



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 217/16

In the matter between:

**DOBROSAV GAVRIĆ**

Applicant

and

**REFUGEE STATUS DETERMINATION  
OFFICER, CAPE TOWN**

First Respondent

**MINISTER OF HOME AFFAIRS**

Second Respondent

**DIRECTOR-GENERAL OF DEPARTMENT  
OF HOME AFFAIRS**

Third Respondent

**MINISTER OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT**

Fourth Respondent

**DIRECTOR-GENERAL OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT**

Fifth Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS,  
WESTERN CAPE**

Sixth Respondent

and

**PEOPLE AGAINST SUPPRESSION, SUFFERING,  
OPPRESSION AND POVERTY**

Amicus Curiae

**Neutral citation:** *Gavrić v Refugee Status Determination Officer, Cape Town and Others* [2018] ZACC 38

**Coram:** Mogoeng CJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J

**Judgments:** Theron J (majority): [1] to [121]  
Jafta J (minority): [122] to [163]

**Heard on:** 6 February 2018

**Decided on:** 28 September 2018

**Summary:** Section 4 of the Refugees Act— Exclusion — Internal remedies  
— Unfounded application

Section 4(1)(b) of the Refugees Act — Non-political crime —  
Criteria

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## ORDER

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On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the High Court, Western Cape Division, Cape Town, is set aside.
3. The decision of the first respondent, Ms Nompakamiso C. Xesha is set aside.
4. It is declared that the applicant, Mr Dobrosav Gavrić, is excluded from refugee status in terms of section 4(1)(b) of the Refugees Act 130 of 1998.
5. There is no order as to costs.

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## JUDGMENT

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THERON J (Mogoeng CJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J and Petse AJ concurring):

### *Introduction*

[1] This application raises important and novel questions about the ambit of the protection that South African law offers to foreigners under the Refugees Act<sup>1</sup> (the Act) and the Constitution.

[2] This matter concerns a review to set aside the first respondent's refusal to grant the applicant refugee status as well as a constitutional challenge to section 4(1)(b)<sup>2</sup> of the Act which excludes persons convicted of certain non-political crimes from being eligible for refugee status.

### *Background*

[3] The applicant is Mr Dobrosav Gavrić, a Serbian national who is seeking refugee status in South Africa. The first respondent is the Refugee Status Determination Officer, Cape Town (RSDO), who refused the applicant's application for refugee status. While all six respondents filed a notice of intention to oppose and submissions, only the RSDO and the second and third respondents, the Minister of Home Affairs and the Director-General of the Department of Home Affairs, collectively filed an answering affidavit. The amicus curiae (friend of the court) is People Against Suppression, Suffering, Oppression and Poverty (PASSOP), a community-based non-profit organisation which aims to protect and promote the rights of refugees, asylum seekers and immigrants in South Africa.

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<sup>1</sup> 130 of 1998.

<sup>2</sup> Section 4(1)(b) of the Act provides that a person does not qualify for refugee status if there is reason to believe that she has committed a crime which is not of a political nature and which, if committed in South Africa, would be punishable by imprisonment.

[4] The applicant lived in Serbia until 2007, where he worked for the Serbian Police Force. During the 1990's, the former Republic of Yugoslavia disintegrated due to ethnic conflict which led to warfare and violence in Serbia – at the time, a territory controlled by the former Republic of Yugoslavia. The driving force behind the violent conflicts in Serbia was the then-President Mr Slobodan Milošević.

[5] During the wars Mr Milošević used a paramilitary unit, Arkan's Tigers, to carry out ethnic cleansing operations. The unit was led by Mr Zeljo Ražnatović, commonly known as Arkan. After the wars ended, organised crime and the Milošević government were closely aligned. Arkan became both a powerful politician and a feared underworld figure.

[6] On 15 January 2000, Arkan and his two bodyguards were assassinated in a hotel in Belgrade, Serbia. The applicant was present at the hotel when the assassination occurred and was seriously injured in the cross-fire.

[7] The applicant was charged with the murder of Arkan and his two bodyguards. He was detained for three years in a Serbian prison while awaiting trial. During this time, the wing of the prison where the applicant was kept was cleared of all other prisoners to protect him from other inmates. After three years, the applicant was released from prison and awaited his trial at home.

