The right to freedom of expression of the media and the right to confidentiality in the asylum-seeking context – a balancing of opposing rights

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I hereby declare that I have read and understood the regulations governing the submission of Master of Law (Public Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate

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I. Introduction

> *'Our Republic and its press will rise or fall together. An able, disinterested, public-spirited press, with trained intelligence to know the right and the courage to do it, can preserve that public virtue without which popular government is a sham and a mockery… The power to mould the future of the Republic will be in the hands of the journalists of future generations.'*[1]

At the core of this research lies two competing rights: the right to freedom of expression and the right to confidentiality (which is one of the rights entailed by the right to privacy). Both are rights which are entrenched in the Constitution of the Republic of South Africa, 1996 (hereafter the 'Constitution') and both are rights which are fiercely guarded.

It was inevitable that these rights would clash when they met – the underlying values they seek to protect are diametrically opposed. The right to free expression protects the underlying values of free and frank debate, the promotion of openness, transparency and accountability and freedom of information, among others. The right to privacy, on the other hand, protects maintaining confidentiality and protecting information from being disseminated. In the asylum-seeking context, the right to confidentiality specifically protects the lives of asylum-seekers, their families and associates and the integrity of the asylum system, amongst others.[2]

The overall purpose of this thesis is to examine the two opposing rights through three different lenses. First, the jurisprudential lens will examine the underpinnings of each right and their relative importance. Next, the judgments lens will examine how each right was dealt with in the matters before the High Court and the Constitutional Court. Finally, the comparative lens will examine how the rights have been dealt with in foreign law in the asylum systems of New Zealand and Canada. The aim of this thesis is to guide the Refugee Appeals Authority ('RAA')[3] in exercising its new discretion by looking through each lens to determine how the opposing rights can, and should, be balanced.

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[1] Joseph Pulitzer, *The North American Review*, May 1904, p. 60.
[2] See the full discussion on both the rights of free expression and privacy in Chapter 2.
[3] Section 21(5) of the Refugees Act, 130 of 1998 provides that the RAA is the body tasked with deciding whether to grant applications to attend or report on its hearings on asylum applications by the media or any person.

The backdrop of this research is in the decision by the Constitutional Court of South Africa in 2013 in the case of *Mail and Guardian Media Limited and Others v Chipu N.O. and Others*[4] (hereafter referred to as '*Chipu*'). It is a landmark judgment which considers the intersection of the right of confidentiality and the right to free expression in South Africa in the context of refugee law.

In *Chipu*, both the High Court and the Constitutional Court dealt with the constitutionality of section 21(5) of the Refugees Act 130 of 1998 (hereafter the 'Refugees Act')[5]. This section provided for the strict confidentiality of asylum applications and the information contained therein and prevented any member of the public or the media from attending asylum application proceedings or viewing the asylum application and supporting documents.[6]

The offending provision was challenged by Mail and Guardian Media Limited, Independent Newspapers (Proprietary) Limited and Media 24 Limited (collectively, the applicants) on the ground that the section unjustifiably limited the right to freedom of expression. The applicants challenged the provision when they attempted to gain access to the proceedings of the Refugee Appeal Board (as it then was).[7] The particular RAB proceedings they sought access to were the application proceedings before the RAB of the Czech national Radovan Krejčíř, who was then seeking asylum in South Africa.[8]

The Constitutional Court held that the section was unconstitutional after balancing the rights to free expression and the right to confidentiality and

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[4] *Mail and Guardian Media Limited and Others v Chipu N.O. and Others* [2013] ZACC 32 ('*Chipu*').
[5] Refugees Act 130 of 1998 ('Refugees Act').
[6] Media summary of *Chipu* supra, Available at *www.saflii.org.za/cases/ZACC/.../32.html.* Accessed on 12 May 2014.
[7] The definition of the 'Refugee Appeal Board' ('RAB') was deleted by section 54 of the Immigration Act, 13 of 2002. Section 21(5) of the Refugees Act, 130 of 1998 now refers to the 'Refugee Appeals Authority' ('RAA') which is not defined in either the Refugees Act or the Immigration Act. Throughout this thesis, where reference is made to the RAB, this is with reference to the RAB as it then was, particularly when referring to the cases before the High Court and Constitutional Court as the RAB was the party involved. When reference is made to the RAA, it refers to the current structure or body which is now responsible for the operation of section 21(5) of the Refugees Act.
[8] K Maughn "The Magical Slippery Man, Radovan Krejčíř", Daily Maverick. April 17, 2012. Available at *http://www.dailymaverick.co.za/article/2012-04-17-the-magical-slippery-man-radovan-Krejcir/#.Ula_iEKfuRI.* Accessed on 12 May 2014.

conducting a limitations analysis under section 36[9] of the Constitution.[10] In the result, the Constitutional Court declared section 21(5) of the Refugees Act invalid.

Following the order of the Constitutional Court in *Chipu*,[11] the legislature duly revised and adopted an amended section 21(5) of the Refugees Act. The Refugees Amendment Act 10 of 2015 amends section 21(5) and the provision exactly mirrors the interim provision crafted by the Constitutional Court in the *Chipu* order.

Although the standard of confidentiality in asylum applications is maintained, the section now allows for the RAA to allow access to, or reporting on, its hearings upon application by the media or any person.[12] The RAA's decision to allow access to its proceedings is dependent upon its consideration of a number of factors. Chiefly, the RAA must weigh the public interest in allowing access to the press and/or the public on the one hand against the rights of the asylum seeker to confidentiality and protection of the integrity of the asylum-seeking process on the other hand.[13]

Post-*Chipu*, and at the time of writing, this revised section has not been litigated or challenged in any reported case.

The amended section 21(5) gives rise to unchartered territory: a new discretion for the RAA to exercise; a new portal of access for the media; a new duty for the media to consider how to report on asylum issues in light of the information they are now able to access; and the repercussions of media access and media reports on asylum seekers, their families and associates.

Given that South Africa's refugee protection system is still in its nascent stage of development, only commencing after the demise of the apartheid regime in the early 1990s[14], it is to be expected that these issues have not been subject to much interrogation domestically.

[9] Section 36 of the Constitution provides for the limitation of rights entrenched in Chapter 2, the Bill of Rights.
[10] The Constitution of the Republic of South Africa, 1996 (the 'Constitution').
[11] *Chipu* supra at para 115.
[12] Section 21(5) of the Refugees Act.
[13] Ibid.
[14] TH Schreier *A critical examination of South Africa's application of the expanded OAU refugee*

Although domestic law is well-developed on the individual rights of free expression and confidentiality in case law, statute and policy documents, these sources, although instructive, are limited in their application in the context of refugee law. There is therefore an argument that regard ought to be had to foreign law on this issue, which could be instructive in this context.

Having regard to the revised section 21(5) of the Refugees Act, and having regard to the dearth of domestic case law and academic opinion on this issue, the principle aim of this research is to formulate an understanding the importance of free expression in the context of asylum proceedings.

This research will be structured as follows. First, there will be a jurisprudential discussion of the right to free expression to understand its import, looking to domestic case law and academic text. In this context, the right to confidentiality will be discussed to understand the contrast between the two rights. Then, briefly, the right to free expression in the asylum-seeking process in international refugee law and regional refugee law will be discussed. Next, the *Chipu* case will be analysed through its entire judicial process, as the first and only domestic case to have grappled with the right to free expression in the context of refugee law.

Finally, there will be an analysis of foreign law decisions in New Zealand and Canada on the right to free expression in the context of refugee law and how "RAA-equivalent" bodies in those jurisdictions exercised their discretion to allow entry to the press.

Finally, this research will conclude that, despite the relative dearth of domestic academic opinion and case law on the right to free expression in the context of seeking asylum, there is sufficient guidance for the RAA to exercise its discretion if it has regard to the wealth of knowledge on the individual rights and if it looks to foreign law where there are lacunae.

In sum, this aspect of domestic jurisprudence requires clarity, which will necessarily develop through the testing of the right in the context of refugee law. Until this area of law is further developed, there is an argument to be made that there is sufficient available guidance to enable the RAA to reach an informed

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definition: Is adequate protection being offered within the meaning of the 1969 OAU Refugee Convention? LLM (UCT) (2008) 3.

decision when exercising its discretion to allow the press access to its proceedings. It is hoped that this research will aid in forming an understanding of the right to free expression in the context of refugee law.

II. A jurisprudential examination of the rights

(i) *Introduction*

The purpose of this chapter is to analyse a few key features of the right to free expression and the right to privacy both generally and specifically in the context of refugee law.

This chapter will cover the levels of protection of the right to free expression; the jurisprudential purpose of the right to free expression; the link between the right to free expression and the right to receive information and ideas; and the importance of media freedom.

Next, this chapter will describe the levels of protection of the right to confidentiality and privacy; the jurisprudential purpose of the right to confidentiality in the asylum-seeking process and the potential for abuse of the asylum-seeking process by the media.

For the purposes of this chapter, the constitutional right to privacy will be discussed to form the general jurisprudential basis of the asylum seeker's right to confidentiality, as the right to confidentiality is entailed by the right to privacy. As the right to confidentiality is ultimately the right which is protected by section 21(5) of the Refugees Act, this is the right which will form the bulk of the discussion on the issue, and will thus be referred to and discussed in favour of the right to privacy.

Given the relative dearth of information and writing available domestically on the right to free expression in the context of refugee law, the discussion on the right in that context is succinct.

(ii) *The right to freedom of expression*

This is a right framed dually as an intrinsic right (that is, a right in itself), and as an instrumental right (that is, a right which provides for the exercise of other rights). Although section 21(5) of the Refugees Act[15] allows both the media and the public access to RAA hearings, for the purposes of this thesis, the arguments made will be mainly confined to media access.

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[15] Refugees Act 130 of 1998.

Though public access to RAA hearings will not be the focus of this research, the public remain an important stakeholder in the RAA process. Through the exercise of the right to free expression by the media, the public can exercise their constitutionally entrenched right to freedom of information.

The core of the right to free expression is discussed first and it is followed by a more detailed discussion on the right to free expression as it is relevant for the media and for the public respectively.

a) Levels of protection

The right is found in, and protected by, domestic, regional and international instruments and enshrined in legal texts by most countries.[16]

At the international level, it is enshrined in the Universal Declaration of Human Rights (UDHR)[17] and the International Covenant on Civil and Political Rights (ICCPR).[18] The similarly-worded provisions extend the right to everyone, which right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through many means.[19]

Regionally, the African Charter on Human and Peoples' Rights (ACHPR)[20] provides for the right in Article 13 and it echoes the provisions of the UDHR, ICCPR and other two regional instruments which precede it.[21]

Domestically, section 16 of the Constitution provides that everyone has the right to freedom of expression, which includes press freedom and the freedom to receive or impart information or ideas.[22]

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[16] At last count, 168 states were party to the ICCPR, though certain countries have entered into reservations on Article 19, which protects free expression, such as the Netherlands, Australia and Belgium, which limits the scope of the right as it appears in the ICCPR text. Available at *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en*. Accessed on 26 May 2014.
[17] Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A (III), 10 December 1948 ('UDHR').
[18] International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976 ('ICCPR').
[19] Articles 19 of the UDHR and Articles 19(2) of the ICCPR.
[20] African Charter on Human and Peoples' Rights, Adopted 26 June 1981, entered into force 21 October 1986.
[21] The European Convention on Human Rights (Adopted 4 November 1950, entered into force 3 September 1953) and the American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July 1978).
[22] Section 16 (1) (a)-(b) of the Constitution of the Republic of South Africa, 1996.

b) The instrumentality argument

Thomas Emerson, a leading American academic on the right to free expression, suggests four reasons for the protection of the right –

1. it allows for self-actualisation, as citizens voice their opinion on the matters concerning themselves and the state;

2. it aids the quest for truth which is essential to the creation of an open, transparent and accountable government;

3. it allows for meaningful social commentary and engagement with the state, essential to participatory democracies;

4. it promotes social cohesion and fosters a nation that can rationally engage, despite differing opinions.[23]

He divides the right into two forms of conduct: expression and action. Whilst expression is entitled to complete protection against government infringement, he argues that action is subject to reasonable regulation designed to achieve a legitimate social objective.[24] The basis of the division lies in his argument that there is no inherent harm in an expression, but rather from the ensuing action.[25]

Emerson's argument that expression is entitled to complete protection against infringement is untenable in the South African context. He does, however, make valuable points on the purposes underlying the right.

Emerson's writings must be analysed contextually – he writes with the First Amendment to the United States Constitution as his principle legislative piece, which enshrines the right to freedom of expression. [26] The right to free expression is strongly protected in the United States, and the United States Supreme Court has characterised freedom of expression as a 'preferred right'. However, some

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[23] T Emerson *The System of Freedom of Expression* (1970) 6 -7.
[24] T Emerson 'Freedom of Association and Freedom of Expression' (1964) 74 *The Yale Law Journal* 1 at 21.
[25] Ibid.
[26] Ibid.
Further, given the fact that the United States' constitution has no limitations clause, the scope of the rights enshrined in it are limited definitionally. This is in contrast to South Africa, where the Constitution does contain a limitations clause, allowing for the justifiable limitation of any right contained therein.

forms of speech such as defamation, fighting words and obscenity fall outside the protection of the First Amendment.[27]

In South Africa, the suggestion made by Emerson regarding the weight of the right and its limitation is untenable – no right is capable of complete protection without limitation. South Africa is a nation built on the equal protection and respect of all rights that are constitutionally entrenched. The right to free expression can be limited where the limitation meets the criteria set out in the limitations clause of the Constitution[28] – then it is legally permissible for the expression to be limited.

Further, the Constitution of the Republic of South Africa provides for categories of expression which are not protected under section 16(2), and which are not permitted under the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 which was passed to give effect to (amongst others) section 16(2)(c) of the Constitution. These provisions prohibit hate speech and expressions which are unfairly discriminatory. The import of this is that an expression, in and of itself, can be harmful. Thus, Emerson's assertion that an expression cannot be inherently harmful cannot be imported into domestic law.

It can be seen that two aims of the right as stated by Emerson apply directly to the media.[29] Freedom of the media undeniably aids the quest for truth and provides not only a platform for citizens to voice opinions on state matters, but also allows citizens necessary exposure to information required for meaningful social commentary. This is crucial to the pursuit of an enhanced, accountable and transparent government and to the pursuit of a participatory democracy where all citizens are active and involved, having access to information and platforms to share their views.

Emerson's writings link to the propositions of Richard Dworkin, an American jurist, who suggests that free expression is both an instrumental right and an end in itself, as it is a right that is required in every modern legal society.[30] In keeping

[27] Van Vollenhoven 'The Right to Freedom of Expression: The Mother of our Democracy' (2015) 18(6) *PER/PELJ* 2305

[28] Section 36 of the Constitution of the Republic of South Africa, 1996.

[29] Section 16(a) of the Constitution of the Republic of South Africa, 1996.

[30] D Davis 'Freedom of Expression' in H. Cheadle, D.M. Davis and N.R.L Haysom (eds) *South African Constitutional Law: Bill of Rights* 2nd ed (2011) 11-3.

the citizenry of the country abreast of current local, regional and global news, the media is instrumentally providing for the full realisation of the public's right to free expression.

Richard Stone identifies three main arguments for the right that appears to be of particular importance, given its inclusion in early constitutional documents.[31] He puts them forward as the arguments from truth, self-fulfilment and democracy.

