IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

MAIL AND GUARDIAN MEDIA LIMITED	**1st APPLICANT**
INDEPENDENT NEWSPAPER (PTY) LTD	**2ND APPLICANT**
MEDIA 24 LIMITED	**3RD APPLICANT**
and	
M.J. CHIPU, N.O., CHAIRPERSON OF REFUGEE APPEAL BOARD	**1ST RESPONDENT**
KREJCIR, RADOVAN	**2ND RESPONDENT**
MINISTER OF HOME AFFAIRS	**3RD RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Applicants herein seek the following relief:

"1. Reviewing and setting aside of the following decisions of the First Respondent:

1.1 The decision taken on 11 February 2011 to refuse the First Applicant access to the appeal hearing before the Refugee Appeal Board ("RAB"), which has been brought by the Second Respondent and which will take place on a date yet to be determined (hereafter referred to as "the appeal hearing");

1.2 The decision taken on 9 March 2011 to refuse the Third Applicant access to the appeal hearing.

1. Reviewing and setting aside the failure of the First Respondent to make a decision in the application made by the Second Applicant for access to the appeal hearing.
2. Ordering that two journalists employed by each of the Applicants may be present at, and may report on the appeal hearing.
3. In the alternative to parts 1 and 3 above:

3.1 Declaring that section 21(5) of the Refugees Act 130 of 1998 is unconstitutional to the extent that it precludes members of the public or the media, in appropriate cases, from attending and reporting proceedings of the RAB.

3.2 Declaring that section 21(5) of the Refugees Act 130 of 1998 is to read as follows: "The confidentiality of asylum applications and information contained therein must be ensured at all times, *save that proceedings before the Appeal Board (which is a term defined in the Act), the Appeal Board may on application or of its own accord allow any person or persons to attend a hearing and to publish a report or reports on the hearing, subject to any conditions determined by the Board"*.

3.3 Reviewing and setting aside the decisions described in par. 1 and 2 above.

3.4 Ordering that, in the event of the Constitutional Court confirming the declaration of invalidity referred to in par 4.1 above, two journalists employed by each of the Applicants may be present and may report on the appeal hearing.

4.Ordering the Third Respondent, and any other of the Respondents who oppose this application, to pay the Applicants' costs."

2.

The Second Respondent in this application then filed a conditional counter-application which sought the following relief:

"1. It is declared that the Refugee Appeal Board Rules, published under GN 1330 in Government Gazette 25470 of 26 September 2003 (the "Board Rules") are *ultra vires* and invalid.

2. In the alternative to prayer 1 above, it is declared that:

1.1 Rule 14 of the Board Rules in inconsistent with the Constitution, inconsistent with the Refugees Act, 130 of 1998 and consequently *ultra vires,* and invalid to the extent that it entitles the Board to admit any member of the public (including any member of the media) to a hearing of the Board other than the family or associates of the asylum Applicant, government officials whose presence is necessary for the conduct of the hearing, representatives of the United Nations High Commissioner for Refugees, witnesses and legal representatives: and

1.2 to remedy the defect, Rule 14(1) is to be read as though it provides as follows:

"14. *Closed proceedings*

(2) The hearings of the Appeal Board will not be open to the public. The Appeal Board may on application or <u>of</u> its own accord allow <u>the family or associates of the asylum-seeker, government officials whose presence is necessary to conduct the hearing, representatives of the United Nations High Commissioner for Refugees, witnesses and legal representatives to</u> attend a hearing."

3. Directing such parties opposing this application to pay the costs of this application, such costs to be paid jointly and severally."

During the hearing however paragraph 1 of these prayers was informally amended so as to only refer to Rule 14(2) of the Board Rules.

3.

<u>Refugees Act 130 of 1998 ("the Act")</u>

The preamble to the Act is important because much of it is again contained in section 6 of the Act. It reads as follows: "*Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and*

treat in its territory refugees in accordance with the standards and principles established in international law."

Chapter 1 of the Act deals with its interpretation, application and administration. It also contains a definitions section. An "asylum seeker" means a person who is seeking recognition as a refugee in the Republic. Section 2 is to the effect that a person may not be refused entry into the Republic if the result is that he or she is compelled to return or remain in the country where 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. Section 4 provides for exclusion from refugee status if, amongst others, there is reason to believe that the person has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment. Section 6 deals with interpretation, application and administration of the Act and it is convenient to quote this: *"Section 6(1) This Act must be interpreted and applied with due regard to-*

(a). the Convention Relating to the Status of Refugees (UN,1951);
(b). the Protocol Relating to the Status of Refugees (UN, 1967);
(c). the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU,1969);
(d). the Universal Declaration of Human Rights (UN, 1948); and
(e). any other relevant convention or international agreement to which the Republic is or becomes a party."

Regard must also be had to section 232 and 233 of the Constitution.

4.

Chapter 2 deals with Refugee Reception Offices, Standing Committee for Refugee Affairs and the Refugee Appeal Board. The Refugee Appeal Board is established by section 12 of the Act which states that it must function without any bias, and must be independent. According to section 13 the members are appointed with due regard to their suitability to serve as a member by virtue of his or her experience, qualifications and expertise, and the person's capability to perform the functions of the Appeal Board properly. One of the members of this Board must be legally qualified. Section 14 deals with the powers and duties of this Board which must hear and determine any question of law referred to it in terms of the Act, and also hears and determines any appeal so lodged in terms of the Act. According to section 14(2) the Board may determine its own practice and make its own rules. These rules must be published in the Government Gazette.