[8] The applicant was convicted for the murders of Arkan and his two bodyguards on 9 October 2008 *in absentia* (in his absence). He was initially sentenced to a term of 30 years' imprisonment but this was later altered on appeal to 35 years' imprisonment by the Serbian Supreme Court. In 2012, the applicant lodged an appeal against his sentence in the European Court of Human Rights. He sought to challenge his sentence under Article 7 of the ECHR Convention.<sup>3</sup> This article

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<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (ECHR Convention). Article 7 of the ECHR Convention reads:

prohibits retrospectivity in criminal matters. At the request of this Court, the Registrar of the European Court of Human Rights indicated that the applicant’s appeal was declared inadmissible on 6 February 2014.

[9] The applicant entered South Africa in 2007 under a false name and passport. His real identity came to light when he became a victim and witness in a shooting incident in 2011. He was subsequently arrested and charged with possession of illegal substances (drugs) and fraud relating to having obtained official documents (driver’s licence, passport and firearm licence) under his false name. The applicant was detained on 27 December 2011. The Serbian Ministry of Justice dispatched a request for his extradition on 29 December 2011. The applicant is currently detained at Helderstroom Correctional Facility in the Western Cape pending the finalisation of the criminal charges, extradition proceedings and this case.

[10] On 30 January 2012, the applicant applied to the RSDO for refugee protection (asylum) under section 3 of the Act<sup>4</sup> on the grounds that he had a well-founded fear of being killed by Arkan’s supporters. This application was rejected on 14 February 2012. On 18 April 2012, the Standing Committee on Refugee Affairs (Standing Committee) set aside the decision of the RSDO and the application was remitted to the RSDO to re-interview the applicant.

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- “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
  2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

<sup>4</sup> Section 3 reads:

“Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country.”

[11] On 19 November 2012, the RSDO concluded that the applicant's asylum application was excluded in terms of section 4(1)(b) of the Act on the grounds that he had committed serious non-political crimes (the decision). In 2013, the applicant instituted proceedings in the High Court, which sought to review and set aside the decision, declare the applicant to be a refugee and declare section 4(1)(b) of the Act constitutionally invalid. In addition, the applicant sought a declaratory order prohibiting the respondents from extraditing, deporting or otherwise returning him to Serbia.

[12] The High Court dismissed the application with costs<sup>5</sup> and an application for leave to appeal to the Full Bench of the High Court was unsuccessful. The Supreme Court of Appeal refused leave to appeal. Leave to appeal is now sought from this Court.

[13] The issues in this matter are whether—

- (a) leave to appeal and condonation should be granted;
- (b) section 4(1)(b) of the Act should be declared inconsistent with the Constitution and invalid;
- (c) a decision that the applicant qualifies for asylum under section 3 of the Act must be made with or before a decision to exclude the applicant under section 4(1);
- (d) the decision of the RSDO is subject to an internal review;
- (e) the decision of the RSDO ought to be reviewed and set aside; and
- (f) the applicant should be declared a refugee.

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<sup>5</sup> *Gavric v Refugee Status Determination Officer, Cape Town* [2016] ZAWCHC 36; [2016] 2 All SA 777 (WCC) (High Court judgment).

*Jurisdiction and leave to appeal*

[14] This matter engages the jurisdiction of this Court as it involves a constitutional challenge to section 4(1)(b) of the Act. Beyond this, it raises arguable points of law of general public importance, such as the definition of a political crime, the proper interpretation and application of the “exclusion clause”, whether an internal appeal process is available to an excluded person under the Act, as well as what the rights are of an excluded person who may be persecuted upon returning to her country of origin. These are issues of great importance to asylum seekers and refugees, and impact their right to fair administrative action. Though not definitive, there are also reasonable prospects of success. It is in the interests of justice that leave to appeal be granted.

*Condonation*

[15] The applicant filed his application for leave to appeal one court day late due to a mistake by his attorney concerning the date of the Supreme Court of Appeal order. The respondents filed their submissions on 30 October 2017 instead of 27 October 2017. In both instances the delay was not excessive and it is in the interests of justice to grant condonation. Condonation is granted.

