourth Respondent
THE DIRECTOR–GENERAL OF THE OFFICE OF THE PRESIDENCY	Fifth Respondent
THE DIRECTOR–GENERAL DEPARTMENT OF HOME AFFAIRS	Sixth Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION	Seventh Respondent
THE 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 COMMITTEE 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

SECOND; SIXTH; NINTH; TENTH AND ELEVENTH RESPONDENTS'

WRITTEN SUBMISSIONS

INTRODUCTION

1. To the extent that we understand it, the relief sought by the Applicants in these proceedings is narrow[1]. These written submissions address only the aspects of the application which are in issue.

THE IMPUGNED DECISION

2. The challenge in these proceedings relates to the decision taken on 22 June 2010 by the Eleventh Respondent acting under supervision and control of the Second and Sixth Respondents *("the Respondents"*), to grant Faustin Kayumba Nyamwasa, the Twelfth Respondent *("Nyamwasa")*, refugee status in terms of section 24(3)(a) the Refugees Act, 130 of 1998 *("the Refugees Act").*

THE GROUNDS FOR THE CHALLENGE

[1] Notice of Motion (NoM) Page 3 Para 1; Founding Affidavit (FA) Page 17 Para 22; See also Applicant's Heads of Argument Page 4 Para 2.

3. The grounds for the challenge of the impugned decision, as we understand them, are *inter alia*:

3.1 the Respondents allegedly failed to consider the provisions of section 4 of the Refugees Act when considering and granting Nyamwasa refugee status despite his alleged involvement in the commission of war crimes abroad;

3.2 the Respondents failed to apply their minds whether or not to grant or refuse Nyamwasa refugee status and thus contravened their domestic and international obligations.

3.3 the impugned decision is unlawful, unreasonable, irrational and unconstitutional[2].

MATTERS WHICH ARE NOT IN DISPUTE

4. There are certain matters in these proceedings which are not in dispute and about which no issue is made. In summary:

4.1 There is no argument concerning the obligations of the Republic of South Africa ("the Republic") in terms of various international instruments to protect the interests of refugees;

[2] FA Page 33 Para i and ii; See also Applicant's Heads of Arguments Page 5 Para 6

4.2 There is also no contest that the Refugees Act is principally concerned with giving meaning, content and effect to the obligations of the Republic towards refugees;

4.3 There is furthermore no issue regarding the fact that the officials of the Respondents have a legal obligation to assist asylum seekers that approach the Refugee Reception Offices to apply for asylum or to have their refugee status determined. In these proceedings there are no conflicting views that this responsibility rests with the officials of the Respondents.

4.4 It is also common cause that Nyamwasa had a well-founded fear of being persecuted in Rwanda by reason of his political opposition to the regime in Rwanda and, owing to such fear, is unwilling to return to Rwanda.

4.5 Furthermore, it is not in issue that Nyamwasa, his wife and children were granted asylum by the Eleventh Respondent on 22 June 2010.

4.6 There is no dispute regarding the entitlement of Nyamwasa's wife to refugee status.

5. The Applicants do concede that the refugee seeking individuals constitute a vulnerable group and ought to have the full protection of the law.

THE RESPONDENTS' CONTENTIONS

6. As we shall seek to point out later the Respondents' main contention will be that Nyamwasa and his family were properly considered and granted refugee status after due process was followed and all relevant factors taken into account.

7. We do not however, seek to divulge information contained in the asylum applications for the reasons which will be dealt with below. We intend to comply with the provisions of section 21(5) of the Act.

8. We also propose to illustrate that the Applicants do not have *locus standi* to be granted the relief they seek.

9. The impugned decision in these proceedings, we contend, falls short of administrative action, in that, such a decision does not materially and adversely affect the rights of the Applicants or any particular individual.

10. If it does we will argue that this application was instituted out of time and there is no application before court for the extension of time and that it otherwise does not comply with the procedural requirements of section 7 of PAJA.

STANDING

11. According to the Applicants, they have standing to institute these proceedings

primarily by virtue of the provisions of section 38 (a)–(e) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution")*. The section states that:

> *"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;*
> *(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; and*
> *(e) an association acting in the interest of its members."* (Our emphasis).