5.

Chapter 3 deals with applications for asylum, how they must be made and to whom presented, which would initially be the Refugee Reception Officer. For present purposes section 21(5) is important and it reads as follows: "The confidentiality of asylum applications and the information contained therein must be ensured at all times". Section 24 deals with the relevant decision regarding an application for asylum which is made by the Refugee Status Determination Officer. He may request information or clarification from an applicant or the Refugee Reception Officer. He may also consult with a representative from the United Nations High Commissioner for Refugees on specified matters and may, with the permission of the asylum seeker, provide this representative with such information as may be requested. Section 24(2)

also provides that when considering an application the Refugee Status Determination Officer must have due regard to the rights as set out in section 33 of the Constitution, and in particular must also ensure that the applicant fully understands the procedures, his or her rights and responsibilities, and the evidence presented. After the conclusion of such hearing he may then grant asylum, or reject the application as manifestly unfounded, abusive or fraudulent, or reject it as unfounded, but may also refer any question of law to the Standing Committee.

6.

Chapter 4 of the Act deals with reviews and appeals, and for present purposes section 26 is important inasmuch as it makes provision for an appeal to be lodged to the RAB, which may, after hearing an appeal, confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of s24(3). Before reaching a decision such Board may also invite the United Nations representative to make submissions, request the attendance of any person who, in its opinion, is in a position to provide the Board with relevant information, of its own accord make further inquiries or investigation, and also request the applicant to appear before it. It must allow legal representation at the request of such applicant.
In my view it is clear, and none of the parties held a different view, that such appeal is an appeal in the wide sense of the word i.e. it is a hearing *de novo.*
See: ***Tantoush v Refugee Appeal Board 2008 (1) SA 232 (T) at par 92.***

7.

Chapter 5 of the Act deals with Rights and obligations of refugees. Section 27(b) is important in the present context and states that: "a refugee enjoys full legal protection, which includes the rights set out in chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act". Chapter 2 of the Constitution of the Republic contains the Bill of Rights (sections 7-39). Section 28(2) provides for the applicability of section 33 of the Constitution before a refugee may be removed from the Republic on certain grounds. It is therefore clear from section 24(2) and also s28(2) that an applicant is entitled to administrative justice, the relevant principles of which are now contained in the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

8.

The Board Rules;
On 26 September 2003 under Government Notice 1330 in Government Gazette 25470, the Board purported to make the Refugee Appeal Board Rules. Rule 14 is of particular interest in the present proceedings:

"14. Closed proceedings

(1) The hearings of the Appeal Board will not be open to the public. The Appeal Board may on application or on its own accord allow any person or persons to attend a hearing.

(2) Where such persons are permitted to attend the hearing in terms of Rule 14(1) above, the Appeal board may nonetheless exclude any person behaving in a manner likely to interfere with the proper conduct of the proceedings."

I say "purported to make", because it is common cause that the following occurred: it was Second Respondent's submission that Rule 14 did not confer a discretion on the Board to permit any member of the public, including journalist, to attend a Board

hearing. Should I however find against them on that issue, he contended that Rule 14 was in any event "*ab initio void".* The reason for that contention emanates from the fact that after the Refugees Act had been promulgated, and put into force on 1 April 2000, the Immigration Act 13 of 2002 was propagated on 31 May 2002. In section 54 of this Act it was provided that the laws mentioned in Schedule 3 were repealed. Schedule 3 and particularly the 3rd column thereof, contained far-reaching amendments to the Refugees Act, inasmuch as it abolished the Refugees Appeal Board, repealed sections 12-14 of the Refugees Act, and consequently deleted reference to "Appeal Board" in other parts of the Refugees Act. These provisions were substituted with provisions providing for immigration courts. The Immigration Act, including section 54 and Schedule 3, were put into force by the President by proclamation on 12 March 2003. This meant that as from 12 March 2003, the Board did not exist but, as I have said, purported to make the relevant Board Rules on 26 September 2003. Thereafter the Immigration Act was in turn amended by the Immigration Amendment Act 19 of 2004, which was promulgated on 18 October 2004 and put into force by proclamation on 1 July 2005. One of its purposes was to repeal the provision that provided for immigration courts. It did not amend section 54 of the Immigration Act but substituted a new Schedule for the Schedule 3 in the original Immigration Act. The new Schedule contained no reference to the Refugees Act. The result was, according to Second Respondent, that the Board did not exist as a legal entity between 12 March 2003 and 1 July 2005, and where it purported to make Rules during that period, such was *ab initio void,* and fell to be set aside. The Board did not exist between 12 March 2003 and 1 July 2005, and neither did any empowering provision under which Rules could have been made. It is obvious that all public power must be exercised lawfully, and, where the "law-maker" (the Board) did not exist, it is in my view difficult to imagine under which circumstances it could have made valid rules. The principle of legality would not countenance that. I therefore fail to understand why Counsel for Second Respondent informally amended the conditional counter application to refer to Rule 14(2) only.
See: ***Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council 1991 (1) SA 374 (CC) at par 58,*** and ***Bula v Minister of Home Affairs 2012 (4) SA 560 (SCA) at par 79.***
De Kock and Others v Van Rooyen 2005 (1) SA 1 (SCA) at par 23-25.