Stone cites John Stuart Mill's writings (as does Emerson, who also identifies the emergence of truth as an integral factor of the right to free expression) as the basis to the argument that there is no monopoly on truth, that the views of the minority should not be suppressed where they are contrary to those of the majority.[32] Mill does, however, allow for derogation from this rule: where it may lead to direct harm to others. This is what, in essence, informs the argument made by proponents of confidentiality of asylum applications.

Stone's arguments, which base the right on self-fulfilment and democracy, are reflected in the writings of Emerson and Dworkin as an instrumental right which fosters meaningful participation and an active, informed citizenry.

The writings of Emerson, Dworkin, Stone and Mill all point to the importance of free expression of the media for several underlying reasons. The recurring themes of fostering meaningful engagement by the public; the pursuit of participatory democracy; and the desire for accountable and transparent governance are all valuable and worthwhile outcomes to justify the protection of the right to free expression.

However worthwhile the outcomes, however, the extent to which the right is protected cannot be absolute, as Emerson suggests. The right can and should be justifiably limited, and Mill identifies an important instance where this is so – where the exercise of the right causes harm to another. Thus, where the exercise of the right to free expression causes more harm by its exercise than the good it achieves, the exercise of the right should be limited. This thinking would seem to underlie the limitations clause and the internal limitations of section 16 and PEPUDA.

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[31] R Stone *Textbook on Civil Liberties and Human Rights* 6th ed (2006) 283.
[32] Stone op cit 284.

I support the argument that free expression is of vital importance to society, but where the exercise of the right causes more harm than good, it should be limited. As a starting point, however, the scope of the outcomes the right seeks to achieve must be borne in mind when it is, or must be, limited. The principles that underlie the right affect society as a whole, and implicate several fundamental pillars of a democracy.

These are important fundamental principles which would be compromised, and the impact of the limitation would be vast, if the media were unable to exercise the right to free expression. Thus, when the right to free expression is, or must be, limited, the authority should bear in mind the scope of the harm that would be caused by stifling free expression, taking into account the gravity of the principles and rights being affected and the breadth of its effect on society.

c) The right to receive information and ideas

Section 16 of the Constitution provides for press and media freedom and the right to impart information and ideas.[33] The concomitant right in the same section is the right to receive these ideas and information.

While the media has the right to impart the information and ideas gained through their access to RAA hearings, this is only permissible in certain instances, according to the amended section 21(5) of the Refugees Act[34]. The amended section provides that other than the asylum seeker granting consent, the RAA can allow access to its hearings where it deems that it is in the public interest to do so. Thus, the argument which should be utilised by the media (or the public) is that the proceedings are in the public interest.

While the public interest ground upon which the press rely for access attempts to give effect to the right to free expression, it also restricts the scope of the right. Access will only be granted and information imparted (by the press to the public, where the press has sought access) *only* if it is in the public interest.

[33] Section 16 (1)(a)-(b) of the Constitution of the Republic of South Africa.
[34] Act 130 of 1998.

Inexorably tied to the constitutional duty of the press to ‘inform citizens and provide a platform for the exchange of ideas’[35] is the right of the public to be informed about these issues – the right of the public to know.

The defence of public interest can be raised for this very reason – that the public have a constitutional right to be informed of and about the matters that concern (or should concern) them.

The case of *Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape)*[36] reiterates the importance of citizens keeping themselves informed of the issues that are ‘vital to open, responsive and transparent government in a democracy’[37] as an exercise of their duty as a citizen of South Africa.

d) The right to press freedom

The right to press freedom is brought to the fore by Judith Lichtenberg, who echoes the arguments made by Emerson, Dworkin and Stone, stating that ‘freedom of the press in democratic societies is… essential, it is thought, to individual autonomy and self-expression.’[38]

The right of press freedom is especially important in South Africa, given the history of the media being used as the mouthpiece of the apartheid government and the widespread suppression of the truth of apartheid and opposition movements during that period by the government.[39]

Wasserman and de Beer argue that the Bill of Rights can be seen as the most important legislative change influencing the operation of the media in post-

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[35] J Stevenson ‘Reformulation of Sub Judice Rule and Prior Restraint of Publication Resolved: A Victory for Press Freedom (*Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape)* 2007 9 BCLR 958 (SCA))’ (2007) 28 *Obiter* 614 at 617.
[36] *Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape)* 2007 9 BCLR 958 (SCA).
[37] Stevenson op cit 618.
[38] J Lichtenberg, ‘Foundations and Limits of Freedom of the Press’ (1987) 16 *Philosophy & Public Affairs* 329 at 329.
[39] ANC, Strategy and Tactics: As amended at the 50th National Conference, December 1997 (Johannesburg: *www.anc.org.za*), quoted in Hermann Giliomee, James Myburgh and Lawrence Schlemmer (2001) ‘Dominant Party Rule, Opposition Parties and Minorities in South Africa’, *Democratization*, 8:1, 168.

apartheid society.[40] Wasserman states that media freedom is coupled with responsibility, often framed in terms of the 'watchdog function' of the media.[41]

South African case law further entrenches the importance of media freedom in several landmark cases. In *Khumalo v Holomisa*[42], the Constitutional Court held that the media play an influential role in a democracy as they have a constitutional obligation to inform citizens and provide a platform for the exchange of ideas. Cameron J in *Holomisa v Argus Newspapers Limited*[43] stated

> 'the success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed, if those criticisms are to be effectively voiced, and if they are to be informed of the factual content and critical perspectives that investigative journalism may provide.'[44]

The Constitutional Court acknowledged in *Chipu* that the media plays a 'key role in society and is not only protected by the right to freedom of expression but is also a key facilitator and guarantor of the right'[45]. The Court also agreed with the *Khumalo* judgment, which stated that 'the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require.'[46] The *Khumalo* judgment goes on to state:

> 'In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.'

The Constitutional Court also acknowledges the role the media plays in furthering open justice, the principle that underlies the right to a trial in public,

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[40] H Wasserman & A de Beer 'Which public? Whose interest? The South African Media and its role during the first ten years of democracy' (2005) 19 *Critical Arts: South-North Cultural and Media Studies* 36 at 37.
[41] H Wasserman 'Freedom's just another word? Perspectives on media freedom and responsibility in South Africa and Namibia' (2010) 72 *International Communication Gazette* 567 at 569.
[42] *Khumalo v Holomisa* (2002) 5 SA 401 (CC).
[43] *Holomisa v Argus Newspapers Limited* (1996) 2 SA 588 (W).
[44] *Holomisa* supra 608-609.
[45] *Chipu* supra 28.
[46] *Chipu* supra quoting *Khumalo* supra.

which is part of the right to a fair trial. In the *SABC* case, the court stated that open justice

> ‘promote[s] the accountability of courts and the administration of justice. It has traditionally been understood to mean that court hearings must be open to members of the public who wish to observe them and to journalists who wish to report upon them. Traditionally the principle has never been absolute’[47].

Stevenson argues that the media is a body upheld by the Constitution and should be endorsed and encouraged by society and government institutions.[48] Given the political landscape of South Africa – a dominant one-party system with weak opposition and high risks of political corruption and subterfuge – an independent and enquiring media is a key agent for the maintenance of democracy.[49]

Media freedom is a cause in which all citizens of a nation should be interested – not only are the media the gatekeepers of information that would otherwise prove difficult for a private citizen to obtain and disseminate, but they are the gatekeepers with a greater duty. They hold the keys to an informed citizenry and are the means by which the public can form opinions.

Media freedom can thus be seen as a necessary prerequisite to the arguments made by Emerson, Dworkin and Stone in that the media, by exercising its right to free expression, is able to function as an instrument through which several other rights can be exercised by others.

In the discussion of the need for free speech, Lichtenberg highlights a crucial reason for the protection of the right: it ‘serves as the people's watchdog, ensuring independent criticism and evaluation of the established power of government and other institutions’.[50]

Emerson, Stone, Dworkin, Wasserman, Lichtenberg and domestic jurisprudence have all shown that the media plays an integral role in providing for the realisation and exercise of other rights and principles. It is also clear that the purposes underlying the protection of the right to free expression are valuable and worth protecting.

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[47] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) para 50.
[48] Stevenson op cit 618.
[49] Stevenson op cit 618.
[50] Lichtenberg op cit 337.

As important as media freedom is, there are downfalls. Lichtenberg echoes the argument made by Dworkin, that

> 'freedom of the press, in other words, is an instrumental good: it is good if it does certain things and not especially good (not good enough to justify special protections, anyway) otherwise'.[51]

The right to free expression cannot operate without limit, nor can media freedom be left unchecked. This would lead to harm, and I agree with the views posited by Mill and Lichtenberg – where it leads to more harm than good, the right should be limited.

I would argue, however, that the starting point of a matter should be the protection of the right to free expression and media freedom. First, considering the great value of the other rights which are dependent upon its exercise and the principles sought to be upheld through its exercise. Second, considering the wide audience which would be affected if media freedom is stifled. These factors tend toward a stance which prefers the protection of the right as a starting point.

Where the exercise of the right must be limited, that is, where it causes or would cause more harm than good, these factors militate in favour of a form of limitation which would have the least inroad in the exercise of the right.

(iii) *The right to confidentiality*

Balanced against the right to free expression is the right of privacy. More specifically, the right of the asylum seeker to confidentiality in their applications for asylum.

The right to confidentiality is one of the rights entailed by the right to privacy. The right to privacy is constitutionally entrenched by section 14 of the Constitution, which provides that 'everyone has the right to privacy, which includes the right not to have…(d) the privacy of their communications infringed'.

The right to privacy has been defined by the courts as 'an individual condition of life characterised by exclusion from the public and publicity'.[52]

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[51] Ibid.
[52] *National Media Ltd and others v Jooste* 1996 (3) SA 262 (A).

The South Africa Law Commission also recognises that the protection of privacy

> 'generally limits the ability of people to gain, publish, disclose or use information about others without their consent. Individuals therefore have control not only over who communicates with them but also who has access to the flow of information about them.'[53]

The right to privacy is a far broader right than will be broached in this thesis. The argument for the purposes of this thesis will remain within the confines of the right to confidentiality in the asylum context.

a) Levels of protection

Confidentiality is not provided for in international refugee law instruments. The main international refugee law instruments, the 1951 United Nations Convention Relating to the Status of Refugees[54] and its 1967 Protocol[55], do not discuss confidentiality.

This is a matter for domestic law, as the circumstances that must be used to determine what procedural protections are to be afforded to asylum seekers and refugees are often unique to the circumstances and history of that country.[56]

However, the United Nations High Commissioner for Refugees ('UNHCR') has provided an advisory opinion which includes a recommendation relating to the confidentiality of asylum proceedings. It provides that:

> 'the State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim'[57].

[53] South African Law Reform Commission 'Privacy and Data Protection' Discussion Paper 109 (October 2005) at 61. Available at *www.justice.gov.za/salrc/dpapers/dp109.pdf*. Accessed on 25 May 2019.
[54] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954).
[55] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967).
[56] Southern African Litigation Centre, Heads of Argument in *Chipu* case (supra) as Amicus Curiae. Available at *www.southafricanlitigationcenter.org/cases/completed-cases/south-africa-the-confidentiality-provisions-in-the-south-african-refugees-act/.* Accessed on 14 April 2014.
[57] UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information. Available at *www.refworld.org/pdfid42b9109e4.pdf* Accessed on 14 April 2014.

The opinion is strongly in favour of the protection of information of the asylum seeker and their right to confidentiality. It states that the vulnerable position of refugees and asylum seekers is of particular import given their situation.

This theme of confidentiality in asylum proceedings is echoed in further UNHCR advisory opinions, including the UNHCR Guidelines on International Protection: Gender-Related Persecution. This states that:

> '[Claimants of refugee status] require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared.
>
> The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family.'[58]

Excerpts from the 2003 UNHCR Guidelines and the UNHCR Handbook also illustrate the need for the utmost respect of the asylum seeker's confidentiality. These documents also provide that the examiner should create a climate of confidence for the asylum seeker to put forward his whole case. In the creation of this atmosphere, it is imperative that the applicant's statements be kept confidential, and that he/she be informed of this right to confidentiality.[59]

A later advisory opinion on confidentiality in asylum applications states that the right to privacy and its confidentiality requirements are 'especially important for an asylum-seeker'.[60] It warns against the sharing of personal information with the country of origin until the claim is rejected, as this would be 'against the spirit of the 1951 Refugee Convention'.

> 'Likewise, the authorities of the country of asylum may not weigh the risks involved in sharing of confidential information with the country of origin, and conclude that it will not result in human rights violations'.[61]

Regionally, there is no instrument which provides for the confidentiality of asylum applications. The 1969 Organisation of African Union Convention

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[58] UNHCR Advisory Opinion (7 May 2002) at paras 35-56.
[59] UNHCR Guidelines (2003) at para 33, UNHCR Handbook at para 200.
[60] UNHCR Advisory Opinion on the Rules of Confidentiality regarding Asylum Information (31 March 2005) at paras 4-5
[61] Ibid.

Governing the Specific Aspects of Refugee Problems in Africa[62] is silent on this issue. The sentiment of the UNHCR is, however, echoed in the regional European text providing for the confidentiality of the process: 'European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status'.[63]

Although due recognition must be given to the views of the UNHCR, these do not in themselves determine how domestic legislation should be interpreted.[64] They are simply non-binding opinions, albeit issued by the highest body protecting refugees in international law.

Nationally, section 21(5) of the South African Refugees Act[65] provides for the right to confidentiality. It states that the confidentiality of asylum applications and the information contained therein must always be ensured.

b) The purpose of the right

The right to privacy is cast by Stone, quoting Wacks, as a 'sweeping phrase which is as comprehensive as it is vague'.[66]

In *Chipu*[67], the Constitutional Court stated that the persecution faced by those who flee their countries is often perpetrated by the state, or not being halted by the state. The asylum seekers are often relentlessly pursued by the government, as are their friends and family at times.

> 'An asylum system which does not provide for any confidentiality whatsoever is highly unlikely to be effective. Many people who qualify as refugees would naturally be disinclined [against exposing] themselves to the serious risks inherent in such a system. The purpose of section 21(5) is vitally important.'[68]

Justice Zondo, in his judgment, identifies three main reasons for the protection of the right:

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[62] 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Adopted on 10 September 1969 by the Assembly of Heads of State and Government, CAB/LEG/24.3., entered into force on 20 June 1974.
[63] European Council: Council of the European Union, Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (2 January 2006)
[64] UNHCR opinion op cit.
[65] Refugees Act 130 of 1998.
[66] Stone op cit 433.
[67] *Chipu* supra.
[68] *Chipu* supra at paras 54, 55.