12. The Applicants do not purport to be vindicating any right in the Bill of Rights. In this regard, the Constitutional Court held in ***Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others***[3] that:

> *"… "Constitutional analysis under the Bill of Rights takes place in two stages.* ***First, the applicant is required to demonstrate that her ability to exercise a fundamental right has been infringed****. This demonstration itself has several parts. To begin with, the applicant must show that the activity for which she seeks constitutional protection fall within the sphere of activity protected by a particular constitutional right. If she is able to show that the activity for which she seeks protection falls within the value – determined ambit of the right, then she must show, in addition, that the law or government action in question actually impedes the exercise of her protected activity. This second showing may be satisfied by demonstrating that the law or government action either expressly intends to restrict the right or effectively restricts the exercise of the right…"*[4] [Emphasis added]

13. It is also trite that a litigant or party to litigation must have a substantial and

[3] 2007 (4) BCLR 339 (CC).
[4] Id at pages 353 – 354.

direct interest in the relief sought. In this application, the Applicants failed to establish the legal connection between itself and the right it seeks to uphold.

14. The Applicant further contends that it is acting in the public interest. It is submitted that the issues of fact and law raised in these proceedings do not concern asylum seekers in general. Neither do they affect the rights or interests of the general public. There are no rights of any person that have been infringed. Thus the question of the infringement of rights does not arise. Furthermore, the relief sought by the Applicant is not of general application, but is directed at the status of one vulnerable[5] individual. Finally, there is an alternative, reasonable and effective manner in which the challenge could be brought, namely, invoking the provisions of section 36 of the Act, if that is essentially the relief that the Applicant is seeking. (It is submitted that that is in effect what the Applicant seeks, namely, the withdrawal of the refugee status of Nyamwasa). In the circumstances, it is submitted that the Applicant is not acting in the public interest.[6]

15. Consequently, we submit that the Applicant has not made out a case that it has *locus standi* to institute these proceedings.[7] In the circumstances, the application stands to be dismissed with costs occasioned by employment of two counsel.

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[5] Id at pages 347 – 348.

[6] See: *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) BCLR 775 (CC) at para [16] – [18].

[7] *The Learned authors Erasmus, Farlam, Fichardt and Van Loggerenrensburg: Superior Court Practice at B1-38 submit that "the statement of facts must at least contain the following information-(i) The applicant's right to apply, that is, his or her locus standi. The right must be established in the founding and not replying affidavit."*

CONFIDENTIALITY OF ASYLUM APPLICATIONS

16. Confidentiality of asylum applications is a principle recognised both in the Republic and internationally. According to the Handbook on Procedures and Criteria for Determining Refugee Status:

"…It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed."[8]

17. In the Republic, applications for and determination of asylum applications are governed by the Refugee Act. Section 21 (5) of thereof provides that:

"The confidentiality of asylum applications and the information contained therein ***must*** *be ensured at all times."* [Emphasis added]

18. Section 21 (5) of the Refugees Act is phrased in peremptory terms and the Respondents have no discretion. In this regard, it is submitted that the Applicant is incorrect in contending that:

"Relying on a legally flawed assumption that the principle of confidentiality in relation to refugee and asylum claim 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".[9]

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[8] *Handbook on Procedures and Criteria For Determining Refugee Status*: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Geneva 1992 (herein after referred to as the "UNHCR Handbook") Pages 47 – 48 Para 200

[9] Applicant's Heads of Arguments Page 7 Para 15; Pages 39 Para 112 – 115; Page 40 Para 116; Page 41 Para 120 – 122; Page 44 Para 132 &133; Page 45 Para 135; Page 46 Para 137 – 140 especially Para 140; Page 47 Para 141; Page 50 Para 151.

