



CONSTITUTIONAL COURT OF SOUTH AFRICA

Mail and Guardian Media Limited and Others v Chipu N.O. and Others

Case CCT 136/12

Date of hearing: 14 May 2013

Date of judgment: 27 September 2013

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 27 September 2013 the Constitutional Court upheld an appeal against a judgment of the North Gauteng High Court, Pretoria concerning the constitutionality of section 21(5) of the Refugees Act. That section provides that the “confidentiality of asylum applications and the information contained therein must be ensured at all times”, thus preventing any member of the public or the media from attending asylum application proceedings.

The second respondent, Mr Radovan Krejcir, applied for asylum in South Africa in 2007. After his application for asylum was refused, Mr Krejcir appealed to the Refugee Appeal Board (RAB). The applicants, comprising three newspaper companies, requested the RAB’s permission to have journalists present during Mr Krejcir’s appeal hearing in order to report on the proceedings. Their requests were refused.

The applicants sought to have the RAB’s refusal decision set aside in the High Court. In the alternative, the applicants sought an order declaring section 21(5) unconstitutional to the extent that it precludes members of the public or the media from attending and reporting on RAB proceedings in any circumstances.

The High Court dismissed the challenge to the refusal decision and held that section 21(5) of the Refugees Act constituted a limitation on the freedom of the press and other media, as well as the freedom to receive or impart information or ideas. However, the High Court concluded that the limitation was justifiable given the importance of

confidentiality to the integrity of the asylum process. The Court thus declared section 21(5) to be constitutional.

In the Constitutional Court, the main issue was whether the requirement of absolute confidentiality in proceedings before the RAB is a justifiable limitation of the constitutional right to freedom of expression (which includes the freedom of the press and the freedom to receive and impart information or ideas).

The applicants argued that absolute confidentiality was an unjustifiable limitation of this right, and requested the Court to read provisions into the Refugees Act conferring a discretion on the RAB to allow third parties to attend certain hearings and to publish in relation thereto. The respondents contended that a rule of absolute confidentiality is required in order to maintain an effective asylum system, and therefore that section 21(5) constitutes a reasonable and justifiable limitation on the right to freedom of expression.

The Southern Africa Litigation Centre (SALC) was admitted as an *amicus curiae*. SALC's concern was that the requirement of absolute confidentiality in asylum proceedings renders the asylum system vulnerable to abuse, compromising South Africa's obligations to ensure accountability for international crimes.

In a unanimous judgment written by Zondo J, the Constitutional Court held that, to the extent that section 21(5) does not confer a discretion upon the RAB to allow access to its proceedings in appropriate cases, the limitation on the right to freedom of expression is unreasonable, unjustifiable and accordingly invalid. The Court suspended the declaration of invalidity for a period of two years to allow Parliament an opportunity to remedy the defect. The Court crafted a temporary reading-in order, conferring a discretion on the RAB, on application and on conditions it deems fit, to allow any person to attend and report on its hearings. This discretion must be exercised with due regard to relevant factors, such as whether the asylum seeker consents to the third party's access or whether it is in the public interest to allow such attendance.

The Court declined to make an order permitting the media access to Mr Krejcir's appeal hearing because the applicants had elected not to appeal against the High Court's decision upholding the RAB's refusal and further because, after the handing down of the judgment, the RAB will have the discretion to relax the requirement of confidentiality.