1. it protects the integrity of the asylum process;
2. it encourages applicants for asylum to disclose information truthfully in the knowledge that only those officials dealing with asylum applications will have access to the applications and the information contained therein; and
3. it protects asylum applicants and their families and friends in their countries of origin from possible dangers or threats to their lives and safety that could arise if the fact of the application for asylum and the information contained therein were disclosed.[69]

Cohen discusses the *Chipu* case and identifies four reasons underlying the need to protect asylum seekers[70]:

1. A blanket ban of access protects the integrity of the asylum system.[71]
2. Disclosures may threaten the life, freedom and security of the asylum-seeker.[72]
3. Disclosure of applications endangers witnesses, relatives and associates of the asylum-seeker remaining in the country of origin.[73]
4. Asylum proceedings are diplomatically sensitive, as the country of origin may attempt to exert its diplomatic power.[74]

However, despite these reasons for confidentiality, Cohen makes the point that the press is a necessary requirement for the purposes of democracy. This is especially so, he argues, in a country where the right was severely curtailed by the apartheid government, and particularly in the field of refugee law, where the potential for fraud is a real concern.[75] Cohen argues that the right to freedom of expression enhances the integrity of the asylum process by deterring fraud and

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[69] *Chipu* supra at para 54
[70] D Cohen, 'Political refugee, diva or international kingpin? Evolving Confidentiality Requirements in Asylum Proceedings in South Africa and Beyond' (2014) 2 *Michigan State International Law Review Fourm Conveniens* 1.
[71]Cohen op cit 8.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Cohen op cit 9-10.

abuse through the promotion of accountability, transparency and fair proceeding.[76]

While I agree that the purposes of protecting an asylum seeker's right to confidentiality are valuable and worth protecting, the right cannot operate without limit. Where the exercise and protection of the right would lead to more harm than good, it should be limited. This is a general principle we can import from the writings of Mill and Lichtenberg – where the exercise of a right leads to more harm than good, it should be limited. The form of the limitation should create the least inroad into the right as possible.

c) The potential for abuse by the press

What Cohen fails to consider is the potential harm the press is capable of wreaking if allowed into the process, the possibility introduced by Lichtenberg.

One angle, left unconsidered by the authors of the above texts, addresses the potential for the media to smear the name of the asylum seeker or to portray them in a bad light. This trial by media may even result in their application not being supported by the country where they seek asylum.

Some academics have criticised the portrayal of refugees and asylum seekers by the media. They can enforce harmful stereotypes and fuel pervasive xenophobic attitudes. Especially in the South Africa, where xenophobia is rife[77], the media may compound the problem by the manner in which they portray these individuals, if not done carefully and sensitively.

In this vein, KhosraviNik conducted an analysis of the representation of refugees, asylum seekers and immigrants in British newspapers (the 'RASIM group').[78]

The author found that texts discussing the RASIM group over the period of ten years by the media is largely negative. He looked at the connotations of the words 'immigrant/immigrate versus emigrant/emigrate'. 'Immigrant' seems to

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[76] Ibid.

[77] C Abdi, 'Xenophobia and its discontents in South Africa', Aljazeera (18 June 2013). Available at *www.aljazeera.com/stroy/201361895126526626.* Accessed on 18 April 2014.

[78] M KhosraviNik, 'The representation of refugees, asylum seekers and immigrants in British newspapers' (2010) 9:1 *Journal of Language and Politics* 1.

'carry a negative connotation and is generally the term used in negative discourse topics such as immigrants and crime'.[79]

He further found that the processes of aggregation, collectivisation and functionalization were practiced.[80] These are linguistic processes through which groups of people are systematically referred to and constructed as one unanimous group with all sharing similar characteristics. Using these techniques, the media have dehumanized and objectified the RASIM group.[81]

Esses, Medianu and Lawson further discuss the role of the media in promoting the dehumanisation of refugees.[82] They argue that the media play an important role in the dissemination and framing of policy relating to refugee issues, and construct and promote particular positions on these issues. Using data gathered from analyses of print media, the authors found that the portrayal of refugees in the West has become increasingly negative. The words associated with this group include 'terrorists', 'criminals' and 'threats'.[83]

Importantly, the authors note that 'crises sell news, whereas positive stories are less newsworthy, so that…what may result is extreme negative reactions to immigrants and refugees, including their dehumanization.'[84]

While I agree with the position that the press have an important purpose in being allowed entry and access into processes and proceedings which would otherwise be closed, they must take care not to abuse the power of their platform in the dissemination of this information. The consequences of biased and insensitive reporting would be aggravated in the asylum context, given the risks to the asylum seeker, his or her family and associates.

The openness of the process between the media and the government may be the solution to this problem. The less uncertain the process, the less the media will problematize the situation, leading to less negative media portrayal of refugees.

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[79] KhovrasiNik op cit 11.
[80] KhovrasiNik op cit 13.
[81] KhovrasiNik op cit.
[82] Victoria M. Esses, Stelian Medianu and Andrea S. Lawson, 'Uncertainty, Threat, and the Role of the Media in Promoting the Dehumanization of Immigrants and Refugees' (2013) 69 *Journal of Social Issues* 518.
[83] Esses et al op cit 520.
[84] Esses et al op cit 522.

If the media and the RAA could be transparent on issues such as the way information regarding asylum seekers should be reported and how asylum seekers are represented in the media, it may mean that many of the problematic issues that have been identified could be avoided. It would require a balance of being instructive for the purposes of protecting the asylum seeker on the one hand versus not being too instructive to the point where the right to free expression of the media is stifled by the proscriptions of the RAA.

(iv) *Conclusion*

The right to free expression cannot operate without limit, nor can media freedom be left unchecked. This would lead to harm, and where it leads to more harm than good, the right should be limited.

The starting point of a matter should be the protection of the right to free expression and media freedom. First, considering the great value of the other rights which are dependent upon its exercise and the principles sought to be upheld through its exercise. Second, considering the wide audience which would be affected if media freedom is stifled. These factors tend toward a stance which prefers the protection of the right as a starting point. Where the exercise of the right must be limited, that is, where it causes or would cause more harm than good, these factors ted toward a form of limitation which would have the least inroad in the exercise of the right.

While the purposes of protecting an asylum seeker's right to confidentiality are important, the right also cannot operate without limit. Where the exercise and protection of the right would lead to more harm than good, it should be limited.

This is a general principle we should rely on – where the exercise of a right leads to more harm than good, it should be limited. However, the form of the limitation should create the least inroad into the right as possible. One such way to prevent against harm to asylum seekers is for the RAA to monitor and potentially amend media reports or coverage in such a way that it protects the asylum seeker and the asylum system but does not stifle the media's right to free expression.

III. The *Chipu* judicial process and public interest

(i) *Introduction*

While the previous chapter set out the jurisprudential underpinnings of the right to free expression and explained the broad purpose of the right, this chapter will examine the right more closely in the context of refugee law.

The aim of this chapter is to record and analyse the sole primary sources on this issue which will serve as a summation of the domestic position on the issue, in contrast to the following chapter, which will discuss the foreign law position.

The first part of this chapter will analyse the right to free expression and how it was framed by the High Court and the Constitutional Court in their respective *Chipu* judgments. Following the *Chipu* decision and the subsequent amendment to the Refugees Act, public interest is seemingly the only factor which must be proven by those seeking access to access RAA hearings. Thus, the next part of this chapter will examine two relevant public interest considerations: international criminal law and open justice.

(ii) *Chipu at the High Court*

The High Court[85] held that while section 21 of the Refugees Act[86] limits press freedom and the right to receive and impart ideas and information, as provided in section 16(1) of the Constitution, the limitation is reasonable and justifiable in light of section 36(1) of the Constitution.[87]

Section 36(1) of the Constitution is dubbed the 'limitations clause', which provides for the factors which must be taken into account in the event that a right contained in the Bill of Rights[88] is limited. It provides the following:

> 'The rights in the Bill of Rights may be limited only in terms of law 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, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;

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[85] *Mail and Guardian Media Limited and Others v Chipu N.O. and Others* (case number 226645/2011) ('High Court *Chipu*').
[86] Refugees Act 130 of 1998.
[87] High Court *Chipu* supra at para 29.
[88] That is, Chapter 2 of the Constitution of the Republic of South Africa, 1996.

(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

The judgment made several significant findings. One finding is that section 21(5) of the Refugees Act is linguistically clear that the confidentiality of asylum applications and information contained therein must be ensured at all times, not simply in the initial stages.[89] This is explained in light of the purpose of refugee law and the confidentiality obligations it imposes, which is 'closely tied to the protection and promotion of the constitutional rights (*inter alia*) to human dignity, freedom and security of the person, privacy and just administrative action'.[90]

In discussing the right to free expression, the Court traversed the applicants' arguments. These were, chiefly, that the right lies at the heart of democracy and the media is a key agent in ensuring that the right is enforced and respected; that the principle of 'open justice' applies, and that an active and informed citizenry requires access to information.[91] Importantly, the Court noted that the right to free expression is neither paramount over other guaranteed rights, nor limitless.[92]

The Court then moved onto a limitations analysis to determine whether the limitation contained in section 21(5) of the Refugees Act was a justifiable limitation of the right to free expression.

In applying the factors set out in section 36(1), the Court discussed the nature of the right to free expression at length,[93] then summarily skipped to instances where the right has been limited.

It found that while the principles of open justice usually weigh in favour of opening proceedings, in this case there are countervailing interests which justify the limitation of the right to free expression.[94]

[89] High Court *Chipu* supra at para 12.
[90] High Court *Chipu* supra at para 13.
[91] High Court *Chipu* supra at para 11.
[92] High Court *Chipu* supra at para 21.
[93] High Court *Chipu* supra at para 19.
[94] High Court *Chipu* supra at para 21.

In examining the purpose of the limitation, the Court found that a blanket ban on access is justified given the need to maintain the privacy and dignity of the asylum seeker and the integrity of the asylum-seeking process.[95]

The Court further found that there is a relation between the limitation of the right to free expression and the purpose of that limitation, referring to the extensive discussion on the right to confidentiality in the asylum-seeking process.[96]

Finally, the Court determined that the less restrictive means proposed to achieve the statute's purpose would not be suitable given the purpose of the right to confidentiality. The Court reasoned that asylum-seekers might be deterred from applying, and may not be candid, if they do not know whether their confidentiality will be respected under all circumstances.[97]

In conclusion, the Court found that the limitation imposed by section 21(5) of the Refugees Act of the right to free expression is a justifiable limitation and not unconstitutional.[98]

In my opinion, the judgment did not provide a detailed analysis of the importance of the right to free expression in the asylum context. The judgment appeared to be biased in favour of the right to confidentiality. The rights were unequally framed – the right to confidentiality and its underpinnings was discussed extensively. Other than the discussion in the limitations analysis, the right to confidentiality was not tested as being too extensively protected. Although this was tested in the limitations test, confidentiality appeared to be well buffered from attack as the Court seemed to overly rely on the importance of the right and failed to consider instances in which it could be justifiably limited.

Further, the Court framed the right of free expression as one which cannot be paramount or limitless. It is interesting to note that limitation of rights was only mentioned in the context of the right to free expression, and not the right to confidentiality. It appeared that the right to free expression was limited to a far greater extent at the outset and theoretically than the right to confidentiality.

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[95] High Court *Chipu* supra at para 23.
[96] High Court *Chipu* supra at para 25.
[97] High Court *Chipu* supra at para 26.
[98] High Court *Chipu* supra at para 27.

There also appear to be gaps in the Court's reasoning regarding the balancing of the rights which are explained away by repeatedly affirming the importance of confidentiality in the asylum seeking process. The judgment failed to consider several arguments and compromises which would result in the least inroad into both rights.

(iii) *Chipu at the Constitutional Court*

The Court tested whether the limitation contained in section 21(5) of the Refugees Act is reasonable and justifiable by conducting a limitations analysis.

The Court stated that free expression is important as it enables the public to form and express opinions on a wide range of matters and is thus vital to democracy.[99] The Court also recognised the role of the media as a facilitator, protector and guarantor of the right and reiterated that the media are 'important agents in ensuring an open, responsive and accountable government'.[100]

The discussion on the importance of the purpose of the limitation focussed on confidentiality being vital to the asylum application process, as it protects the asylum seeker's friends and family. Further, the Court acknowledged that an asylum system which does not provide for confidentiality would be ineffective and would likely be a system which to refugees would be unwilling to submit.[101]

The Court found that there was a relation between the limitation and its purpose – the limitation protects asylum seekers and the integrity of the asylum system.[102]As to whether there were less restrictive means to achieve the purpose, the Constitutional Court referenced a situation where the asylum seeker's information was already in the public domain.[103] It was held that in such a situation, the limitation serves no purpose and cannot be justified.[104]

The Court also referred to the example of an asylum seeker who is rejected on the basis of the commission of a crime against humanity. In such a case, there is no

[99] Constitutional Court *Chipu* supra at paras 50 and 51.
[100] Constitutional Court *Chipu* supra at para 52.
[101] Constitutional Court *Chipu* supra at paras 54 and 55.
[102] Constitutional Court *Chipu* supra at para 58.
[103] Constitutional Court *Chipu* supra at para 59.
[104] Constitutional Court *Chipu* supra at para 59.

reason why the confidentiality provisions of the Refugees Act should protect such an application, as the limitation would not serve any purpose.[105]

In this vein, the Court noted an inconsistency in the application of the confidentiality provisions – a person who has committed a crime against humanity or a crime against the peace is disqualified from getting refugee status, but section 21(5) of the Refugees Act would still prohibit access to their application.[106]

The Court found that the purpose of section 21(5) of the Refugees Act can be achieved by less restrictive means – conferring a right on the RAB to exercise discretion in appropriate conditions.[107] If the RAB is granted a discretion, it should consider a number of factors when granting access. These include whether granting access would be in the public interest.[108]

In conclusion, the Court held that section 21(5) of the Refugees Act is not a reasonable and justifiable limitation of the right to free expression insofar as it does not allow the RAB to exercise discretion.[109]

In my view, the Constitutional Court's judgment also leaves a gap. The Court discussed two factors the RAB (now the RAA) can take into consideration when deciding whether to exercise its discretion. One factor whether granting access would be in the public interest.[110] The Court does not delve into what these public interest considerations would be in this instance. Domestically, there is judicial precedent as to what constitutes 'public interest' generally.[111] While these established sources of what constitutes public interest may be useful, it is argued that public interest considerations in the asylum context would need to be nuanced and specific.

For this reason, the second part of this chapter will examine two public interest considerations which are more tailored to the asylum context to understand what would underpin an application for access to an RAA hearing.

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[105] Constitutional Court *Chipu* supra at para 61.
[106] Constitutional Court *Chipu* supra at para 57.
[107] Constitutional Court *Chipu* supra at para 93.
[108] Constitutional Court *Chipu* supra at para 92.
[109] Constitutional Court *Chipu* supra at para 94.
[110] Constitutional Court *Chipu* supra at para 92.
[111] See a discussion of this in point (iv) below on public interest generally.

(iv) *Public interest considerations*

a) Public interest generally

As a starting point, I briefly set out the general principles of public interest.

Swanepoel draws on the South African Law Commission's 1998 proposals on the issue.[112] He cites the *Al-Bashir*[113] case as invoking the principles of public interest. The nature of the case is relevant for the context of my argument on international criminal law. With approval, he quotes the applicant's argument:

> 'It is also important to all South Africans that their government be compelled to abide by the law, both international and domestic. The rule of law is a founding value of South Africa and is enshrined in the Constitution.
>
> When officials of the South African government fail to fulfil their legal obligations, particularly in such a serious and public matter as the instant case, it affects all South Africans equally, as it demonstrates an unjustifiable disregard for the law and an unjustifiable tolerance of war crimes and crimes against humanity.'[114]

Swanepoel also cites *Southern African Litigation Centre v National Director of Public Prosecutions*[115], which centred on international criminal law and South Africa's responsibilities. The applicants successfully argued that

> 'the international community universally condemns torture, and they have "an interest in the prohibition of torture and the apprehension of torturers". The essential content of the public interest involved in the application was that, without effective prosecution of torturers, there was a risk of "South Africa becoming a safe haven for torturers, who may travel here freely with impunity"'.[116]

Swanepoel notes that the Commission posited that two different meanings that can be attached to 'public interest':[117]

> 'The phrase can firstly mean that it is in the public interest to have a particular matter raised and adjudicated. Secondly, it can mean that the effect of the successful outcome of the matter is that each and every member of the public or part thereof benefits therefrom.'[118]

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[112] CF Swanepoel 'The public-interest action in South Africa: The transformative injunction of the South African Constitution' 2016 41(2) *Journal for Juridical Science* 29.
[113] *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*, unreported, case number 27740/2015.
[114] Swanepoel op cit 30, quoting applicant's founding affidavit paras. 56-58.
[115] Unreported, case number 77150/09.
[116] Swanepoel op cit, quoting *Southern African Litigation Centre* supra at para 12.1.
[117] Swanepoel op cit, quoting SA Law Commission 1998:26 at para. 4.5.2.
[118] Ibid.