19. The only exception to section 21 (5) of the Refugees Act is Regulation 6 of the Refugees Regulations[10] which provides:

> ***"6 Disclosure of information and surrender of documents***
>
> *(1) …*
>
> *(2) 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).*
>
> *(3)* ***Sub-regulation 6(2) does not apply to disclosures to a government official or employee of the Republic*** *who has need to examine the information in connection with-*
>
> *(a) the adjudication of the asylum application;*
>
> *(b) the defence of any legal action arising from the adjudication or failure to adjudicate the asylum application;*
>
> *(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.*
>
> *(4) …"*

20. The Applicant never sought or obtained the consent of Nyamwasa or his wife pursuant to sub-regulation 6 (2) of the Refugees Regulations. In the circumstances, the Applicant would only fall within the parameters of sub-regulation 6 (3) if it were either a government official or an employee of the

[10] (Forms and Procedure) Published under Government Notice R366 in Government Gazette 21075 of 6 April 2000 as amended by Government Notice R938 Government Gazette 21573 of 15 September 2000 (hereinafter referred to as the "Refugees Regulations")

Republic.

21. The Applicant identifies itself as "a non-profit organisation registered in terms of the Non-Profit Organisation Act 71 of 1997, under registration number 010 - 387-NGO."[11] It is therefor, common cause that the Applicant is neither a government official nor an employee of the Republic.

22. It is not the Applicant's case that the provisions of section 21 (5) of the Refugees Act or the provisions of sub-regulations 6 (2) and 6 (3) respectively are unconstitutional. We submit that these provisions form part of our law and the Respondents[12] are enjoined by the Constitution to apply the law.

23. Accordingly, the Respondents are prohibited by operation of law from disclosing information contained in an asylum application and elicited at the hearing **without the written consent of the applicant.**

24. For these reasons, we submit that the Applicant is once again incorrect in contending that it is entitled to disclosure of any information for which sub-regulations 6 (2) and 6 (3) respectively, sought to sanction.

[11] FA Page 11 Para 3 and 3.1

[12] Section 7 (2) of the Constitution provides that: "*The State must respect, protect, promote and fulfil the rights in the Bill of Rights."* In *Women's Legal Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) at Para 19 it held that "the State" for purposes of this section includes "*all those actors who derive their authority from the Constitution …as well as bodies created by statute*".

IS THE IMPUGNED DECISION ADMINISTRATIVE ACTION

25. The Applicant argues that these proceedings were instituted under Rule 53 of the Uniform Rules of this Court.[13]

26. According to O' Regan J:

> *"The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself… The common law informs the provision of PAJA and the Constitution, and derives its force from the latter."*[14]

27. The Learned Justice stated further that:

> *"The provisions of section 6 of PAJA divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. The authority of PAJA to ground such causes of action rests squarely on the Constitution."* [15]

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[13] NoM Pages 4 & 5; Applicant's Heads of Argument Page 7 Para 6

[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004(4) SA 490 (CC) at Para [22].

[15] *Bato Star* Para 25; See also *Zondi v MEC for Traditional & Local Government Affairs* 2005 (3) SA 589 CC at Para 99 where the Constitutional Court held that " *Section 33 of the Constitution guarantees to everyone "the right to administrative action that is lawful, reasonable and procedurally fair." As its preamble makes clear, PAJA was enacted to give effect to section 33 of the Constitution. However, PAJA cannot be used to evaluate a constitutional challenge. A constitutional challenge must be evaluated under section 33 of the Constitution. Generally, PAJA only comes into the picture when*

28. The Applicant contends that the impugned decision is administrative action and reviewable in terms of sections 6 and 8 of Promotion of PAJA.[16]

29. The Applicant's review application must accordingly comply with the prerequisites set out in PAJA.

30. Administrative action is defined in section 1 of PAJA as:

> ***"Definitions***
>
> *1. In this Act, unless the context indicates otherwise-*
>
> *(i)* ***"administrative action"*** *means* ***any decision taken****, or any failure to take a decision,* ***by****-*
>
> *(a)* ***an organ of state****, when-*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*

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it is sought to review administrative action. Ordinarily anyone who wishes to review any administrative action must now base the cause of action on PAJA. This is so because "[t]he cause of action for judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past." (Footnotes omitted).

[16] FA Page 32 to 33 Para 53

which adversely affects the rights of any person and which has a direct, external legal effect, *but does not include-…" [Emphasis added]*

31. Section 1 of PAJA properly construed, sets out seven requirements that have to be satisfied in order for a decision to qualify as an administrative action as defined.

32. The said requirements include that the administrative action concerned must adversely affect rights of a person and must have a direct, external legal effect.