9.

The Rule of Law is obviously a Constitutional matter, and despite the fact that the Second Respondent's counter claim was conditional on the findings that section 21(5) was unconstitutional, I am in my view at liberty within the ambit of sections 169 and 172 of the Constitution, to declare the purported rules to be of no force and effect, but particularly Rule 14 (2), and also the 2nd sentence of Rule 14 (1), which is in any event *ultra vires* section 21(5) of the Act. I will return to this topic when I deal with the interpretation of section 21(5) of the Act. In any event, it is clear that a rule cannot be used to interpret an Act. See: ***Moodley v Minister of Education and Culture, House of Delegates 1989 (3) SA 221 (AD) at 233 E-F***, and ***Hamilton-Brown v Chief Registrar of Deeds 1968 vol 4 SA 735 (T) at 737 D,*** although this dealt with a particular Act and regulations made there-under, the principle remains the same, namely: "It is not, however, legitimate to treat the Act and the regulations made thereunder as a single piece of legislation, and to use the latter as an aid to the interpretation of the former. The section in the Act must be interpreted before the regulation is looked at and, if the regulation purports to vary the section as so

interpreted, it is *ultra vires* and void. It cannot be used to cut-down or enlarge the meaning of the section…".

10.

The interpretation of section 21(5) ("the confidentiality of asylum applications and the information contained therein must be ensured at all times").

Mr. Cockrell SC on behalf the Applicants preferred to deviate somewhat from his written heads of argument, by dealing with the review application in the context of the provisions of Rule 14 (1). In the heads of argument the relevant constitutional framework was dealt with first, and Mr. Marcus SC, correctly in my view, adopted the approach that the starting point was the interpretation of section 21(5) of the Act in the proper context. In law, context is everything (in life also, but I must not be read to declare that law and life are two separate concepts).

See: ***Aktiebolaget Hàssle and Another v Triomed (Pty) Ltd 2003 (1) SA 155 (SCA) at 157*** , where Nugent JA said that in law this was so, when it comes to construing the language used in documents, whether the document be a statute, or a contract, or something else. The Constitutional Court has also said that the overall context of an Act is important in an interpretive exercise. See: ***SA Liquor Trades Association v Gauteng Liquor Board 2009 (1) SA 565 at par 25 and 33.*** Apart from the context of any given statute, or section thereof, a court must of course interpret legislation as per the provisions of section 39 (2) of the Constitution. Interpretation seeks to give effect to the object or purpose of legislation, and involves an inquiry into the intention of the legislature. It is concerned with the meaning of words without imposing a view of what the policy or object of legislation is or should be. See: ***Mankayi v Anglo Gold Ashanti 2010 (5) SA 137 (SCA) at par 23 and 25,*** and ***SAA v Aviation Union of South Africa 2011 (3) SA 148 (SCA) at 155 to 158***. In that decision it was made clear that whilst recognising the need to give effect to the object and purpose of legislation, it was not the function of a court to do violence to the language of a statute. In any event, the ordinary meaning of words used in a statute or in a section must be interpreted, and in interpreting statutes within the context of the Constitution, will not require the distortion of language so as to extract a meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in-turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. See: ***South African Police Service v Public Services Association 2007 (3) SA 521 (CC) at par 20.***

11.

Applicants, in the context of section 21(5) of the Act submitted that it infringed upon the rights contained in section 16(1) of the Constitution, which deals with freedom of expression, the freedom of the press and freedom to receive or impart information or ideas. With reference to a number of decisions of the Constitutional Court it was submitted that freedom of expression lies at the heart of democracy, and that individuals in society needed to be able to hear, form and express opinions and views freely on a wide range of matters. The media had a particular role to play in protecting the right, and were in fact key agents in ensuring that the provisions of s16(1) of the Constitution were complied with, enforced and respected.

See: ***South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others 2007 (1) SA 5234 (CC) at par 23; South African National***

Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) at par 7; S v Mamabolo (E-TV and Others intervening) 2001 (3) SA 409 (CC) at par 37.
Applicants furthermore relied on the principle of "open justice" which flows from the constitutional principles of freedom of expression and accountability. In ***S v Mamabolo supra at par 28 and 29*** the following was said in this context: "…this openness seeks to ensure that the citizenry knows what is happening, such knowledge in-turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts and, ultimately such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, free of the more important aspirational attributes prescribed for the judiciary by the Constitution…". I was referred to a decision of the House of Lords in ***Scott v Scott [1913] (AC) 417 at 447: "***Publicity is the very soul of justice. It is the *keenest spur* to exertion and the surety of all guards against improbity. It keeps a Judge himself, while judging, under trial." I must say at this stage that neither I nor Mr. Marcus SC on behalf of the Second Respondent, nor Mr. Bofilatos SC on behalf of the First and Third Respondents had any problems with these submissions, or needed to be converted in that regard. It was also pointed out that the open justice concept was applied to many other public bodies such as commissions of enquiry, misconduct proceedings of various professional councils, liquidation enquiries ect. The result was that the goal of the present application was to advance two democratic imperatives, namely the goal of ensuring that the public has access to information which engage the public interest, and the need to allow scrutiny of the decision-making process when it would be in the public interest to do so. Accordingly the submission was that the public interest in particular plays a core role in the analysis in terms of section 16 of the Constitution, and particularly, the analysis of whether any limitation of the rights protected by section 16 was justified.