Another important judgment as to what constitutes public interest is the minority judgment of O'Regan J in *Ferreira v Levin*[119]. The judgment sets out a list of factors to determine whether an applicant is acting in the public interest. They include:

> 'whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court'. [120]

The *Al-Bashir* and *Southern African Litigation Centre* matters illustrate that South Africa takes its international and domestic obligations seriously, particularly those which implicate international criminal law. They also illustrate the importance of holding institutions and officials responsible in the discharge of their duties and the associated public interest in achieving that end.

In addition to the substance of the matter being in the public interest, literature[121] and case law[122] suggest that certain procedural or definitional requirements must be met in order for a matter to be deemed to be 'in the public interest'.

These 'definitional requirements' include that a matter will be in the public interest if the effect of the successful outcome of the matter is that the public or part thereof benefits therefrom.[123] This harks back to the argument posited in Chapter 2 – the greater the scope of exercise of the right to free expression, the greater it should be protected.[124]

This argument is supported by the public interest principle – a matter is in the public interest where it is likely to benefit many, or most. Thus, where the right to free expression is being used to benefit the public at large, this should fall into the definition of being in the public interest.

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[119] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC).
[120] *Ferreira v Levin* supra at para 237.
[121] Swanepoel op cit.
[122] *Ferreira v Levin* supra.
[123] Swanepoel op cit, quoting SA Law Commission 1998:26 at para. 4.5.2.
[124] See the discussion under the concluding thoughts in point 1(b) of Chapter 2.

The minority judgment of *Ferreira v Levin*[125] provides considerations which could guide media organisations in their applications for access to the RAA. They form a clear basis of grounds to consider in an application.

b) Public interest in the asylum context

There are two factors in particular which should inform whether there is public interest in a specific matter before the RAA. These factors are: international criminal law and transparency of RAA processes, and the concepts of 'open justice' and democracy. Where any one of these factors, or a combination of these factors, are applicable to a certain matter before the RAA, the media's argument for access will be stronger.

The two abovementioned factors are by no means an exhaustive list, nor do they form a definitive list as to what should be taken into account by the RAA. Rather, they are suggested factors, especially pertinent to the *Chipu* case, and which have been identified by the parties and by the Constitutional Court in its decision.

(i) International Criminal Law

Domestically, South Africa acknowledged its obligations under international law to apprehend and punish those who commit international crimes in the case of *S v Basson*[126] and through the adoption of national legislation.

South Africa is a party to the Geneva Conventions and its protocols[127] and has enacted the Implementation of the Geneva Conventions Act,[128] incorporating these provisions into South Africa's domestic legal order. The Geneva Conventions require South Africa to 'search for, punish and prosecute perpetrators'.[129]

South Africa is also a party to the Rome Statute of the International Criminal Court[130] and adopted the Implementation of the Rome Statute of the International

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[125] *Ferreira v Levin* supra.
[126] *S v Basson* 2005 (1) SA 171 (CC) at para 37.
[127] 1949 Geneva Conventions for the Protection of Victims of War; the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts; and the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts.
[128] Act 8 of 2012.
[129] SALC Heads of Argument op cit 7.
[130] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

Criminal Court Act[131] to carry out its obligations in accordance with the principle of complementarity,[132] to exercise its criminal jurisdiction over those responsible for international crimes.[133]

The Southern African Litigation Centre ('SALC'), admitted by the Constitutional Court as an *amicus curiae* in the *Chipu* case, argued for the importance of free expression for the purpose of upholding international criminal law obligations. Their argument was based on section 4(1)(a) of the Refugees Act. This section provides that:

> 'a person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she 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.'[134]

The section is an exclusion to asylum for those seeking refuge in South Africa. This provision is not unique to our domestic system[135] – it is also a feature in international instruments dealing with refugees.[136] It prohibits states from granting refugee status to persons accused of war crimes, crimes against humanity and genocide.[137] Even though they may meet the definitional criteria for refugeehood, where there is reason to believe that the individual has committed an international crime, they may be excluded from protection.[138]

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[131] Act 27 of 2002.
[132] This principle specific to international criminal law allows for the initiation of domestic prosecutions of international crimes in accordance with duly adopted national legislation incorporating provisions of the Rome Statute. Arts 1 and 17 of the Rome Statute op cit.
[133] Preamble of the Rome Statute op cit.
[134] Ibid.
[135] SALC Founding Affidavit op cit 12.
[136] The 1951 Refugee Convention and the 1969 OAU Convention op cit both recognise classes of persons who are not eligible for refugee status even if they satisfy the inclusionary criteria.

Article 1(F)(a) of the Refugees Convention provides that:
'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

Article 1 (5) of the OAU Convention provides that:
'The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has 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'.
[137] SALC Founding Affidavit op cit 13.
[138] SALC Heads of Argument op cit 10.

The purpose of the exclusion is to ensure the integrity and sustainability of the asylum-seeking process, so that only those who are genuinely in need of protection are granted it.[139] 'In the premises, the purpose of section 4(1)(b) of the Act is not only rational and reasonable in the circumstances, it also conforms to the relevant laws, norms and standards of international law.'[140]

The purpose of the exclusion clause is therefore two-fold:

1. It protects refugee status from being abused by those who are undeserving; and
2. It ensures that those who have committed grave crimes do not escape prosecution.[141]

These sentiments are echoed in judgments of foreign courts. The Canadian Supreme Court held in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*[142] that

> '[w]hen the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status.'
>
> 'The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees.'[143]

I agree that asylum applicants who have committed, or who are believed to have committed, such atrocities rightly should not qualify for the protection offered by the asylum system by operation of section 4 of the Refugees Act.

However, I also agree with the approach in *Gavrić*,[144] which holds that 'exclusion decisions are…subject to the internal remedies of the Act and an applicant may appeal'. This echoes the position of the Guidelines on

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[139] SALC Heads of Argument op cit 11.
[140] *Gavrić v Refugee Status Determination Officer, Cape Town and Others* [2018] ZACC 38 at para 25.
[141] See Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003 at para 2.
See also Khan and Schreier, *Refugee Law in South Africa* (2014) at 93; Gilbert "Current Issues in the Application of the Exclusion Clauses" in Feller, Türk and Nicholson (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 427-8.
[142] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Canada: Supreme Court, 4 June 1998 ('*Pushpanthan*'), at para 63, citing *Sivakuma v Canada (Minister of Employment and Immigration) (CA)* [1993] 1 CF 433, Canada: Federal Court at 445.
[143] *Pushpanthan* supra 63.
[144] *Gavrić* supra at para 53.

International Protection No. 5, which states that 'given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure'.[145]

International criminal law considerations are in the public interest for three reasons. First, it is based on the general principle that the public should be informed and aware of news and events which affect them and the country. Second, it is based on the general requirement of openness, transparency and accountability of institutions exercising public power. Third, it is based on the specific need for public and judicial scrutiny of asylum processes.

First, the public should know the nature and conduct of certain asylum seekers entering its territory as a matter of national security. The public have an interest in being appraised of events and other news which may affect their safety and security.[146] An asylum seeker who has committed, or is believed to have committed, grave crimes could pose a threat to national security and may be a threat to public safety. The public should be appraised of information of this nature.

Second, the public has the right to demand transparency from those organs of state tasked with enforcing and upholding South Africa's obligations.[147] The RAA is one such body which exercises public power. The general value of openness and transparency for the public in the decisions of quasi-judicial bodies is discussed in point (iv) below. The specific need for transparency of RAA processes is that the public should be aware of the decisions of bodies which are tasked with upholding the country's international human rights obligations.[148] It is only through access to RAA hearings and obtaining reports on RAA processes and decisions that this can be achieved. It is important that the public be allowed to monitor the compliance of bodies tasked with upholding constitutional and legislative obligations.[149]

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[145] Guidelines on International Protection No. 5 op cit at para 31.
[146] *Holomisa* supra at para 615, where Cameron J states that '[t]he success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens'. It is argued that for there to be robust debate, there must be alert citizens. Alert citizens can only be so if they are appraised of relevant information.
[147] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 at para 67.
[148] *Helen Suzman Foundation* supra at para 67. See also *Gavrić* supra at para 67.
[149] Ibid.

Third, the public and the courts should be able to scrutinise the decisions of and hold the relevant bodies accountable should they not exercise their powers correctly.[150] It is important for the efficient and proper operation of an institution that there is oversight and scrutiny. This is even more important in the case of public institutions which exercise judicial powers.[151] These organisations should be held to a higher standard as they are imbued with wide powers and exercise them on behalf of the country.[152] The only means through which the public and courts can monitor, scrutinise and challenge the decisions of these institutions is through being granted access to them.

It is important to maintain the integrity of the asylum system and protect it from abuse,[153] and allowing access into that process can aid this. If the media can access asylum appeal proceedings, it could lead to early detection and prevention of entry of human rights abusers. Early intervention, at the stage when the RAA is still to decide the outcome of the asylum application, may mean that the media could access information about the asylum seeker and their potential involvement in the commission of international crimes. As SALC argued, confidentiality inherently limits the likelihood of early detection and prevention of entry of those responsible for section 4(1)(a) crimes.[154]

If the asylum application process is kept secret, and if the processes and decisions of the RAA are not monitored and scrutinised, there is scope for degradation of the asylum and criminal systems through corruption and maladministration. Review and transparency mechanisms are designed to be protectors against such risks, and function to minimise the threat of such instances. To achieve this, access should be granted to RAA hearings and reports obtained on its decisions. These are matters in which there is public interest.

(ii) 'Open Justice' and Participatory Democracy

While the Constitutional Court *Chipu* judgment did not deal extensively with this argument, it noted the purpose of the principle of open justice.[155]

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[150] Ibid.
[151] *SABC* supra at para 32.
[152] *Gavrić* supra at para 67.
[153] *Gavrić* supra at paras 23 and 24.
[154] SALC Heads of Argument op cit at para 34.
[155] *Chipu* supra at para 53.

In discussing the principle, the Court cited *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* (*'SABC'*).[156] *SABC* stated that open justice is a principle which underlies the right to a trial in public, which is part of the right to a fair trial.[157] It is a principle which

> 'promotes the accountability of courts and the administration of justice. It has traditionally been understood to mean that court hearings must be open to members of the public who wish to observe them and to journalists who wish to report upon them'.[158]

The High Court *Chipu* judgment[159] noted the judgment of *S v Mamabolo*[160], and a decision of the House of Lords in *Scott v Scott*[161]. Both those judgments note the same point: publicity and transparency are guards against improbity and ensure free and frank debate, promoting impartiality.[162]

A number of other Constitutional Court cases underline the importance of the principles of open justice and accountability.[163] The general principle of open justice was discussed in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*[164] and *President of the Republic of SA v M & G Media*[165]. Both judgments highlight the importance of accountability.

Although it is essential as a founding value,[166] it is also a guard against a government operating in secrecy.[167] The principle of open justice further 'ensure[s] transparency, accountability and responsiveness in the way courts and all organs of State function'.[168]

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[156] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC) (*'SABC'*), quoted at para 53 of the Constitutional Court *Chipu*.
[157] *SABC* supra at para 50, quoted at para 53 of *Chipu* supra.
[158] Ibid.
[159] High Court *Chipu* at para 11.
[160] *S v Mamabolo (E-TV and Others Intervening)* 2001 (3) SA 409 (CC).
[161] *Scott v Scott* [1913] (AC) 417.
[162] High Court *Chipu* at para 11, quoting *Mamabolo* supra at paras 28-29 and *Scott* supra at 447.
[163] Applicant's heads of argument at para 14.
[164] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) (*'Rail Commuters Action Group'*).
[165] *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC).
[166] *Rail Commuters Action Group* at paras 73-75.
[167] *President of the Republic of South Africa* supra at para 10.
[168] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services in re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) ('*Independent Newspapers*') at para 40.

Open justice is not only intrinsically important, but also instrumentally important. In *S v Mamabolo*, the Constitutional Court stated that:

> 'openness seeks to ensure that the citizenry know 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.
>
> Ideally, also, robust and informed public debate about judicial affairs promotes peace and stability by convincing [the public] … that there exists a set of just norms and a trustworthy mechanism for their enforcement.'[169]

SABC makes the point that open justice is important not only for the media, but also for the wider public:

> 'This case, then, is not essentially about the rights of the SABC. Rather, it concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the Judiciary. This is a strong constitutional consideration… the fact that courts do their work in the public eye is a key mechanism for ensuring their accountability.'[170]

The applicants make the point that the public have access to judicial or quasi-judicial proceedings in order to preserve accountability, integrity, impartiality, and fairness.[171] The RAA is a quasi-judicial body which exercises final authority in asylum applications.[172] It is important that light is brought to bear on the RAA in order to test its impartiality, integrity and accountability.

Open justice is a check on the RAA, which would hold it to account. In this instance, the principle operates as an intrinsic right. Access to RAA hearings would invite public scrutiny of its decisions and thereby hold it accountable.

Open justice is also an instrumental principle which is tied to transparency, fairness and democracy. These are principles which rely on the proper exercise of the others to be fully effective. Further, open justice engenders public debate and allows the public to be informed. In these ways, open justice is instrumental to the exercise of other rights.

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[169] *Mamabolo* supra at paras 29-31.
[170] *SABC* supra at para 29.
[171] Applicant's heads of argument at para 15.
[172] It is unclear whether the RAA will take on the role of the RAB and how the work of these two bodies will interact, as the RAA and its function have not been defined or provided for in the amended Refugees Act.

Applications for access to RAA hearings would be bolstered by an argument for open justice. It is a principle which speaks to public interest – not only is it intrinsically important, but it is also instrumentally important as a key to the exercise of other rights and principles.

(v) *Recommendations for access to RAA hearings*

It is clear from the amended Refugees Act that the RAA's decision to allow access to its hearings is limited to two bases. The first is that access will be granted where the asylum seeker gives consent. The second is where it is in the public interest to allow access.

The RAA would have to consider on a balance of probabilities whether the public interest in the matter would outweigh the interests of maintaining confidentiality. Instead of simply proving 'negatively' that no harm exists, an applicant seeking access should rather prove 'positively' that public interest exists.

The media may be required to commit to more sensitive reporting as it may be called to maintain the protection offered to asylum seekers by abiding by the RAA's access conditions should it choose to impose any. Although this would suggest an inroad into the pure application of the right to free expression, it does not follow that this inroad is untenable and unjustifiable.

The RAA should equally hold itself to a high ethical standard in this regard and should seek only to safeguard the interests of the asylum seeker, not its own interests in maintaining confidentiality of its processes as an institution.

The RAA would have to walk a fine line when placing conditions on access – the more restrictive a requirement, the greater the inroad it would have on the right to free expression. However, where a restriction is insufficient, the risk of a breach of an asylum seeker's right to confidentiality is greater.