33. We contend that a decision to grant asylum, particularly the impugned decision, is not administrative action for the following reasons:

30.1 The primary objective of the Applicant is to promote human rights (including socio- economic rights) of asylum seekers, refugees and other international migrants.[17] The impugned decision does not adversely affect the rights of the Applicant, asylum seekers, refugees and other international migrants;

33.2 The Respondents are under a constitutional obligation not to return any person to his or her country of origin if doing so would subject such person to persecution.[18] Therefore, the impugned decision does not adversely affect the rights of Nyamwasa or any asylum seeker or

[17] FA Page 36 Annexure "KR2"

[18] See generally *Minister of Home Affairs and Others v Tsebe and Others; Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT126/11 [2012] ZACC 16 (27 July 2012) ("Tsebe's case).

refugee and other international migrants.

34. For these reasons, we submit that the impugned decision does not adversely affect the rights of anyone and is, for that reason, not administrative action as defined under PAJA and is accordingly, not reviewable under PAJA.

35. The Applicant claims to be lodging these proceedings in the public interest. Section 4 of PAJA deals with administrative action affecting the public[19] and provides:

> ***"4. Administrative action affecting the public***
>
> *(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the rights to procedurally fair administrative action, must decide whether…"*

36. It is submitted that for section 4 of PAJA to apply, the Applicant must prove that the impugned decision amounts to an administrative action and the impugned decision must materially and adversely affect the rights of the public.

37. We submit that the Applicant's application does not make out a case that the impugned decision is administrative action that materially and adversely affects the public (nor was it intended to do so). The decision affects only one individual, although not adversely. Section 4 of PAJA is, consequently of no

[19] In terms of section 1, "public" is defined as including "any group or class of the public".

application in the present case.

THE REVIEW IS OUT OF TIME

38. In the event the Honourable Court finding that the impugned decision is administrative action as contemplated in section 1 of PAJA, the Respondents then submit that the review application does was filed out of time.

39. Section 7 (1) (a) of PAJA provides that:

> *"**Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date –***
>
> *(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded;*
>
> *or*
>
> *(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might have reasonably have been expected to have been aware of the action and the reasons".*

40. According to the Applicant, it submitted its first Briefing paper on 6 July 2010.[20] We assume that by then it knew of about the impugned decision. These proceedings were instituted in April 2011, nine to ten months from the date on which the Applicant might reasonably have been expected to become aware of the impugned decision.

41. Section 9 of PAJA provides:

> ***"Variation of time***
>
> *9. (1) The period of –*
>
> *(a) 90 days referred to in section 5 may be reduced; or*
> *(b) 90 days or 180 days referred to in section 5 and 7 may be extended for a fixed period'*
>
> *by agreement between the parties or' failing such agreement, by a court or tribunal on application by the person or administrator concerned.*
>
> *(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."*

42. The Applicant did not apply for the variation of time in terms of section 9 of PAJA before instituting these proceedings.

43. Accordingly, we submit that the Applicant is non - suited.

<u>THE GROUNDS FOR THE CHALLENGE</u>

44. Before addressing the grounds for challenging the impugned decision, we deal with the relevant provisions of the Refugees Act and where applicable, International Law.

[20] FA Page 54 annexure "KR7"; Applicant's Heads of Argument Page 9 Para 25

THE RELEVANT PROVISIONS OF THE REFUGEES ACT

45. At the outset it is necessary to understand the purposes served by the Refugees Act and to appreciate the manner in which it is structured. In its preamble, the Refugees Act states that it is designed to give effect within the Republic of South Africa to the relevant international instruments, principles and standards relating to refugees and to provide for the reception into South Africa of asylum seekers.

46. The Refugees Act regulates applications for and recognition of refugee status and provides for the rights and obligations flowing from that status.