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Section 21(5) is in my view clear from a linguistic point of view. The confidentiality of asylum applications and information contained therein must be ensured at all times. "All times" does in my view not mean "sometimes". "Confidential" means "not intended for public knowledge" (see Shorter Oxford English Dictionary at pg 487). This left the question what "at all times" meant? The suggestion was that confidentiality only applied to the initial stages of any asylum application, and that in line with the injunction that a court must interpret a section that would permit constitutionality and in the present context comply with the provisions of section 16(1) of the Constitution, it meant in the present instance that the Board ought to have a discretion to allow the media to be present during the relevant appeal hearing of Second Respondent. Applicants made great play in the founding affidavit and again in their reply, that the Second Respondent was a public figure at his own instance. He gave interviews, sought interviews and attracted attention to his way of life, apart from the evidence that he gave in previous court hearings. Whilst he contended that international law required asylum applications to be kept confidential for a number of reasons which I will deal with in a moment, it was Applicants' case that access to the Appeal Board hearing was justified on the facts of this case. Second Respondent contended, not surprisingly, that it could never be permitted to allow media access to a refuge appeal, whatever the facts and circumstances of the case. Applicants in turn submitted that this absolute position was no more sustainable than would be an absolutist claim by the media of the right of access to every refugee appeal. It was not Applicants' case that they should have access to all refugee appeals, but the core

question in their view was the following: "Does the Constitution permit an absolute rule that the RAB may never make know any information relating to an application for refugee status and may never allow public access to an appeal?" Applicants say that a blanket ban on access to refugee appeal hearings would be inconsistent with the Constitution for another reason, and that would be that it would be irrational. The purpose of an appeal hearing was to establish the truth, and a secret hearing undermined the ability of the Board to establish the truth or conversely open hearings facilitated the establishment of the truth. A witness who knew that his evidence would be open to scrutiny by others would be less likely to submit untruthful evidence. A ban on access therefore facilitated dishonesty. The conclusion was that a blanket statutory secrecy in respect of refugee appeals was inconsistent with the Constitution and accordingly invalid.

13.

I have mentioned that it was Applicants' case that the confidentiality aspect contained in section 21(5) of the Act only applied to the initial stages of the particular application process. On behalf of all of the Respondents it was contended that such argument lost sight of the express wording of section 21(5), the context of refugee law generally as well as its statutory context in South Africa. In 1996 South Africa acceded to the United Nations Convention relating to the status of refugees of 1951 (the "Refugees' Convention"), and its 1967 Protocol. In order to give effect to these international obligations, South Africa enacted the Refugees Act. The applicable treaties were therefore incorporated into domestic law.

See: ***Tantoush supra at par 61.***

The purpose of refugee law, and in particular the Refugees Convention and the Refugees Act is to protect persons who are in danger of, or vulnerable to, persecution on the specified grounds. In this regard the purpose of refugee law and the confidentiality obligations imposed by such, is closely tied to the protection and promotion of the constitutional rights (*inter alia)* to human dignity, life, freedom and security of the person, privacy and just administrative action. It was against the backdrop of these rights that section 21(5) of the Refugee Act must be interpreted to give affect to confidentiality at all stages of the asylum application process. I agree with that approach.

The Supreme Court of Appeal has emphasised in this context that refusing a refugee entry to this country, thereby exposing her or him to the risk of persecution or physical violence in his home country, is in conflict with the fundamental values of the Constitution.

See: ***Abdi and Another v Minister of Home Affairs and Others 2011 (3) SA 37 (SCA) at par 27***. I have mentioned the relevant constitutional rights being contained in sections 10,11,12,14 and 33 of the Constitution (and *PAJA)*. It must be remembered that in the ***Abdi*** decision (at par 22), the SCA held that the words of the Act mirror those of the UN Convention and the OAU Convention of 1969. Further, the Act's provisions are in accordance with international law and practice as evidence by decisions of the European Court of Human Rights. (par 24). It is also abundantly clear from the wording from section 6 of the Act itself that it must be interpreted and applied with due regard to *inter alia* the Refugees Convention, the Protocol, the Universal Declaration of Human Rights and "any other relevant convention or international agreement to which the Republic is or becomes a party". Section 6 can therefore not be interpreted in isolation, and not only with reference to its own wording, but as I have said, within its statutory context and in order to give effect to

the purposes of the Act generally. I have mentioned the relevant authorities which support this approach. Respondents also argued that it was important to understand the purpose and function of confidentiality in the context of refugee law as interpreted and practiced internationally. The South African Refugees Act , as the Supreme Court of Appeal has said, is in accordance with international law and practice. One must therefore read the words contained in section 21(5) in the context of the Act as a whole, and in the light of all relevant circumstances. See: ***Natal Joint Municipal Pension Fund v Ndomeni Municipality 2012 (4) SA 593 (SCA) at par 24 and 26***.