(vi) *Conclusion*

The RAA is granted a weighty power, which brings with it a weighty duty. The RAA is required to balance the rights of free expression and confidentiality, to decide whether access to its hearings should be granted and access conditions. In the event that the asylum seeker does not give consent to the access, the RAA

will be required to consider whether access is in the public interest, the grounds of such interest, and weigh countervailing confidentiality considerations.

While the High Court and Constitutional Court provided a sound basis for these issues, it is clear that neither judgment considered the matter to its full extent. The Courts had only one crisp issue before them – is the limitation of the right to free expression justified? The courts have answered this and in so doing, provided the only domestic jurisprudence on this issue.

The next chapter will explore the powers of bodies similar to the RAA in foreign jurisdictions – New Zealand and Canada. The aim is to provide a comparison of similar powers provided to similar bodies and how these powers were exercised in order to guide the RAA in exercising its discretion.

IV. Foreign law analysis

(i) *Introduction*

The purpose of this chapter is to provide an understanding of how the right to free expression in the context of refugee law is dealt with in foreign jurisdictions. The aim of this is to provide guidance to the RAA, the courts, and those interpreting and/or relying on the amended section 21(5)[173].

This chapter will focus on the judgments of the courts and “RAA-equivalent” bodies in each jurisdiction to determine how the rights have been balanced and protected, the arguments used to protect each right, and the success of the argument. The discussion on each jurisdiction will conclude with key takeaway points that we can potentially adopt or consider adopting in interpreting and applying section 21(5) of the Refugees Act.

I have chosen New Zealand and Canada as comparative jurisdictions because they have both been identified as countries with liberal and open asylum policies.[174] Their refugee policies are comprehensive and well-developed.

Canada has welcomed high numbers of refugees, including 25 000 Syrian refugees in during 2015 and 2016.[175] The Canadian Prime Minister, Justin Trudeau, has also ‘underscored his government's commitment to bringing in “those fleeing persecution, terror & war”’.[176]

New Zealand has a ‘world leading asylum determination system and refugee resettlement programme. The Government, Non-Government Organisations and communities provide a wide range of support to asylum claimants and people from refugee backgrounds.’[177] Prime Minister Jacinda Ardern and her government have also ‘adopted a community sponsorship model for refugees that

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[173] South African Refugees Act, Act 130 of 1998.
[174] E Smick ‘Canada’s Immigration Policy’ *Council on Foreign Relations*, 6 July 2006. Available at https://www.cfr.org/backgrounder/canadas-immigration-policy. Accessed on 30 May 2019.
[175] H Spectator ‘Editorial: Protecting the integrity of Canada’s refugee system’ *The Spectator*, 11 April 2019. Available at https://www.thespec.com/opinion-story/9280172-editorial-protecting-the-integrity-of-canada-s-refugee-system/. Accessed on 30 May 2019.
[176] ‘US refugee ban: Canada's Justin Trudeau takes a stand’ *BBC News*, 29 January 2017. Available at https://www.bbc.com/news/world-us-canada-38786656. Accessed on 30 May 2019.
[177] ‘Discussion Paper: Treating asylum claimants with dignity and respect’ *NZ Human Rights Commission,* June 2017. Available at https://www.hrc.co.nz/files/7515/0223/2928/ESC_Rights_Discussion_2017_ONLINE.pdf. Accessed on 30 May 2019.

has been specifically mentioned by the United Nations as it drafts its latest refugee strategy'.[178]

(ii) *New Zealand*

New Zealand has an extensive and thorough refugee law system. The governing legislation, the Immigration Act 51 of 2009 ('Immigration Act'), provides for how claims for asylum are made[179], who may make a claim,[180] the procedure for claims[181], and the cessation or cancellation of recognition of refugee status[182]. The Immigration Act also establishes the Immigration and Protection Tribunal.[183] The Tribunal decides appeals against decisions relating to refugeehood made in terms of the Immigration Act.[184]

a) Governing legislation

The Immigration Act[185] is the principal legislation which governs asylum and refugee-related matters in New Zealand, and in particular, section 151 of that Act governs confidentiality.

The Immigration Act prescribes that confidentiality as to the identity of the claimant and the particulars of a claim must be maintained during and subsequent to the determination of a claim.[186] This mirrors the South African Refugees Act, which also requires that confidentiality must be maintained at all times as the default position (with the exceptions to the default position, as set out in section 21(5) of the Refugees Act[187], as previously discussed.[188])

However, the similarities between refugee legislation regarding confidentiality in South Africa and New Zealand ends there. The New Zealand Immigration Act seemingly goes further than the South African Refugees Act in its protection of the confidentiality of the claimant and the refugee system. From a reading of the

[178] L Walters 'NZ works to double refugee quota as others close their borders' *Stuff*, 20 June 2018. Available at https://www.stuff.co.nz/national/politics/104837520/nz-works-to-double-refugee-quota-as-others-close-their-borders. Accessed on 30 May 2019.
[179] Section 133 of the New Zealand Immigration Act, Act 51 of 2009.
[180] Section 129 of the New Zealand Immigration Act, Act 51 of 2009.
[181] Section 133 -142 of the New Zealand Immigration Act, Act 51 of 2009.
[182] Section 143 – 148 of the New Zealand Immigration Act, Act 51 of 2009.
[183] Section 217 of the New Zealand Immigration Act, Act 51 of 2009.
[184] Section 217(2) of the New Zealand Immigration Act, Act 51 of 2009.
[185] New Zealand Immigration Act, Act 51 of 2009.
[186] Section 151(1) of the New Zealand Immigration Act, Act 51 of 2009.
[187] South African Refugees Act, Act 130 of 1998.
[188] See the discussion under point (v) of Chapter 3.

Immigration Act, it appears that the New Zealand position differs from the South African position in three ways.

First, the exceptions to the default position are more limited. Secondly, the appeal body is not empowered to exercise any discretion to allow public access to its hearings. Thirdly, the legislation only allows for a countervailing public interest consideration to be taken into account in one limited instance.

The default position in New Zealand is subject to certain exceptions, set out in section 151(2) of the Immigration Act. These exceptions provide that confidential information regarding a claim may be disclosed for the purposes of determining the claim,[189] and to the UNHCR,[190] among others.

Two exceptions in the Immigration Act, which mirror the South African considerations of safety of the claimant and of their family and associates,[191] are contained in section 151(2)(d) and section 151(2)(e) of the Immigration Act. The former allows for information relating to a claim to be published in a decision by the Immigration and Protection Tribunal or otherwise in a manner which would be 'unlikely to allow identification of the person concerned'.[192] The latter allows for the disclosure of information if there is 'no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information'.[193]

A further exception to the default position which mirrors the South African position[194] is contained in section 151(6) of the Immigration Act, which provides that a claimant can waive his or her right to confidentiality either expressly or impliedly.

The Immigration and Protection Tribunal is a creature of statute, like the RAA, and can only exercise the powers granted to it by the Immigration Act. The Tribunal is established in section 3(2)(f) and 217 of the Immigration Act, and its regulating provisions are contained in Schedule 2 to the Immigration Act.

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[189] Section 151(2)(a) of the New Zealand Immigration Act, Act 51 of 2009.
[190] Section 151(2)(c) of the New Zealand Immigration Act, Act 51 of 2009.
[191] Section 21(5)(b)(vi) of the South African Refugees Act, Act 130 of 1998.
[192] Section 151(2)(d) of the New Zealand Immigration Act, Act 51 of 2009.
[193] Section 151(2)(e) of the New Zealand Immigration Act, Act 51 of 2009.
[194] Section 21(5)(a) of the South African Refugees Act, Act 130 of 1998.

In terms of section 18(3) of Schedule 2, 'if an appeal is brought by a claimant, a refugee or a protected person, or a person formerly recognised as a refugee or a protected person, the Tribunal must conduct the hearing in private'. This is an emphatic blanket ban on public access to appeals before the Tribunal. This is not in line with the current South African position, which allows the RAA to exercise a discretion to allow access to its hearings.[195] The Tribunal is granted the further power to make an order prohibiting the publication of any information it receives, or its proceedings.[196]

Importantly, the Tribunal must publish its decisions for research purposes,[197] but it can edit the decision in such a way to remove the name of the persons involved and any particulars likely to lead to the identification of the appellant or other person before publicly disseminating the decision.[198]

Unlike South Africa, which allows public interest to be taken into consideration when determining whether to grant *access* to RAA hearings,[199] the Immigration Act provides that *publication* of the Tribunal's decisions relating to a claim (other than for research purposes)[200] may be allowed where it is in the public interest to do so.[201] If it is found that there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information,[202] 'the Attorney-General may, subject to any orders of the Tribunal, publish the decision of the Tribunal relating to the claim if the Attorney-General determines that, in the circumstances of the particular case, it is in the public interest to do so'.[203]

While it appears that New Zealand refugee legislation is more limiting of the right to free expression and more protective of the right to confidentiality, case law suggests that the right to free expression is well-protected.

[195] Section 21(5) of the South African Refugees Act, Act 130 of 1998.
[196] Section 18(4) of Schedule 2 to the New Zealand Immigration Act, Act 51 of 2009.
[197] Section 19(1) of Schedule 2 to the New Zealand Immigration Act, Act 51 of 2009.
[198] Section 19(4) of Schedule 2 to the New Zealand Immigration Act, Act 51 of 2009.
[199] Section 21(5)(b) of the South African Refugees Act, Act 130 of 1998.
[200] Section 19(1) of Schedule 2 to the New Zealand Immigration Act, Act 51 of 2009.
[201] Section 151(4)(b) of the New Zealand Immigration Act, Act 51 of 2009.
[202] Section 151(2)(e) of the New Zealand Immigration Act, Act 51 of 2009.
[203] Section 151(4)(b) of the New Zealand Immigration Act, Act 51 of 2009.

b) Case law

<u>*Refugee Appeal No. 76299 and Refugee Appeal No. 76297 – the importance of accountability, equality and fairness as principles underlying access*</u>

In the matter of *Refugee Appeal No. 76299 and Refugee Appeal No. 76297*,[204] the Refugee Status Appeals Authority (the predecessor of the Immigration and Protection Tribunal) decided a matter which dealt with the publication of a decision of the Authority. Counsel for the appellants requested that the '*TD decision*'[205] be made available to them, as their clients' cases appeared to be similar.[206]

Three underlying reasons for publication of the *TD decision* were argued:[207] accountability,[208] equal treatment[209] and fairness.[210] Further, it was argued that the Authority had a duty to facilitate access to its decisions as it is the ultimate decision-maker in these instances.[211]

The Authority stated that generally, refugee claims should be kept confidential.[212] The Immigration Act provided for the exceptions to the confidentiality obligation including waiver and the absence of a serious possibility of endangerment.[213]

The Authority concluded that the exceptions to the confidentiality obligation applied to the *TD decision*, as TD had waived his right to confidentiality and there was no serious possibility of endangerment.[214] Thus, the Authority ordered the publication of the *TD decision*, providing that his name be redacted from the decision.[215]

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[204] *Refugee Appeal Nos. 76299 & 76297*, Nos. 76299 & 76297, New Zealand: Refugee Status Appeals Authority, 17 July 2009, available at http://refworld.org/docid/4a7643a2.html (accessed 14 October 2018).
[205] *Refugee Appeal No. 76204.*
[206] *Refugee Appeal Nos. 76299 & 76297* supra at paras 2 and 3.
[207] *Refugee Appeal Nos. 76299 & 76297* supra at para 24.
[208] *Refugee Appeal Nos. 76299 & 76297* supra at para 25.
[209] *Refugee Appeal Nos. 76299 & 76297* supra at para 27.
[210] *Refugee Appeal Nos. 76299 & 76297* supra at para 29.
[211] *Refugee Appeal Nos. 76299 & 76297* supra at para 30 - 31.
[212] *Refugee Appeal Nos. 76299 & 76297* supra at paras 2 and 3.
[213] *Refugee Appeal Nos. 76299 & 76297* supra at para 16.
[214] *Refugee Appeal Nos. 76299 & 76297* supra at para 50.
[215] *Refugee Appeal Nos. 76299 & 76297* supra at para 51.

Attorney-General v X and Another – the importance of international criminal law as a motivating factor for disclosure/access

In *Attorney-General v X and Another*,[216] the New Zealand Supreme Court decided on the interpretation of the former confidentiality provision of the Immigration Act, section 129T,[217] and whether section it allowed for disclosure in order to investigate X's extradition or prosecution.[218]

The Court acknowledged that section 129T(3)(b) imposed two conditions for disclosure. First, that the disclosure is to 'an officer or employee of a Government department or other Crown agency', and second, that the 'functions of that officer or employee must "require" disclosure'.[219]

In the result, the Court held that section 129T, properly construed, permits the disclosure of information relating to X's claim to officials who require that information to determine X's extradition or prosecution.[220]

Underlying this disclosure is Article 1F of the Convention Relating to the Status of Refugees[221], which provides that the Convention does not protect those who have committed a war crimes.[222] To give effect to this principle, and the principle of *aut dedere aut judicare*,[223] it was held that section 129T(3)(b) should allow disclosure to those officials considering extradition or prosecution.[224]

K v Attorney-General (High Court) – the importance of disclosure in furthering the principles of open justice and accountability

In the case of *K v Attorney-General*,[225] the High Court of New Zealand dealt with the scope of the confidentiality obligation of section 151 of the Immigration Act. K sought to overturn a decision of a Refugee Protection Officer ('RPO') who refused to keep information relating to K's witnesses confidential.[226]

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[216] *Attorney-General v X and Another* [2008] NZSC 48.
[217] *Attorney-General* supra at para 3.
[218] *Attorney-General* supra at para 7.
[219] *Attorney-General* supra at para 14.
[220] *Attorney-General* supra at para 16.
[221] 1951 Convention relating to the Status of Refugees.
[222] *Attorney-General* supra at para 15.
[223] This is literally translated as "either surrender or submit to justice".
[224] *Attorney-General* supra at para 15.
[225] *K v Attorney-General* [2015] NZHC 2380.
[226] *K (High Court)* supra at para 1.