47. The interpretation, application and administration of the Refugees Act must be with due regard to the Convention Relating to the Status of Refugees (UN, 1951); the Protocol Relating to the Status of Refugees (UN, 1967); the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969); the Universal Declaration of Human Rights (UN, 1948); and any other relevant convention or international agreement to which the Republic is or becomes a party.[21]

48. The Standing Committee has the powers and duties, *inter alia*, to formulate and implement procedures for the granting of asylum; to regulate and supervise the work of the Refugee Reception Officer; to liaise with representatives of the UNHCR or any nongovernmental organisation; to advise the Minister or

[21] Section 6 (1) of the Refugees Act

Director-General on any matter referred to it by the Minister or Director-General; to review decisions by the Refugee Status Determination Officers in respect of manifestly unfounded applications; to decide any matter or law referred to it by a Refugee Status Determination Officer; to monitor the decisions of the Refugee Status Determination Officers; and to determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued.[22]

49. Central to the Refugees Act are sections 2 and 3 respectively, which provide that:

> *"2 Notwithstanding any provisions of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—*
>
> *(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or*
>
> *(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."*

50. Section 3 states that subject to Chapter 3, a person qualifies for refugee status, 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*

[22] Section 11 of the Act

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 of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

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

(c) is a dependant[23] of a person contemplated in paragraph (a) or (b)."

51. The Section 21 (1) of the Refugees Act provides that:

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

52. A person who qualifies for refugee status and who would like one or more of his or her dependants who have accompanied him or her to the Republic to receive asylum must, when applying for asylum, also assist every such dependant to apply for asylum in terms of the Refugees Act or apply on behalf of any such dependant who is not able to apply by himself or herself.[24]

53. Section 36 of the Refugees Act provides:

"Withdrawal of refugee status

[23] **'Dependant'** is defined in the Act and includes, among others, the spouse and any unmarried dependent child of the asylum seeker.

[24] Section 33 of the Refugees Act

36. (1) If a person has been recognised as a refugee erroneously on an application which contains any materially incorrect or false information, or was so recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application or if such person ceases to qualify for refugee status in terms or section 5 –

(a) the Standing Committee must inform such person of its intention of withdrawing his or her classification as refugee and the reasons therefor; and

(b) such 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 person may be dealt with as a prohibited person under the Aliens Control Act, 1991.

(3) Any refugee whose recognition as such is withdrawn in terms of subsection (1) may be arrested and detained pending being dealt with in terms of the Aliens Control Act, 1991.[25]

FIRST CHALLENGE - THE EXCLUSION CLAUSE

54. Section 4 of the Refugees Act deals with exclusion from refugee status and states:

"4. *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 of and principles of

[25] The Aliens Control Act was repealed and replaced with the Immigration Act 13 of 2002.

the United Nations Organisation or the Organisation of African Unity; or

(d) …"

55. The 1951 Convention Relating to the Status of Refugees ("hereinafter referred to the "1951 Convention") contains similar provisions. Article 1F thereof deals with Persons considered not to be deserving of international protection and states:

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

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) …
(c) …"

56. In ***R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)***[26] , the English Court held in relation to the interpretation of the 1951 Refugee Convention that:

"the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the Preamble."

57. According to the United Nations High Commissioner for Refugees guidelines on the exclusion clause:

"Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the

[26] [2005] 2 AC 1 at Para 18

regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made."[27]

58. In the UNHCR handbook, it is stated that:

"The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status... ***considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.***"[28] [Emphasis added]

59. It is nonetheless, a well-recognised and accepted maxim of international law, that every sovereign nation has inherent powers to forbid and regulate entrance of foreign nationals into its borders, or to admit them on such conditions as it sees fit to prescribe.[29]

60. Dealing with the vulnerability of refugees and asylum seekers, the Constitutional Court stated in ***Union of Refugee Women*** case[30] that:

"Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country."

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[27] UNCHR Guidelines on International Protection: Application of the Exclusion Clauses, 4 September 2003 at Para 31 (Herein after referred to as "UNCHR Guidelines")

[28] Page 35 Para 149; See also UNCHR Guideline at Para 2.

[29] at Para 28

[30] ***See Tsebe*** supra and all cases cited therein especially ***Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of Death Penalty and Another intervening)*** 2001 (3) SA 893 (CC).

61. There can be no doubt, so the Applicant has conceded, that if returned to Rwanda, Nyamwasa and his family members are likely to be subjected to persecution based on his political opinion. The concession is stated as follows:

*"**We assert that in light of the political situation in Rwanda and the jurisprudence dealing with non-refoulement in South Africa, to extradite or deport Nyamwasa would expose him to the well-founded fear of being persecuted as a result of his alleged political opposition to the Rwandan government and statements criticizing President Kagame, and the possibility of ill-treatment."***[31] [Emphasis added]

62. According to Professor Goodwin–Gill[32]:

"It is well established that the principle of non-refoulement includes protection from return to territories where the individual, although not directly at risk of persecution, torture or cruel, inhuman or degrading treatment or punishment, faces a danger of being expelled to other territories where such a risk exists."