14.

Respondents quite correctly submitted that it was important to understand the purpose and function of confidentiality in the context of refugee law as interpreted and practiced internationally. Confidentiality of proceedings at every stage of asylum proceedings was a feature of refugee law in virtually every major jurisdiction. The reasons for that were set out in the ***Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*** published under the auspices of the United Nations High Commissioner for Refugees. Confidentiality was important so that the applicant could fully explain his case, opinions and feelings, discuss the relevant circumstances, his trauma and fears, whilst being reassured that confidentiality was respected so as to ensure the required openness on one hand, and the safety of the applicant, his family and witnesses on the other hand. Reference was also made to the United Nations advisory opinion to the Japanese Government of 31 March 2005 which emphasised the importance of confidentiality at all stages of the relevant proceedings, including all administrative and judicial review proceedings. For this reason confidentiality had to apply "at all times" as per section 21(5) and accordingly to the appeal process before the Refugee Board. In the context of section 16(1) of the Constitution, Respondents briefly argued that it was wrong to transplant the "open justice" principle to the present Appeal Board hearing which is a body established for a particular purpose in line with international law and obligations. In their heads of argument the Second Respondent's counsel "assumed" that section 21(5) of the Act constituted a limitation of section 16 of the Constitution and then dealt with the limitation clause provided for by section 36(b) of the Constitution. During argument however Mr. Marcus SC agreed that the provisions of section 21(5) of the Act infringed the rights contained in section 16(1) of the Constitution, and then proceeded to deal with the limitations analysis.

15.

In my view the provisions of section 21(5) are absolute in its content and does not give the Board any discretion to allow the press access in so-called appropriate cases. It therefore cannot also co-exist with the second sentence of Rule 14(1), that I have already referred to.

16.

I therefore declare that section 21(5) of the Refugees Act 130 of 1989 infringes upon the freedom of the press and other media and the freedom to receive or impart information or ideas as provided for by the provisions of section 16(1) of the Constitution.

17.

Limitation of Rights

It is convenient to refer to this provision. Section 36 of the Constitution provides:
"**Limitation of Rights**

(1) The rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taken into account all relevant factors including-

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

Before I deal with these limitation considerations, I deem it necessary to refer to certain of the factual allegations contained in the affidavits before me. Applicants classified the Second Respondent as a public figure, and they gave numerous facts emanating from his evidence in his bail application and the extradition proceedings. They accordingly alleged that most facts relating to his unlawful activities both in South Africa and in other countries are already in the public domain. They do not rely on the truth of those allegations or the accuracy of certain media reports which were attached to the founding affidavit, but say that the media reports show the nature of the speculation that is currently in the public domain about the Second Respondent. They submitted that it was clearly of manifest public interest to know the grounds on which he is refused or granted an asylum-seeker permit. They say that at the very least the following facts cannot be denied:

17.1 He is a man with serious allegations of criminality currently being levelled against him. Some of these allegations involve alleged links with a person involved in law enforcement at a senior level;

17.2 he is also a man who alleges that he faces a political conspiracy in the Czech Republic as a result of supporting the election campaign of a former Prime Minister. Other arguments were made in the founding affidavit concerning the importance of the freedom of the press and the right of the public to be fully informed, an analysis of the Refugee Act itself, and various other submissions relating to the principles of open justice and freedom of expression. Inasmuch as the present section 21(5) imposes a blanket ban on public access or media access, Applicants accept that there may be instances where it would be inappropriate for access to be granted to an RAB appeal. It is for that reason that RAB is vested with a discretion whether to grant access, or ought to have that discretion. They also accept that the principles of open justice and freedom of expression are not the only important constitutional principles that may be taken into account by the RAB when deciding whether to grant access. They submit however that on the facts of this case there are no counter-veiling principles which will have the affect of out-weighing the importance of open justice, and the right of members of the public to receive information in the public interest. There can be no material privacy or dignity interest of Second Respondent to keep the hearing closed, since information which potentially limits his rights to dignity and privacy is already extensively in the public domain. Full details were given in this context which are not necessary to repeat herein, but which emanate from the previous court proceedings. Applicants then dealt with the remedy that

ought to be granted in the context of their prayers sought, on the assumption that the reading-in required by prayer 4.2 was not appropriate. Having regard to the legislation pertaining to refugees, both in South Africa and in other countries, I am of the view that the reading-in suggested by prayer 4.2 of the notice of motion is not appropriate on the facts. A court must be careful not to be too incisive in this regard, and it must endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. See: ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at par 75.*** I also need to keep in mind the principle of separation of powers, which requires a court to pay appropriate respect to the proper role of the legislative arm of Government. I accept that confidentiality is a very important purpose of any refugee legislation and on that basis the suggested reading-in would be inappropriate. It is in any event inappropriate where it is sought on the basis of the facts of one particular refugee only, legislation is aimed at the, majority of particular cases, or classes, or affected persons, and generally not at isolated or exceptional cases.
See: ***Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC) at par 38 – 41.***

18.