K requested that the RPO limit the disclosure of the information in his witness statements to a specified list of people.[227] Further, K requested an undertaking that information regarding his witnesses would not be disclosed to any other person without notice to K's counsel as to why the disclosure is necessary and not a threat to the safety of the witness.[228]

The RPO's argued that the only limitations by which he was bound were those in section 151 of the Immigration Act, and he did not consider that he had the power to limit disclosure to other officials.[229]

K's counsel relied on an UNHCR advisory opinion which[230] reiterates the need for protection of asylum seekers' privacy and confidentiality,[231] and that the State receiving such information should refrain from sharing that information with the asylum seeker's country of origin.[232]

The Court noted that the UNHCR advisory opinion did not contemplate that the confidentiality obligation would be absolute.[233] Further, the Court noted the decision of the Court of Appeal in *Attorney-General v X*,[234] which permitted the disclosure of information contained in a claim to officials who required that information for the claimant's possible extradition.[235]

The Court found that the requirements of natural justice should 'enable the RSB to investigate the truthfulness of statements which it has been asked to take into account in making the determination required'.[236]

Regarding the RPO's contention that he was not empowered to limit the extent to which information he received would be available to other government officials,[237] the Court held that section 151 is permissive, and would not prevent

[227] *K (High Court)* supra at para 29.
[228] *K (High Court)* supra at para 29.
[229] *K (High Court)* supra at para 30.
[230] *K (High Court)* supra at para 65.
[231] *K (High Court)* supra at para 66.
[232] *K (High Court)* supra at para 67.
[233] *K (High Court)* supra at para 69.
[234] *Attorney-General* supra.
[235] *K (High Court)* supra at para 73.
[236] *K (High Court)* supra at para 102.
[237] *K (High Court)* supra at para 104.

the RPO from giving an undertaking or another means of limiting the exercise of its powers to disclose information to others.[238]

The Court held that the RSB (and the RPO) had shown itself to be mindful of its confidentiality obligations[239] and was not unreasonable[240] in not entering into an arrangement which would have prevented it from making permitted disclosures in terms of section 151.[241]

In the result, the Court held that K was not entitled to the relief sought, given the interpretation of the RPO and the RSB of their obligations in terms of section 151(2) of the Immigration Act.[242]

K v Attorney-General (Court of Appeal) – the importance of taking reasonable measures to protect asylum seekers

The *K v Attorney-General (High Court)* case discussed above went on appeal to the New Zealand Court of Appeal.[243]

The issues before the Court of Appeal were largely those before the High Court,[244] including whether the RSB's refusal to give the confidentiality undertakings breached K's right of natural justice;[245] and whether the RSB's refusal to give the confidentiality undertakings was unreasonable.[246]

As to whether an RPO can limit the disclosure of information under section 151(2) to protect witnesses, the Court held that confidentiality undertakings which restrict the disclosure of information are not precluded.[247] The Court points out that the RPO should 'be willing to consider reasonable measures that reduce the risk that disclosure will identify the person or place the safety of anyone at risk'.[248] Whilst the Court found that the RSB may give undertakings, these cannot

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[238] *K (High Court)* supra at para 108.
[239] *K (High Court)* supra at para 113.
[240] *K (High Court)* supra at para 112.
[241] *K (High Court)* supra at para 114.
[242] *K (High Court)* supra at para 123.
[243] *K v Attorney-General* [2016] NZCA 416.
[244] *K (Court of Appeal)* supra at para 33.
[245] *K (Court of Appeal)* supra at para 33.
[246] *K (Court of Appeal)* supra at para 33.
[247] *K (Court of Appeal)* supra at para 56.
[248] *K (Court of Appeal)* supra at para 51.

include irrevocable undertakings which may have the effect of tying the court's hands.[249]

On whether the RSB's refusal to provide the undertakings breached K's right to natural justice, the Court acknowledged that an RPO is a public authority empowered to make decisions which implicates rights in the New Zealand Bill of Rights Act 1990 and as such, natural justice must be followed.[250] It was accepted that natural justice may require that the RPO consider giving an undertaking where the claimant deems this necessary.[251] Despite this, the Court held that as the confidentiality undertakings sought were irrevocable, they could not be given and K's right to natural justice was not breached.[252]

In the result, the Court dismissed the appeal as the RPO correctly refused the limits on disclosure of information that K requested.[253]

c) Key takeaways

It is apparent from a reading of the Immigration Act and case law that New Zealand protects the integrity of the refugee system and the confidentiality of claims and asylum seeker's information. In contrast, the South African system is more robust in dealing with the competing interests of confidentiality and free expression.

Despite this difference in approach, New Zealand's refugee law system presents an interesting contrast from which we may benefit when applying and interpreting domestic legislation.

South Africa and New Zealand are aligned as to the default position – confidentiality must be maintained, subject to certain exceptions.[254]

Public interest looks quite different for both jurisdictions – in South Africa, it is the main countervailing consideration to granting access,[255] while in New

[249] *K (Court of Appeal)* supra at paras 56-57.
[250] *K (Court of Appeal)* supra at para 58.
[251] *K (Court of Appeal)* supra at para 60.
[252] *K (Court of Appeal)* supra at para 63.
[253] *K (Court of Appeal)* supra at para 68.
[254] See section 21(5) of the South African Refugees Act, 130 of 1998 and section 151 of the New Zealand Immigration Act, 2009.
[255] Section 21(5)(b) of the Refugees Act, 130 of 1998.

Zealand it is one of the factors that is considered when determining the publication of a decision.[256]

Despite this difference in approach, New Zealand does allow for access to be granted to the Tribunal's processes through the publication of its judgments.[257] This allows for the media to access decisions and report on those, which in turn allows for the public to have access to information regarding those decisions.[258]

Refugee Appeal No. 76299 and Refugee Appeal No. 76297 elucidates the underlying principles of publication – accountability[259], equal treatment[260] and fairness[261]. Publication of decisions is a form of access, although not physical access to hearings, and this case is an important one for interpretive purposes. It highlights the importance of access and the factors underlying it. These can be used in the South African context to motivate for physical access, or simply to motivate for the release of the RAA's judgments if they are withheld.

In *Attorney-General v X and Another*, the Court highlighted the importance of not protecting asylum seekers who have committed war crimes. This links to the principles of international law,[262] and the importance of access for the purposes of exposing these issues in the public interest.[263] While the scope of disclosure was limited to officials dealing with the claimant's extradition or prosecution,[264] the fact that disclosure was permitted on those grounds is important, and a boon for those arguing for access before the RAA.

In *K v Attorney-General (High Court)*, the Court made the point that even the UNHCR opinion did not envisage that the confidentiality obligation would be absolute[265], and that information regarding the claim could be disclosed to certain officials.[266]

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[256] Section 151(2) of the Immigration Act, 2009.
[257] Ibid.
[258] See the discussion on this issue in point (i)(c) of Chapter 2.
[259] The Court relied on the decision of *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258, 262 (CA) for this principle.
[260] The Court relied on Woolf, Jowell and Le Seuer, *De Smith's Judicial Review* (2007) 6ed at paras [11.062] and [11.063] for this principle.
[261] This is a right recognised in the New Zealand Bill of Rights, 1990 in section 27(1).
[262] See the discussion in point (iv)(b)(i) of Chapter 3.
[263] See the discussion in point (iv)(b)(ii) of Chapter 3.
[264] *Attorney-General* supra at para 15.
[265] *K (High Court)* supra at para 69.
[266] *K (High Court)* supra at paras 114 – 116.

Importantly, this case highlighted the importance of 'RAA-like' bodies in effectively discharging their mandate to uncover the truth of a claim.[267] This speaks to the principle of open justice and accountability,[268] which is key to exercising the right to free expression in the public interest.

This case further highlights that 'RAA-like' bodies are empowered to impose limits on the disclosure of information, even to other government officials.[269] This may aid in our interpretation of the powers of the RAA, which should be empowered to impose limits on the information it releases or allows access to.

The *K v Attorney-General (Court of Appeal)* case elaborated on the disclosure of information by RAA-equivalent bodies – the body must consider reasonable measures to minimise the safety risks.[270]

It is important to note, however, that the refugee authority is not entitled to give *irrevocable* undertakings with regard to the disclosure of information, lest the courts are hamstrung.[271] It illustrates that even in the context of providing confidentiality undertakings to refugees, refugee authorities must take into account the role of courts and the judicial process.

This judgment also illustrates that refugee authorities are not required to give irrevocable undertakings to claimants when requested to do so.[272] The test should rather be, when deciding whether to restrict the disclosure of information, to determine whether reasonable measures are available to protect the safety of the claimant as a result of the disclosure.[273]

What we can glean from this case is that the focus should not be on the strict protection of information by the refugee authority, but rather on what protection can be offered in the event of disclosure to protect the claimant's safety. This is an important principle we can import in our law. The RAA should rather focus on the measures it can take to protect the safety of the claimant when determining whether to allow access to its hearings.

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[267] *K (High Court)* supra at para 102.
[268] See the discussion in point (iv)(b)(ii) of Chapter 3.
[269] *K (High Court)* supra at para 108.
[270] *K (Court of Appeal)* supra at para 51.
[271] *K (Court of Appeal)* supra at paras 56-57.
[272] *K (Court of Appeal)* supra at para 60.
[273] *K (Court of Appeal)* supra at para 51.

(iii) *Canada*

Canada has an expansive and well-organised refugee law system. The governing legislation, the Immigration and Refugee Protection Act SC 2001, c.27 ('IRPA'), comprehensively covers how claims for asylum are made[274], who may make a claim,[275] the procedure for claims,[276] and the cessation or cancellation of recognition of refugee status.[277]

IRPA also establishes the Immigration and Refugee Board[278], which is constituted by four separate divisions – the Refugee Protection Division[279], the Refugee Appeal Division[280], the Immigration Division[281] and the Immigration Appeal Division[282].

a) Governing legislation

IRPA[283] is the principal legislation which governs asylum and refugee-related matters in Canada, and in particular, section 166 of that Act governs confidentiality.

Section 166 provides that proceedings before the Refugee Protection Division and the Refugee Appeal Division must be conducted 'in the absence of the public'.[284] While the default position is the maintenance of the confidentiality of the process, there are certain exceptions to the standard rule. These exceptions are set out in section 166(d) of IRPA, which provides that -

> 'on application or on its own initiative, the Division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out in paragraph (b), the Division is satisfied that it is appropriate to do so'.[285]

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[274] Section 99 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[275] Section 95 – 97 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[276] Section 95 – 107 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[277] Section 108 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[278] Section 151 – 169 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[279] Section 169.2-170.2 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[280] Section 171 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[281] Section 172-173 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[282] Section 174-175 of the Immigration and Refugee Protection Act, SC 2001, c.27.
[283] Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[284] Section 166(c) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[285] Section 166(d) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.

The three factors which the Division must take into account are set out at section 166(b) of IPRA, which are: whether there is a serious possibility of the life, liberty or security of a person being endangered if the proceedings are held in public;[286] whether the societal interest in the proceeding being public is outweighed by the need to prevent disclosure for the fairness of the proceedings;[287] and whether there is a real and substantial risk that matters involving public security will be disclosed.[288]

The Refugee Protection Division, established in section 169 of IRPA, is governed by the Refugee Protection Division Rules ('the RPD Rules').[289] The RPD Rules provide for confidentiality at Rule 57(12), which grants the Division the discretion to take any measures it considers necessary to ensure the confidentiality of the proceedings.[290]

These measures include the exclusion of the applicant and/or their counsel from a hearing whilst the party responding to the application provides evidence,[291] and requiring the applicant's counsel to give an undertaking that evidence or representation by the respondent will not be disclosed until a decision is made to hold the hearing in public.[292]

The RPD Rules also provide that a person who makes an application to the Division to have a proceeding conducted in public must do so in writing and in accordance with Rule 57(2).[293] Importantly, the RPD Rules also provide that in an application for asylum, the claimant must state whether they want the Division to consider the application in public or in the absence of the public and to give reasons therefor.[294]

The Refugee Appeal Division, which is established in section 171 of IRPA, is governed by the Refugee Appeal Division Rules ('RAD Rules').[295] It mirrors the RPD Rules, by providing that applications must state whether the Division

[286] Section 166(b)(i) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[287] Section 166(b)(ii) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[288] Section 166(b)(iii) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[289] Canada Refugee Protection Division Rules, SOR/2012-256.
[290] Rule 57(12) of the Canada Refugee Protection Division Rules, SOR/2012-256.
[291] Rule 57(12)(b)(i) of the Cada Refugee Protection Division Rules, SOR/2012-256.
[292] Rule 57(12)(b)(ii) of the Canada Refugee Protection Division Rules, SOR/2012-256.
[293] Rule 57(2) of the Canada Refugee Protection Division Rules, SOR/2012-256.
[294] Rule 57(4)(c) and (d) of the Canada Refugee Protection Division Rules, SOR/2012-256.
[295] Canada Refugee Appeal Division Rules, SOR/2012-257.

should consider the application in private or in public,[296] and the reasons therefor, and as the Appeal Division is also granted the same discretionary powers to ensure the confidentiality of its proceedings.[297]

It is clear from a reading of IRPA and the RPD and RAD Rules governing the Refugee Protection Division and Refugee Appeal Division that the Canadian refugee system mirrors the South African approach. The confidentiality of the information and the claimant are well-protected – confidentiality and protection are the default position in IRPA[298] and the RPD and RAD Rules[299], as it is in the South African Refugees Act[300]. However, exceptions to the default are permissible.[301]

IRPA and the Rules allow for flexibility by allowing the Divisions to exercise discretion and permitting the Divisions to deviate from the default.[302] The exceptions in section 166(d) of IRPA allow for the Division to exercise a discretion in allowing access by conducting a hearing in public. Similarly, section 21(5)(b) of the Refugees Act allows for the RAA to exercise its discretion in allowing access.

Further, one of the factors the RAA is required to take into account in granting access is the public interest.[303] Similarly, the Refugee Appeal Division is required to balance the public interest in a public trial against the need for fair proceedings.[304]

The Canadian legislation goes one step further than the South African legislation in one respect – applications for access. In terms of Rule 57(2) of the Canadian RAD Rules, anyone seeking access to the hearings of the Division must bring an application. So far, this mirrors the South African approach. However, instead of placing the onus solely on the applicant seeking access to make out a case for

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[296] Rule 42(4)(c) and (d) of the Canada Refugee Appeal Division Rules, SOR/2012-257.
[297] Rule 42(13) of the Canada Refugee Appeal Division Rules, SOR/2012-257.
[298] Section 166(c) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[299] Rule 57(12) of the Canada Refugee Protection Division Rules, SOR/2012-256 and Rule 42(4)(c) and (d) of the Canada Refugee Appeal Division Rules, SOR/2012-257.
[300] Section 21(5) of the South Africa Refugees Act, 130 of 1998.
[301] Section 166(c) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27 and section 21(5)(b) of the South Africa Refugees Act, 130 of 1998.
[302] Section 166(d) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27 and
[303] Section 21(5)(b) of the South African Refugees Act, Act 130 of 1998.
[304] Section 166(b)(ii) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.

access, the RAD Rules also provide that the applicant seeking asylum must state whether the hearing should be in public or private, and to motivate therefor.[305]

While it is understandable that the right of the asylum seeker to have an election is a right which seeks to protect and support the asylum seeker, it is also important to note that the claimant is required to take a position on the issue of access. This is not the South African position – the claimant is not required to take a view on the publicity of RAA proceedings.

While the claimant's position may contrast with the view taken by the person claiming access, the Division will be better placed to fairly decide the issue of access once it has both sides of the argument. Further, requiring the claimant to state their view may mean that the person seeking access would be able to properly answer the case and successfully argue for access.

b) Case law

Minister of Public Safety and emergency Preparedness v Josip Budimcic – the importance of flexible solutions allowing for the exercise and protection of both rights

This case was a public hearing before the Refugee Protection Division involving an application by the Minister to 'vacate the determination of Convention refugee status that was granted' to Budimcic in 1994.[306]

The National Post, a domestic newspaper, applied to have the proceedings of the Division open to the public.[307] The Division pointed out that there had already been a significant amount of media coverage of the case, and Budimcic did not object to the hearing being held in public, [308] save that there may be witnesses whose identity should be protected.[309] The Division took into account the factors in section 166(b) of IRPA, and held that none of those factors were present, aside from the witnesses identities remaining confidential.[310]

[305] Rule 42(4)(c) and (d) of the Canada Refugee Appeal Division Rules, SOR/2012-257.
[306] *Minister of Public Safety and Emergency Preparedness v Josip Budimcic* RPD File No./Dossier: VA7-00522 at para 1.
[307] *Budimcic* supra at para 2.
[308] *Budimcic* supra at para 8 of Appendix 1.
[309] *Budimcic* supra at paras 3 and 4 of Appendix 1.
[310] *Budimcic* supra at para 8 of Appendix 1.