63. Similarly, in ***TI v United Kingdom***[33], the European Court of Human Rights held that:

"The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, expose to treatment contrary to Article 3 of the Convention."

64. What is stated above is in conformity with our Constitution and statute law.

65. We furthermore submit that the Applicant's above-mentioned concessions were

[31] FA Page 85 Para 69.
[32] The Refugee in International Law (Oxford, 2007) at p252
[33] [43844/98] at page 15

properly made. The relief sought in this application, we submit, is destructive of the assertions made by the Applicant above. Essentially, the Applicant's concessions render this application academic and our courts have repeatedly declined to exercise discretion to grant declaratory orders in respect of abstract, hypothetical or academic questions.[34]

66. Further, we have submitted above that the South African constitutional jurisprudence prohibits the deportation or extradition of a person from the Republic to a place where fundamental rights entrenched in our Constitution such as a right to dignity and a right not to be subject or cruel, inhuman and degrading treatment are likely to be violated.[35]

67. Article 14 (1) of the 1948 Universal Declaration of Human Rights provides that:

"everyone has the right to seek and to enjoy in other countries asylum from persecution."

68. Article 12 (3) of the 1981 African Charter on Human and People's Rights provides that:

"every individual shall have a right, when persecuted to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions."

69. Article of 32 of the 1951 Convention deals with expulsion and provides that:

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[34]See Herbstein & Van Winsen: *The Civil Practice of Supreme Court of South Africa* (4th edition) at 1054 and numerous cases cited in footnote 19.

[35]***The Tsebe*** case, above. See also ***Nishimura Ekiu v The United States* 142 US 651 (1892)** at 659 quoted with approval in ***Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA)** at Para 29

"(1) *The Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order*."

70. We submit that the Respondents (in particular, the Eleventh Respondent) were aware of the allegations against Nyamwasa when considering the application for asylum for which he was also a party, and exercised discretion in favour of the asylum applicant and granted Nyamwasa and his family refugee status. The impugned decision is lawful and constitutionally permissible. For these reasons, we submit this ground of complaint is not sustainable and the application stands to fail.

SECOND CHALLENGE – FAILURE TO CONSIDER RELEVANT INFORMATION

71. Section 6 (2) (e) (iii) of PAJA provides that an administrative action is reviewable if –

"(e) *the action was taken –*

…

(iii) Because irrelevant considerations were taken into account or relevant considerations were not considered;

72. In dealing with a review under section 6 (2) (e)(iii) and 6(2)(f)(ii) Van Zyl J held in ***Stanfield v Minister for Correctional Services***[36] that:

[36] 2004 (4) SA 43 (C) at Para 102

"If the decision in question points, on balance, to bad or flawed reasoning and such reasoning was of material or substantial significance in prompting the decision–maker to come to his decision, the decision would be invalid and liable to be set aside on review. This would, in my view, be consonant with the well-established values of justice, fairness and reasonableness. It would also accord with the requirements of good faith and public interest."

73. We have illustrated above on the basis of the common cause or undisputed facts that the Applicant has conceded that Nyamwasa should not be deported or returned to Rwanda on the basis that there is likelihood that he will be subjected to persecution in that country.

74. We have also demonstrated that the scheme of the Refugees Act and asylum and refugee regime in general is to protect persons from being subjected to violations of fundamental right by being subjected to persecution.

75. Accordingly, we are fortified in our submission that the Applicant cannot seriously pursue an argument that impugned decision, on balance, is based on bad or flawed reasoning and such reasoning was of material or substantial significance in prompting the Respondents to come to such decision. This is so on the Applicant's own admission.

76. In his affidavit the Eleventh Respondent has confirmed the facts and circumstances that led him to grant asylum to Nyamwasa, in particular, and to Nyamwasa and his wife and family, in general. He stated, in effect, that Nyamwasa qualified in terms of the provisions of section 3(a) of the Act. About this there is no dispute. Nyamwasa also qualifies by virtue of being the spouse

of his wife who qualifies in her own right.