<u>Aspects of Second Respondent's answering affidavit:</u>

Second Respondent set out a legal argument in his answering affidavit which, in constitutional litigation is not only acceptable, but a requirement inasmuch as it leads to a proper ventilation of relevant issues. For that reason he proposed an interpretation of the Act in the light of the preamble to the Act, the provisions of section 6, customary international law and legislation in comparable jurisdictions. He also dealt with the limitations exercise that section 36 of the Constitution required. What is important at the moment are the following allegations having regard to the purpose of refugee legislation and confidentiality requirements, and he referred to a number of interlocking policy considerations:

18.1 Confidentiality serves to protect the life and liberty not only of the asylum seeker, but also of his and her family and associates (some of whom may have been instrumental in aiding the asylum seeker to flee the country of origin or in supporting the asylum seeker in the receiving country) as well as witnesses;

18.2 it is essential to the integrity of the asylum process;

18.3 it encourages asylum seekers to come forward and to furnish full and honest accounts of their asylum claims;

18.4 it is necessary in order to preserve the fairness of the proceedings;

18.5 it is necessary to balance the requirements of diplomatic comity against the need to grant refugee status to persons genuinely in need of protection.

He then dealt with those considerations in the answering affidavit, many of which were then repeated and expanded upon in the Second Respondent's heads of argument, and argument in court, with which the First and Third Respondents associated themselves with. It is noteworthy what the Applicants said in their replying affidavit in respect of these alleged interlocking policy considerations. They say that

none of those policy considerations justifies the contention that the proceedings must be closed in all cases. They say that none of these policy considerations meets the Applicants' case in this regard. They demonstrate that in "some, or even many, or even in most cases" (I underline), it will be appropriate to require confidentiality. They do not, however, justify an absolute blanket ban on public access to the hearings without exception. It is also significant that they continue to say that it may be that in the majority of cases the rights and interests of the Applicant to confidentiality outweigh the public interest in openness. Indeed, this flows from the fact that the majority of applicants for asylum are unknown to the public. However, as this case shows, there may occasionally be instances where the applicant has such a public profile, and his application raises such issues of national importance, that openness is required. Requiring a blanket ban prevents the RAB, in such a case, from giving effect to what the Constitution requires. Having read all of the allegations contained in the affidavits as well as the confidential affidavits handed to me in a separate file, I have failed to discover "such issues of national importance" that the Applicants refer to (par 14 of the replying affidavit). I assume for present purposes that there is a public interest in the outcome of the appeal as opposed to mere public curiosity, in the light of the facts that were presented in the Second Respondent's bail application and the extradition hearing. Certain of those facts may or may not be in the public interest, but this is a far cry from saying that one is dealing with issues of "national importance". The relevance of Applicants' concession set out herein above will become apparent when I deal with the limitation factors. The reference to "national importance" seems to mean the following to Applicants, and I deem it appropriate to quote from the replying affidavit: "29.1…it is the Applicants' contention that the allegations about alleged criminality and whether Mr. Krejcir should be accorded refugee status are inexplicably linked. The allegations in the public domain suggest that Mr. Krejcir is involved in serious organised crime. Mr. Krejcir's version is that he is an honest business man who is being persecuted. These versions are inconsistent, and the information which will be ventilated in the RAB proceedings will relate directly to the question of which version is true. Given the extremely serious allegations that have been made against Mr. Krejcir, it is in the public interest for these issues to be ventilated in the public eye. The public has a right to know the reasons for the outcome of Mr. Krejcir's appeal, regardless what it is, and also have a right to witness the adjudication of that appeal."
I may add that it was reported in the media some weeks ago that all criminal charges against Mr. Krejcir had been withdrawn. The allegations contained in the Applicants' replying affidavit are, as I have said, then reflected in their heads of argument where it is said that it is not Applicants' case that they should have access to all refugee appeals, but rather that access is justified on the facts of this case.

19.

Section 36(1)(a) of the Limitation Clause;
The nature of the Right;

The parties to these proceedings agree that the right to freedom of expression is fundamental to a constitutional democracy. I also do not need to be converted. It is also so that persons must be able to see how justice is done; and, as the Applicants have asserted, the closer particular speech is located to the core values of the right to freedom of expression, the higher the thresh-hold of justification. In other words, the more the reception of particular information is in the public interest, the harder it will be to justify limiting its dissemination.

See: ***Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406 (CC)***. There are, as the Constitution itself makes it clear, limitations to the right to freedom of expression, and these are contained in section 16(2). There are other accepted limitations as well, and in ***Independent Newspapers (Pty) Ltd v Minister for Intelligent Services*; *In re Masetla v President of the Republic of South Africa 2008 (5) SA 31 (CC) at par 43 – 44*** Moseneke DCJ put the position as follows: [43] "I am, however, unable to agree with the submission that a restriction placed on public access to proceedings is only permissible as an exceptional occurrence and that the party seeking to restrict the court record bears a true onus of demonstrating that the restriction is justifiable. The logical consequence of this stance is that all court records may not be restricted, except in exceptional circumstances, by a court order after formal application, on notice to interested parties and after a hearing in an open court. In other words, I accept that the default position is one of openness. My difficulty arises in defining the circumstances in which that default position does not apply. As will become apparent later, I cannot accept the argument that the default position may only be disturbed in exceptional circumstances. {44] The "exceptional circumstances" standard advanced is inconsistent with the design of our Constitution and the jurisprudence of this court on several counts. The better approach, I think, is to recognise that the cluster of rights that enjoins open justice derive from the Bill of Rights. These Rights are individually and collectively, like all entrenched rights, not absolute. They may be limited by a law of general application provided the limitation is reasonable and justifiable. It is not uncommon that legislation and the common law in this country and elsewhere, in open and democratic societies, limits open court hearings when fair trial rights or dignity or rights of a child or rights of other vulnerable groups are implicated."