The Division held that the hearing would be held in public, with the exception that certain witnesses could give evidence in private and their identities would be protected.[311] As to the extent of media coverage, the Division reiterated the purpose of section 166 of IRPA, to 'ensure the hearing can continue in a fair and orderly fashion, all the while protecting the rights, dignity and privacy of the participants'.[312] Accordingly, the Division decided that no electronic devices would be allowed into the hearing room, including cellphones.[313]

Edmonton Journal v Attorney-General, Alberta – the importance of free expression for the purposes of accountability and democracy, and proportionality of decisions

The Supreme Court of Canada had to decide whether the impugned section was a justifiable limitation on the right of free expression. Section 30 of the Alberta Judicature Act prohibited the publication of any detail relating to matrimonial proceedings, other than brief details as to the identity of the parties, a brief description of the legal submissions, and the court's findings.[314]

The Court recognized the vital importance of the right to express ideas and comment on the functioning of public institutions,[315] and that it should only be 'restricted in the clearest of circumstances'.[316] The Court acknowledged that freedom of expression is critically important for the functioning of a democratic society.[317]

The Court added that the rule of law was another important feature of democracy, which requires that the courts should function openly[318] and be open to public scrutiny and criticism.[319] The Court put it aptly: 'the principle that courts must function openly is fundamental to our system of justice'.[320] Free expression also

[311] *Budimcic* supra at para 9 of Appendix 1.
[312] *Budimcic* supra at para 11 of Appendix 1.
[313] *Budimcic* supra at para 12 of Appendix 1.
[314] *Edmonton Journal v Alta. (A.G)* [1989] 2 S.C.R at 1327.
[315] *Edmonton Journal* supra at 1336.
[316] *Edmonton Journal* supra at 1336.
[317] *Edmonton Journal* supra at 1339.
[318] *Edmonton Journal* supra at 1339.
[319] *Edmonton Journal* supra at 1337.
[320] *Edmonton Journal* supra at 1346.

plays a key role in allowing members of the public to exercise their right to freedom of information by accessing information pertaining to the courts.[321]

In considering whether the right to free expression is justifiably limited by the impugned section, the Court considered whether the limitation was sufficiently important to 'warrant overriding a constitutionally protected right or freedom', and whether 'the means chosen to attain the objectives are proportional or appropriate to the ends'.[322]

The Court decided that section 30 did not meet the standard of proportionality and did not 'impair the right of freedom of expression as little as possible'.[323] The impugned section went much further than was necessary to protect the objectives it sought to protect.[324] It held that the section 'cannot be said to constitute a minimal interference with the right of freedom of expression,'[325] as the 'inroad into the right is substantial and significantly reduces the openness of the courts'.[326]

In coming to its decision, the Court remarked, 'in today's society, it is the press reports of trials that make the courts truly open to the public… the public's right to know is undeniable'.[327] Further, the Court stated that the right to free expression is of such paramount importance that 'an interference with it must be of a minimal nature'.[328]

Toronto Star Newspapers Ltd. v Canada – the importance of timely release of information for the purposes of democracy, openness, transparency and accountability

In this case, the Supreme Court of Canada had to decide whether a publication ban violated the right to free expression.[329] It is useful for a discussion on the publication of sensitive information in a context outside refugee law.

[321] *Edmonton Journal* supra at 1339-1340.
[322] *Edmonton Journal* supra at 1342-1343.
[323] *Edmonton Journal* supra at 1346.
[324] *Edmonton Journal* supra at 1346.
[325] *Edmonton Journal* supra at 1346.
[326] *Edmonton Journal* supra at 1346.
[327] *Edmonton Journal* supra at 1346.
[328] *Edmonton Journal* supra at 1347.
[329] *Toronto Star Newspapers Ltd. v. Canada* [2010] 1 SCR 721.

In terms of section 517 of the Criminal Code,[330] an accused person is entitled to apply for a publication ban on the evidence and information produced and the representations made at a bail hearing, as well as any reasons given for the order.[331] If an accused applies for the ban, a justice of the peace is mandatorily required to order the ban in terms of the section.[332]

The majority held that the publication ban is justifiable.[333] The Court found that the validity of a mandatory ban must be determined by assessing its proportionality and rationality to ascertain whether it is necessary and justified.[334] The majority held that free expression is a right which can be justifiably limited in a free and democratic society.[335]

The Court held that the ban was connected to its objectives,[336] as it was intended to 'ensure expeditious bail hearings and to safeguard the right to a fair trial'.[337] Further, the Court found that the ban was not absolute or permanent – rather, it prohibited distinct categories of information and was discharged at the end of the trial.[338]

The dissenting judgment found that the mandatory ban is not a justifiable infringement of the right to free expression.[339] To cure the section, the minority judgment suggests that the ban be discretionary, not mandatory.[340]

The minority judgment took into account the amount of time between the bail hearing and the end of a trial, which could be years.[341] This delay amounts to a denial of access to information,[342] which delay is 'a profound interference with the open court principle'.[343]

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[330] Criminal Code, R.S.C. 1985, c. C-46.
[331] *Toronto Star Newspapers Ltd.* supra at 722.
[332] *Toronto Star Newspapers Ltd.* supra at 722.
[333] *Toronto Star Newspapers Ltd.* supra at 725.
[334] *Toronto Star Newspapers Ltd.* supra at 723-4.
[335] *Toronto Star Newspapers Ltd.* supra at 723.
[336] *Toronto Star Newspapers Ltd.* supra at 724.
[337] *Toronto Star Newspapers Ltd.* supra at 723.
[338] *Toronto Star Newspapers Ltd.* supra at 724-5.
[339] *Toronto Star Newspapers Ltd.* supra at 725.
[340] *Toronto Star Newspapers Ltd.* supra at 726.
[341] *Toronto Star Newspapers Ltd.* supra at 726.
[342] *Toronto Star Newspapers Ltd.* supra at 726.
[343] *Toronto Star Newspapers Ltd.* supra at 726.

On the importance of the open court principle, the dissenting judgment states that the public must be able to see the judicial process at work, and their ability to meaningfully engage with what a judge says depends on the reasoning behind that finding.[344] Further, the minority found that public confidence in the judicial system requires relevant information to be delivered in a timely manner. To mandatorily ban the publication of crucial information when it is of most concern and interest to the public is not justified.[345]

Dagenais v Canadian Broadcasting Corporation – the importance of reasonability and proportionality in protecting rights

In this case, the Supreme Court of Canada had to decide on the validity of a publication ban which prohibited the broadcast of a mini-series.[346]

The respondents applied for an injunction to restrain the Canadian Broadcasting Corporation from broadcasting the mini-series and from publishing any information relating to the proposed broadcast.[347] The court granted the injunction, prohibiting the series from being aired anywhere in Canada. The court of appeal approved the injunction but limited its scope, and reversed the order banning any publicity relating to the series.[348]

The majority held that the publication ban could not be upheld.[349] Although it was intended to prevent 'a real and substantial risk to the fairness of the trial of the four respondents', the initial ban was too broad in its scope.[350] The majority found that the test for publication bans – whether there is a 'real and substantial risk of interference with the right to a fair trial' – does not did not sufficiently protect the right to free expression.[351]

The majority took into account the nature of the expression being limited by the ban[352] and whether the ban was necessary. The Court found that the ban was not necessary as there were reasonable alternative measures which would not have

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[344] *Toronto Star Newspapers Ltd.* supra at 758.
[345] *Toronto Star Newspapers Ltd.* supra at 763.
[346] *Dagenais v Canadian Broadcasting Corp.* [1994] 3 R.C.S at 836.
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] *Dagenais* supra at 840.
[351] *Dagenais* supra at 839.
[352] *Dagenais* supra at 880.

curtailed the right to free expression and would have effectively protected the right to a fair trial.[353]

The Court suggested that publication bans should be reformulated to take free expression into account, as these bans necessarily curtail free expression.[354]

The Court suggested that publication bans should be subject to a two-fold test: first, is the ban necessary to prevent a real and substantial risk to a fair trial because reasonable alternatives will be ineffective, and second: do the benefits of the ban outweigh the disadvantages of the ban to the right of free expression?[355]

The Court gave further protection to free expression by requiring that the party seeking a publication ban must show that the ban is a justifiable limitation on the right to free expression.[356] Further, they must show that the ban is necessary, that there are no other effective remedies, and that the ban is as limited as possible.[357] Finally, the judge is required to weigh the ban and its effect on free expression to determine if the ban is proportionate.[358]

c) Key takeaways

While Canadian legislation appears to provide for the strict confidentiality of the asylum process, it does allow certain exceptions to the rule. Section 166 of IRPA allows for the Refugee Protection Division to allow access to its proceedings on application. One of the factors it is required to take into account when allowing access is the public interest requirement, that is, ‘whether the societal interest in the proceeding being public is outweighed by the need to prevent disclosure for the fairness of the proceedings’.[359]

Principally, the Canadian asylum system mirrors the approach in domestic legislation, which requires that confidentiality should be maintained as a rule, save for certain exceptions.

The Canadian system appears to go further than the South African system in providing two additional factors as exceptions to the general rule. These are:

[353] Ibid.
[354] *Dagenais* supra at 839.
[355] Ibid.
[356] *Dagenais* supra at 840.
[357] Ibid.
[358] Ibid.
[359] Section 166(b)(ii) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.

whether there is a serious possibility of the life, liberty or security of a person being endangered if the proceedings are held in public,[360] and whether there is a real and substantial risk that matters involving public security will be disclosed.[361]

The South African system provides that these are factors to be considered when determining whether public access should be granted.[362] In the Canadian system, it appears that these are separate factors which weigh as heavily as the public interest factor. In practice, these are competing factors which would be weighed separately in the Canadian system. By contrast, in the South African context, these are factors which underlie whether the proceeding would be held in public.

The distinction is minor, but important: the Canadian system recognises public interest as an individual consideration which competes against two other equally important considerations. In South Africa, public interest and its relative importance is determined by the weight given to the underlying factors. That is to say, whether or not a matter is in the public interest appears to depend on the weight given to the factors the RAA must consider.

The Canadian refugee system recognises that a matter can be of public interest but could simply be outweighed by another consideration and therefore not made public.

This recognises that public interest is an important consideration which stands alone, apart from other considerations, and is not dependent on the determination of the importance of other considerations for its validity. In the domestic system, it would appear that the determination that the validity and importance of public interest is not recognised as an end in itself, but is dependent on the relative importance and validity of the countervailing considerations.

Although public interest appears to differ in meaning in Canada and South Africa, the Canadian approach would assist with the interpretation of section 21(5). As has been argued above, the current reading of section 21(5) creates an illogical system by tying public interest to the determination of unrelated factors.

[360] Section 166(b)(i) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[361] Section 166(b)(iii) of the Canada Immigration and Refugee Protection Act, SC 2001, c.27.
[362] Section 21(5)(b)(i)-(vi) of the South African Refugees Act, 130 of 1998.

The Canadian approach separates the issues into logical 'pockets' of information for analysis by setting public interest as a separate countervailing interest to the asylum seekers' interests. This approach also tends to accord public interest the due weight it deserves as a stand-alone consideration to be determined, and not simply determined in accordance with other considerations.

The *Budimcic* case illustrates that although certain information should be kept confidential, the matter could still be heard in public.[363] The court in this matter was able to recognise and protect the importance of public interest and access as well as the confidentiality of witnesses – an indication that discretion can be exercised by presiding officials with success. The case also shows that solutions requiring a compromise of the rights can (and should) be implemented. These solutions must protect the core of the rights but also attempt to limit the right only insofar as necessary to protect the competing right.

South Africa could import this approach into domestic law. The RAA and the courts should attempt to find solutions which would be the least intrusive to the exercise of a right, where possible. If we accept that both the rights to free expression and confidentiality are equally important, there should be a solution aimed to protect both rights. This approach may mean that both rights may be slightly infringed, but this outcome is preferred because one right is not completely infringed at the expense of the other.

The approach taken by the court in this matter harks back to the argument I made in Chapter 3 in the critique of the *Chipu* case – where possible, a compromise between the competing rights should be struck. Where the compromise can protect the core of the rights with as little intrusion as possible into either right, this should be the preferred approach.

Edmonton Journal acknowledges the importance of the exercise of free expression as it holds public institutions accountable and is key for the functioning of a democratic society.[364]

Following this reasoning, it is critical for the functioning of the RAA that it be held to account for its decisions given that it is a public institution exercising

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[363] *Budimcic* supra at para 9 of Appendix 1.
[364] *Edmonton Journal* supra at 1336.

public power. This harks back to the argument I posited in Chapter 3 regarding the need for institutions exercising public power to be open, transparent and accountable.[365]

It is also important for the RAA to make decisions which make as little inroad into the right of free expression as is necessary to achieve its ends. When interpreting the relevant section and considering applications for access, the RAA should be guided by the general principle of proportionality, particularly in instances where the right to free expression will be severely limited.

The judgment serves as a reminder of the importance of the right to free expression, and that it is vital for the purposes of accountability and democracy. This case mirrors South African law on the issue[366], and buoys the argument I made Chapter 2 - participatory democracy and accountable and transparent governance are all valuable outcomes which justify the protection of the right to free expression.[367]

The *Toronto Star* case is an illustration of the importance of the right to confidentiality and a restatement that the right to free expression can be justifiably limited where necessary.[368]

The view I take is in line with the minority judgment. The minority judgment notes the issue with a *mandatory* ban versus a *discretionary* ban – the time period during which the ban operates could be extensive.[369] This would seem to fly in the face of accountability of judicial systems and processes, as information would not be released when it is of greatest concern to the public.[370]

The very purpose of the principle of open justice and transparency is to engender free and frank debate, promoting impartiality and guarding against improbity.[371] Further, as I argued in Chapter 3, open justice engenders public debate and

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[365] See the discussion in Chapter 3 under point (iv)(b)(i) and point (iv)(b)(ii).
[366] See the discussion in Chapter 3 under point (iv)(b)(ii).
[367] See the discussion under point (i)(b) in Chapter 2.
[368] *Toronto Star* supra at 723.
[369] *Toronto Star* supra at 726.
[370] *Toronto Star* supra at 763.
[371] High Court *Chipu* at para 11, quoting *Mamabolo* supra at paras 28-29 and *Scott* supra at 447.

allows matters to become part of the public discourse. It is instrumental to upholding the principles of a constitutional democracy.[372]

It should follow that for there to be frank debate on issues and for there to be accountability, the underlying information should be provided in a timely manner. There would be little point in the public becoming appraised of a matter, for example, ten years after its inception. This would not lead to fruitful debate on current issues, nor would institutions be held to account for their decisions in a timely and meaningful manner. This would fly in the face of the principles of participatory democracy, openness and transparency.

While I advocate for the approach taken by the minority judgment, there may be value in the imposition of a temporary or partial ban on access or reporting on RAA hearings. If necessary, a partial or time-sensitive ban on RAA proceedings may be imposed where this would lead to the least inroad into either right. If the right to free expression must be limited in a certain situation, it should be limited as little as possible for as short a time as possible.

This may be an approach which the RAA could adopt – the release of certain information at the expiration of a reasonable time period. It may be a less invasive solution to allow delayed 'access' whilst still protecting the right to confidentiality. This may raise issues of timeliness, however, as noted in the minority judgment, which is a valid concern.