77. The Eleventh Respondent also stated that he considered the allegations of war crimes made against Nyamwasa and concluded that they were they were conflicting and unsubstantiated reports which did not amount to concrete information linking the Twelfth Respondent to the alleged crimes.[37]

78. We once again submit that the application must fail also on this ground.

THIRD CHALLENGE - RATIONALITY OF THE IMPUGNED DECISION

79. Section 6 (2) (f) (iii) of PAJA provides that an administrative action is reviewable if –

> (f) the action itself -
>
> …
>
> (ii) it not rationally connected to -
>
> (aa) the purpose for which it was taken;
>
> (bb) the purpose of the empowering provision;
>
> (cc) the information before the administrator;
>
> (dd) the reasons given for it by the administrator

80. The question whether, the decision to grant or refuse asylum to a person who, owing to a well-founded fear of persecution fled his or her country of origin and is unwilling, on account of such fear, to return thereto, has been dealt with above.

[37] Para 4 of affidavit of Eleventh Respondent confirming paras 52.3, 52.4, 53.1, 54.1, 54.2 and 66.3 of affidavit of Sixth Respondent.

81. The test ultimately is one of rationality. No case can be made out that it is irrational to grant Nyamwasa refugee status in circumstances where the Eleventh Respondent[38] was satisfied that Nyamwasa complied with the provisions of section 3(a) and 33 of the Act after considering the exclusionary provisions of section 4 thereof.

82. Stated differently, it cannot be argued that granting a person refugee status in those circumstances, is irrational. It further cannot be said that the decision that the Eleventh Respondent took was one that no reasonable decision-maker in his position could have taken.

OTHER RELEVANT PROVISIONS OF THE IMMIGRATION ACT

83. Section 9 (4) of the Immigration Act reads:

> *"a foreigner who is not the holder of a permanent residence permit may only enter the Republic as contemplated in this section if his or her passport is valid for not less than 30 days after the expiry of the intended stay; and issued with a valid temporary residence permit, as set out in this Act"*

84. Section 1 of the Immigration Act defines an illegal foreigner as follows:

[38] See *Bula & others v Minister of Home Affairs & others* 2012 (4) SA 560 SCA at Para 77 where the Supreme Court of Appeal held that "*As is abundantly clear the scheme of the Act is that it is for the RSDO to determine the merits of an application for asylum and not for a prior interrogation by a court. In the passage in Abdi, relied on by the Minister and the DG, this court was stating the obvious. It does not follow that in the passage referred to this court intended to convey what is presently submitted on behalf of the Minister. On the contrary, the concluding sentence in para 22 of Abdi makes it clear that the Department's officials are obliged to ensure that once there is an indication of an intention to apply for asylum they assist the person concerned to lodge such an application at a Refugee Reception Office."*

"'Illegal foreigner' means a foreigner who is in the Republic ***in contravention of this Act****."*

85. In terms of section 32 (2) of the Immigration Act, an illegal foreigner shall be deported.

CONCLUSION

86. It is common cause that any person who applied for asylum and whose application is rejected or who subsequent to being granted asylum has the refugee status withdrawn, becomes an illegal foreigner liable to deportation as contemplated in the Immigration Act. We submit that owing to Nyamwasa's real risk of persecution, he cannot be deported as envisaged in the Immigration Act. The Applicant does not seek his deportation, merely the withdrawal of his refugee status and the granting to him of permanent residence.

87. We submit that the Applicant has not made out any case for the withdrawal of Nyamwasa's refugee status. No case has been made out for the invocation of section 36 of the Act.

88. We further submit that were Nyamwasa's refugee status to be withdrawn, he would not qualify for permanent residence as he would be a prohibited person and thus an illegal foreigner.

89. We submit that Nyamwasa was properly afforded protection in the Republic and the relief sought in the notice of motion is not competent. Consequently,

the application stands to be dismissed with costs, such costs to include those occasioned by the employment of two counsel.

ADV MARUMO T K MOERANE SC

ADV NAOME MANAKA

Chambers Durban and Sandton

17 SEPTEMBER 2012