20.

The Respondents say that asylum-seekers are such vulnerable group, and of course the Constitutional Court has held so as well in ***Union of Refugee Women and Others v Director- Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC) at par 28-29*** where the following was said: "Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the Applicants, the facts that persons such as the Applicants are refugees are 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. Apparent to these experiences is the further trauma associated with displacement to a foreign country. The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse"". Other important cases in the context of the limit of the right to freedom of expression are: ***S v Mamabolo supra at par 41*** and ***Laugh it off Promotions CC v SAB International (Finance) 2006 (1) SA 144 (CC) at par 47*** where it was stated that the right to free expression in our Constitution is neither paramount over other guaranteed rights, nor limitless.

21.

There are many other well recognised instances in our law where the right to : "open justice" is outweighed by superior interests, some of which are the following:

21.1 Proceedings involving children who are accused or witnesses in criminal proceedings;
21.2 divorce proceedings;
21.3 protection of the identities of rape victims and other victims of sexual violence;
21.4 matters where there is a likelihood that harm might result to a witness who testifies at open proceedings;
21.5 various other situations in which an exclusion of the media is needed to preserve the proper administration of justice.

The Canadian Charter of Rights and Freedoms is akin to our chapter 2 of the Constitution. It also guarantees the rights and freedoms set out in it subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In the context of a case involving a ban on publication of the identity of a complainant in a sexual case, the Supreme Court of Canada in ***Canadian News Papers Company v Canada (A-G) [1988] 2 SCR 122*** held that the relevant section of the Criminal Code which contained the relevant ban on publication was introduced to remedy a situation where a victim of a sexual assault did not report this offence for fear of treatment by either the police or prosecutors, or fear of trial procedures or fear of publicity or embarrassment. It was held that while freedom of the press was an important value in a democratic society which should not be hampered lightly, it must be recognised that the limits opposed by the particular section in the Criminal Code on the media's rights were minimal.

22.

The right to freedom of expression and the "open justice principle" does usually weigh in favour of opening-up proceedings like those in front of the RAB, however, there are a number of counter veiling rights and interests which serve to justify the exclusion set out in section 21(5).

23.

The Importance of the Purpose of the Limitation;

It is clear that the relevant limitation is prevalent in the refugee legislation and practice of other open and democratic societies. The purpose of the limitation of the right is set out in Second Respondent's main answering affidavit, and I have referred thereto as well as the Applicants' reply. I regard the integrity of the asylum system as a crucial feature. Two particular important examples suffice in this context:

23.1 An asylum seeker can often only substantiate "well-founded fear of persecution" by divulging information to the adjudicator of the asylum claim, or leading the evidence of witnesses, which carries the risk a threat to life or liberty to the asylum seeker, family or associates or witnesses. If the confidentiality of the proceedings cannot be guaranteed, such information will not be presented or evidence will not be led. This inhibits the asylum seeker from airing his or her case to the fullest extent possible. It could of course, in some cases, prevent the asylum claim from succeeding;
23.2 asylum proceedings are particularly and peculiarly susceptible to diplomatic pressure from the country of origin. Such interference deeply compromises the integrity of the asylum adjudication. It may sway the adjudicator to reject a well-founded asylum claim on spurious grounds in order to preserve the diplomatic relationship.

A blanket ban on access by the general public is therefore justified in my view. In their replying affidavits the Applicants have admitted that in most cases a blanket ban is justifiable, but have insisted that the facts of this case demand access to the appeal hearing. I do not agree that this is so, and in any event the integrity of the asylum system, the safety of witnesses, relatives and associates, the fact that the refugee might be unwilling or unable to return to his or her country of origin because of circumstances subsequent to his flight, the asylum-seekers privacy and dignity interests and the general fairness of the asylum-hearing outweigh the limited interests of the Applicants herein.

24.

The Nature and Extent of the Limitations;

The nature of the limitation is a complete ban on access of the general public to the relevant appeal proceedings. The confidentiality aspect pervades the entire proceedings, from lodgement of the application until after the conclusion of an appeal or review. This is therefore a limitation of the "open justice" principle which must however also be seen in the relevant context. Whatever crimes the Second Respondent may have committed in South Africa are also irrelevant, having regard to the provisions of section 4(1)(b) of the Refugees Act: only crimes committed prior to entry of the country of refuge are relevant. I have already mentioned that according to various newspaper reports of some weeks ago, all criminal charges were withdrawn against the Second Respondent. For obvious reasons I do not know what the further intention of the prosecuting authority is. If any acts committed in South Africa are relevant, closing the hearing has virtually no impact at all on the right and opportunity of the media to report on such. They would be able to attend any relevant criminal court hearing. If there is indeed a public interest to know the grounds upon which the Second Respondent will be granted or not granted asylum, as opposed to mere public curiosity, then this interest or curiosity must yield to the more general public interest in the integrity of the asylum system and the confidentiality of asylum proceedings. That was Applicants' contention, and I agree with it.