The case of *Dagenais* showed that bans can be justifiably limited in their scope where the ban fails to sufficiently protect the right to free expression. This case is an interesting foil to the decision of the majority in the *Toronto Star* case, which held that publication bans are a justifiable limitation on the right to free expression.[373]

Dagenais also illustrates that where reasonable alternative measures are available which would effectively protect the competing right of a fair trial without curtailing the right to free expression, this should to be preferred.[374] This harks

[372] See the discussion in Chapter 3 under point (iv)(b)(ii).
[373] *Toronto Star* supra at 723.
[374] *Dagenais* supra at 880.

back to the views I posited in Chapters 2[375] and 3[376] – the preferred outcome should be that the one which causes the least inroad into either right.

The court also formulated a test for whether a ban on access should be imposed – whether the ban is necessary because alternatives will be ineffective, and whether the benefits of the ban outweigh its disadvantages.[377] This is a well-formulated test which the RAA may consider applying when determining whether to ban access to its proceedings.

(v) *Conclusion*

Although the asylum-seeking systems in New Zealand and Canada differ from the South African approach, it is clear that both systems can assist in the interpretation of the amended section 21(5) of the Refugees Act.

Both New Zealand and Canada have considered public access to 'RAA-like' bodies' hearings based on public interest and their judgments consider both sides of the issue – access and denial. Although these judgments and statutes are not binding as they are foreign law, it is still useful to have regard to decisions from jurisdictions which have dealt with similar issues.

It was aptly put by Chaskalson P in *S v Makwanyane*: 'we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it'.[378]

The RAA and the courts would benefit from similar bodies which have grappled with similar issues when interpreting and applying section 21(5) of the Refugees Act.

[375] See the discussion under (i)(b) and (iii) on the limitation causing the least inroad.
[376] See the discussion under point (ii) and (iii) on compromised solutions.
[377] *Dagenais* supra at 839.
[378] *S v Makwanyane and Another* [1995] ZACC 3 at para 39.

V. Conclusion

(i) *Introduction*

The rights of free expression and confidentiality are diametrically opposed – one seeks to expose information, the other to keep information private. Each right has sound reasoning underpinning it and each right is backed by weighty jurisprudential argument stating its importance. Even though each right is equally important, in the event of a clash between the two, it is inevitable that the exercise and full scope of one right would be compromised.

When these rights compete in the context of refugee law, the fact that they are diametrically opposed is more pronounced. Confidentiality has the effect of chilling free expression for the purpose of protecting the asylum system and the asylum seeker. The right to free expression has the effect of exposing information about the asylum system, the asylum seeker and the RAA for the purposes of (among others) openness, transparency and accountability and aiding public debate in a democracy.[379]

The stakes for asylum seekers and their families and associates are high where the confidentiality of their application is not maintained. Similarly, the stakes for the media and society are high when the entire asylum adjudication process is cloaked in secrecy and confidentiality. It is therefore necessary to strike a delicate balance between the two competing rights, particularly in the context of refugee law.

The purpose of this thesis was to assist with the RAA's exercise of discretion in determining which right should be favoured in the event of a clash between the opposing rights in the refugee context. More specifically, this thesis sought to formulate an understanding the importance of free expression in the context of asylum proceedings.

[379] See the discussion on these issues in Chapter 2 under point (i)(b) and Chapter 3 (iv)(b)(i) and (ii).

(ii) *On the jurisprudence of the rights*

The jurisprudential underpinnings of the rights were canvassed earlier[380] to determine why they are protected, and how to give effect to and better protect these rights.

The right to free expression is a right which has value both intrinsically and instrumentally.

The instrumentality argument is important in this context – particularly given the facts of the *Chipu* case. Academics like Emerson, Dworkin, Stone and Mill have commented on the importance of free expression as instrumental to the purposes of, among others, democracy; self-fulfilment and an informed citizenry.[381] The media is a key feature in the realisation and fulfilment of each of these ends – it allows a free flow of information and a provides access thereto for millions of people.[382]

Aside from the argument that the right to free expression is an instrumental right, in which the media is a key player by allowing for those rights to be realised, there is also the argument that media freedom is intrinsically important. Several Constitutional Court judgments highlight the importance of the media in upholding and protecting the right to free expression.[383] These judgments speak to the importance of the media as a 'watchdog' and as agents who ensure an open, responsive and accountable government.[384]

The right to confidentiality for asylum seekers is integral to their safety. It is important to create an environment for asylum seekers where they are assured that the information they share will be treated as confidential and with respect. In the spirit of UNHCR opinions and the Refugee Convention, the right of confidentiality is central to asylum-seeking processes.

Protecting the right to confidentiality means that the integrity of the asylum process is maintained, and allows for the full ventilation of information by the asylum seeker, as well as protecting the asylum seeker, his or her family and

[380] See Chapter 2 under point (i) and (ii).
[381] See this discussion in Chapter 2 under point (i).
[382] See the discussion in Chapter 2 under point (i)(c).
[383] See the discussion in Chapter 2 under point (i)(d).
[384] Ibid.

associates. Taking into account the nature of the risks inherent in the asylum-seeking process for the asylum seeker and his or her family and associates, as well as the importance of maintaining the integrity of the system, it is clear that media access to RAA hearings may, if not properly managed, cause harm to the people involved.

(iii) *On the balancing of the opposing rights*

The media has sometimes come under criticism for its portrayal of events and people, and there are sometimes accusations of 'trials by media', where bias is shown toward certain people and versions of events. With the advent of greater connectivity in an age of technological advances, more media sources and greater access to those sources by more people than before, there is a heavy burden on the media to report content in a manner which is sensitive to, and does not violate, others' rights.

Media coverage and reports must be well managed and should be sensitive to the needs of the asylum system and asylum seekers. While it is crucial that free expression is protected and exercised, the right to free expression cannot simply be exercised in an unfettered manner. The risks for the asylum system and asylum seekers, their family and associates if information is reported incorrectly or if highly sensitive material is reported are too high to justify an unlimited exercise of the right to free expression.

The limitation of public interest provided for in the amended section 21(5) of the Refugees Act is a good guide for the media and the RAA to decide whether to allow media access to RAA hearings. The considerations in section 21(5)(b) are enquiries to determine whether a matter should be reported and whether, if access is granted to the media, certain information should be redacted, anonymised or not disclosed for the protection of the asylum seeker and the integrity of the system.

It is argued that the test of whether a matter is in the public interest must be separated from the enquiries in section 21(5)(b). This distinction may mean that where a matter is determined to be in the public interest, but the asylum seeker has a great interest in retaining confidentiality, then the RAA should not allow

the existence of this sole factor to militate against allowing the access to its proceedings.

A matter can be in the public interest but may not be reported because of the weight given to the factors in section 21(5)(b). Similarly, a matter may not be in the public interest at all but can meet the factors in section 21(5)(b). I accept for the purposes of this argument that where a matter is not in the public interest, access will not be granted by virtue of the operation of the public interest limitation, which is the ultimate consideration.

The purpose of the above contrast is to show that the enquiry into whether a matter is in the public interest is not necessarily linked to the enquiries in section 21(5)(b)[385]. The enquiry into whether something is in the public interest cannot hinge on the factors listed in that section. Public interest is a consideration which has its own jurisprudence and its own countervailing jurisprudential considerations.

It would make little sense to determine that a matter is not in the public interest simply because the asylum seeker has an interest in retaining confidentiality, for example. This would not render the matter *not* to be of public interest, but may count against granting media access. Further, this narrow interpretation would unnecessarily limit the right to free expression.

Whilst it is true that the right to free expression cannot be fully realised in this context, it also should not be that the right to free expression should always necessarily be the right which is compromised. As argued above, the right to free expression cannot sometimes be fully realised in the refugee context because of the sensitivity required and the magnitude of the risks to the asylum seeker and the asylum system which may exist.

In determining whether to allow the media access to its proceedings, the RAA should first consider whether the matter is in the public interest. In determining this, the RAA could consider the public interest factors discussed in Chapter 3 of this thesis.

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[385] Section 21(5)(b)(i) of the Refugees Act, 130 of 1998 (as amended).

These considerations included international criminal law and the need for transparency in the asylum process.[386] Section 4(1)(a) of the Refugees Act excludes those believed to have committed crimes under international criminal law from obtaining refugee status.[387] This protects against abuse of the asylum system and ensures that those who have, or who are believed to have, committed grave crimes are not protected by the asylum system.[388]

Allowing access into RAA proceedings would allow a light to be shone into RAA processes to determine whether this principle is being upheld. Further, it is of great concern that the public are made aware of those who are seeking access to the country.

Another public interest factor to be considered are the principles of open justice and participatory democracy.[389] The aim of these principles is to promote the accountability of courts, transparency and impartiality.[390] These principles serve to ensure free and frank debate that is robust and informed. The RAA, as a quasi-judicial body, should invite public scrutiny for these purposes.

Once the RAA has determined that something is in the public interest, it should then consider whether access should be granted to its proceedings in light of the factors of section 21(5)(b)(i)-(vi).[391] Where a number of the factors are present, or there are weighty considerations in relation to one or more of them, access should be denied. Where the public interest considerations outweigh those factors, access should be granted.

However, where it is possible to accommodate both the right to free expression and the right to confidentiality, this should be preferred. Even though a compromise would mean that neither right would be fully protected or exercised,

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[386] See the discussion under point (iv)(b)(i) of Chapter 3.
[387] Ibid.
[388] Ibid.
[389] See the discussion under point (iv)(b)(ii) of Chapter 3.
[390] Ibid.
[391] For ease of reference, these are: (i) the interests of the asylum seeker in retaining confidentiality; (ii) the need to protect the integrity of the asylum process; (iii) the need to protect the identity and dignity of the asylum seeker; (iv) whether the information is already in the public domain; (v) the likely impact of the disclosure on the fairness of the proceedings and the rights of the asylum seeker; and (vi) whether allowing any person or the media access to its proceedings or allowing the media to report thereon would pose a credible risk to the life or safety of the asylum seeker or of his or her family, friends or associates.

it would be the preferred solution as it would lead to the least inroad into the other right.

(iv) *On lessons from foreign law*

Chapter 4 of this thesis provided an analysis of foreign law decisions in New Zealand and Canada on the right to free expression in the context of refugee law and how 'RAA-equivalent' bodies in those jurisdictions exercised their discretion to allow or deny media access.

Foreign law has shown that compromises can be used successfully – that is, the manner of access and coverage and information reported can be limited to allow for protection of the asylum seeker and the asylum process.[392]

The New Zealand asylum-seeking system is geared more toward the protection of the right to confidentiality than the right to free expression.[393] However, the system allows for the publication of Tribunal decisions where this would be in the public interest.[394] The decisions also recognised the importance of sharing information relating to the asylum seeker's alleged international criminal law offences for the purposes of preventing abuse of the asylum system.[395]

The decisions also spoke to the principles of openness and transparency and showed that RAA-like bodies are empowered to impose limits on the disclosure of information, even to other government officials.[396] This may aid in our interpretation of the powers of the RAA, which would be empowered to impose limits on the information it releases or allows access to.

Finally, its decisions showed that the focus should not be on the strict protection of information by the refugee authority, but rather on what protection can be offered in the event of disclosure to protect the claimant's safety.[397] The RAA should rather focus on the measures it can take to protect the core of an asylum claim – the safety of the claimant.

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[392] See the discussion under points (i)(c) and (ii)(c) of Chapter 4, which extracts the lessons from New Zealand and Canada respectively.
[393] See this discussion under point (i)(a) of Chapter 4.
[394] Section 151(4)(b) of the New Zealand Immigration Act, Act 51 of 2009.
[395] *Attorney-General* supra, discussed in Chapter 4 under point (i).
[396] *K (High Court)* supra and *K (Court of Appeal)* supra, discussed in Chapter 4 under point (i).
[397] *K (Court of Appeal)* supra, discussed in Chapter 4 under point (i).

The Canadian system appears to mirror the South African system – it does, however, appear to go further than the domestic asylum system in its protection of the right to free expression.[398] The rules provide that the asylum seeker must take a view on the issue of access and motivate as to whether a hearing should be public or private.[399] While this seeks to protect the asylum seeker, it is also important that the asylum seeker is required to motivate as to whether his or her hearing should be public or private.

Further, the Canadian system recognises public interest as a separate consideration which competes against two other equally important considerations.[400] Domestically, public interest and its relative importance is seemingly determined by the weight given to the underlying factors.

The Canadian decisions show that it is possible to retain the confidentiality of key figures, but still allow the hearing to be conducted in public.[401] The existence of a competing factor to public interest does not necessarily render public access impossible, and compromises can be implemented. The decisions also recognise the importance of holding public institutions accountable for the purposes of democracy and transparency.[402]

The approach adopted in certain decisions also showed that the RAA may allow for delayed access.[403] Although this is not the ideal position, it is less invasive than denying access.[404] This may raise issues of information being obtained and disseminated in a timely manner, but this may be a solution to ensure that time-sensitive and other confidential material could be released in a way that protects the asylum seeker but still allows access to a certain extent.

The decisions also reiterated the importance of proportionality and reasonableness.[405] Bodies exercising a public power, like the RAA, should be guided by these fundamental principles of decision-making. A court also

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[398] See this discussion under point (ii)(a) of Chapter 4.
[399] Rule 42(4)(c) and (d) of the Canada Refugee Appeal Division Rules, SOR/2012-257, discussed under point (ii)(a) of Chapter 4.
[400] See the discussion on this under point (ii)(c) of Chapter 4.
[401] *Budimcic* supra, discussed under point (ii)(c) of Chapter 4.
[402] *Toronto Star* supra, discussed under point (ii)(c) of Chapter 4.
[403] *Toronto Star* supra, discussed under point (ii)(c) of Chapter 4.
[404] *Toronto Star* supra, discussed under point (ii)(c) of Chapter 4.
[405] *Dagenais* supra, discussed under point (ii)(c) of Chapter 4.

formulated a test for whether a ban on access should be imposed – first, is the ban necessary to prevent a real and substantial risk to a fair trial because reasonable alternatives will be ineffective, and second: do the benefits of the ban outweigh the disadvantages of the ban to the right of free expression?[406]

This is a well-formulated test which the RAA may consider applying when determining whether to deny (that is, ban) access to its proceedings.

(v) *Final thoughts*

Though carefully crafted, the *Chipu* judgment and the amended section 21(5) provide for an unprecedented power for the RAA to exercise. It also provides a new portal of access for the press and a concomitant duty to report with sensitivity.

The purpose of this research was to understand the underpinnings of the rights to free expression and confidentiality; to analyse how they have been dealt with in the *Chipu* judgments; and to learn from decisions made by bodies similar to the RAA in New Zealand and Canada.

This research has shown that there are no clear-cut answers or arguments which support that one right should *always* be preferred over the other. The rights must be balanced, and the RAA should take into account the extensive and detailed arguments underlying the rights; the manner in which the rights were treated by the High Court and the Constitutional Court; and foreign law on the issue.

Above all, the RAA must carefully consider applications for access in light of the above considerations – solutions which prefer a compromise of the two rights should be preferred, where possible.

Despite the relative dearth of domestic academic opinion and case law on the right to free expression in the context of asylum-seeking, there is sufficient guidance for the RAA to exercise its discretion if it has regard to the wealth of knowledge on the individual rights and if it looks to foreign law for guidance where there are lacunae.

In sum, this aspect of domestic jurisprudence requires clarity, which will necessarily develop through the testing of the right in the context of refugee law.

[406] *Dagenais* supra at 839, discussed under point (ii)(c) of Chapter 4.

Until this area of law is further developed, there is sufficient available guidance to enable the RAA to reach an informed decision when exercising its discretion to allow the media access to its proceedings.

It is hoped that this research has aided in forming a cohesive understanding of the right to free expression in the context of refugee law.

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