25.

The Relation Between the Limitation and its Purpose;

There is no doubt that the relevant limitation is properly connected to its purposes and I have already referred to the importance of the confidentiality aspect in the South African Act and other international documents. I have mentioned why confidentiality is necessary, and why this must be so at all stages as required by the provisions of section 21(5).

26.

Less Restrictive Means to Achieve the Statutes Purpose;

The only form of less restrictive means to achieve the purpose that was proposed in the affidavits before me was to allow the Board to have a discretion to allow persons to attend the appeal hearing, and to publish a report thereon, subject to conditions that may be imposed by the Board. The existence of less restrictive means to limit a constitutional right is, on its own, obviously not decisive inasmuch as the limitations analysis concerns proportionality in which all factors is weighed against each other.

See: ***Road Accident Fund v Madeyide 2011 (2) SA 26 (CC) at par 63 to 66, 81 and 92***.

A discretion in the case of section 21(5) would not be a suitable and less restrictive means to achieve the purposes of confidentiality. This is so because if asylum-seekers do not know, even before they lodge applications for asylum that confidentiality will be respected under all circumstances, there is a realistic chance that some of them may either not lodge applications at all, or even if they do, are not completely candid about what they do disclose. Where the Board to have a discretion, an asylum-seeker would have to make a choice before hand whether to disclose more, in order to make out a proper case for asylum, but subject to the risk of safety to those closely associated with him, or disclose those interests, but then running the risk of having the asylum application turned down. In my view this will totally subvert the asylum process and the confidentiality that I deem to be an essential part of it.

27.

The conclusion therefore is that the limitation imposed by section 21(5) of the Refugees Act to the rights contained in section 16(1) of the Constitution constitutes a justifiable limitation of those rights as well as the "open justice" principle and is accordingly not unconstitutional. The review application by Applicants as per prayers 1,2 and 3 of part B of the notice of motion must therefore fail. The unconstitutionality of section 21(5) of the Act that was raised as an alternative to prayers 1, 2, 3 and for the reasons given above the alternative relief sought in par 4.1, 4.2, 4.3, 4.4 and 4.5 must also fail. Although Second Respondent's conditional counter-claim relating to the mentioned Appeal Board Rules was brought on a conditional basis as being *ultra vires* and invalid with an alternative prayer relating to Rule 14(1), it is clear from the objective facts that the Board had no power to make rules during the period in which it itself did not even exist. If there was no empowering legislation, it could obviously not act in terms thereof. The result is that the rules cannot be legally valid. There are many older and modern authorities to this effect, and as far as the former is concerned I can do no better then refer to ***Administrative Law, L Baxter, Juta and Company, pages 384-387***. The general principle has always been that a public authority has no powers other then those which have been conferred upon it by legislation. In the more modern context I have referred to the ***Fedsure supra*** decision of the Constitutional Court in this context. It would be an unacceptable absurdity if I had to close my eyes to the objective reality in this context, and either read something in to a rule which does not exist in law, or assume that the Appeal Board has validly adopted such rules by implication merely because of the fact that they continued to act throughout the years as if those rules were validly in existence. The rules were simply not lawfully made, and that should be the end of the matter. The only question that needs consideration however is the fact that objective invalidity *ab initio* may bring with it a legal uncertainty and possible litigation that was never contemplated by any interested party. It must be remembered that generally speaking our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside. On the facts of this case a good distinction can be made between what existed in law and what existed in fact. For the relevant period the Appeal Board did not exist and it could not make the rules. That is according to law. In fact however it continued to operate and in fact did make the relevant rules. Legal effect is then given to the consequences of the initial void act and that is the reason why they will have legal affect until the initial act is set aside by

a court. See: ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at par 26 to 35.***

28.

As far as costs are concerned I intend to follow the approach laid down again in ***Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC) at par 21-25.*** The application raised important matters of constitutional substance.

29.

The following orders are therefore made:

29.1 Applicants' application for review in terms of prayers 1, 2 and 3 of the notice of motion is dismissed;

29.2 It is declared that the provisions of section 21(5) limit the rights of the press and limits its freedom to receive or impart information or ideas provided for in section 16(1) of the Constitution, but that such limitation is justifiable and reasonable taking into account all of the factors as provided for by section 36(1) of the Constitution. Accordingly prayer 4 of Applicants' notice of motion is dismissed.

29.3 It is declared that the Refugee Appeal Board Rules published under GN 1330 in Government Gazette 25470 of 26 September 2003 are invalid. This declaration of invalidity shall come into force as from the date of this judgment;

29.4 No order as to costs is made.

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JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

Date of hearing:	15 and 16 November 2012
Date of Judgment:	6 December 2012
Applicants Counsel:	Adv. Cockrell SC Adv. Friedman
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