*Merits**The scheme of the Refugees Act*

[16] The legal framework under which the applicant’s application for asylum falls to be considered includes the provisions of the Refugees Act, the Extradition Act,<sup>6</sup> the Constitution and relevant international instruments.<sup>7</sup> The preamble to the Act

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<sup>6</sup> 67 of 1962.

<sup>7</sup> Chapter 14 of the Constitution, read together with the purpose of and the preamble to the Act, enjoins the South African government to have regard to the relevant international and continental instruments to which South Africa is a signatory. These include the Convention Relating to the Status of Refugees, 28 July 1951 (1951 Convention), the Protocol Relating to the Status of Refugees, 4 October 1967 (1967 Protocol) and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 (OAU Convention).

provides that effect must be given to the “relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; and to provide for matters connected therewith”. Consonant with the preamble, the Act establishes a framework for the consideration and determination of applications for asylum, the conferral of refugee status and for internal reviews and appeals.

[17] Section 2 of the Act contains a general prohibition against the return of a person to any country where her life, physical safety or freedom will be threatened.<sup>8</sup> Section 3 (the inclusion clause) provides – subject to an application for asylum being made under section 21 of the Act—

“A person qualifies for refugee status for the purposes of this Act if that person—

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

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<sup>8</sup> Section 2(a) reads:

“Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group”.



- (c) is a dependant of a person contemplated in paragraphs (a) or (b).”

[18] Section 4 contains what is known as the exclusion clause, namely the grounds disqualifying a person from being awarded refugee status. It reads:

- “(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—
- (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
  - (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or
  - (c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the [African Union]; or
  - (d) enjoys the protection of any other country in which he or she has taken residence.
- (2) For the purposes of subsection (1)(c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the [African Union].”

[19] In terms of section 24(3), the RSDO—

- “must at the conclusion of the hearing (for asylum)—
- (a) grant asylum; or
  - (b) reject the application as manifestly unfounded, abusive or fraudulent;  
or
  - (c) reject the application as unfounded; or
  - (d) refer any question of law to the Standing Committee.”

*Constitutional challenge to section 4(1)(b)*

[20] The applicant initially contended that section 4(1)(b) of the Refugees Act is inconsistent with the Constitution and violates the rights to, inter alia, life, dignity, equality and security of the person. Although the parties agreed, in the end, that the challenge to the constitutionality of section 4(1)(b) must fail, it is incumbent on this Court to nevertheless deal with this argument in order to provide clarity as it impacts numerous asylum seekers and refugees. In addition, the relationship between section 4(1)(b) and section 2 may impact the applicant should extradition proceedings commence following this decision.

[21] According to the applicant, the alleged inconsistency of section 4(1)(b) with the Constitution stems from two defects. Firstly, section 4(1)(b) results in unconstitutional consequences. He argues that the purpose of section 4(1)(b) is clear: it denies a person refugee status based on the crimes that she is believed to have committed. The potential consequence of this is that a person who has “a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group”, or who “owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere” might be compelled to leave South Africa and return to his or her home country to face treatment that may be horrific and inhumane.

[22] Secondly, the applicant submits that section 4(1)(b) is constitutionally invalid in that it gives the RSDO an overbroad, vague and unguided discretion to make decisions that affect constitutional rights – in terms of this discretion RSDOs determine which persons will be allowed to seek refugee status and which persons will be excluded. This second leg was based on the notion that the exercise of this discretion, unlike other decisions made by RSDOs, is not capable of being

appealed or reviewed to a higher body in terms of the Act. The findings of this Court discussed below in respect of the internal review or appeal process means that this ground has fallen away and so I deal only with the first ground.

[23] The key international and regional conventions governing refugee law are those referred to in the preamble to the Act.<sup>9</sup> To ensure that persons guilty of heinous acts and serious common crimes do not abuse the institution of asylum in order to avoid being held legally accountable for their acts, international instruments specifically embrace exclusion clauses such as section 4(1) of the Act.<sup>10</sup> In very similar terms, these instruments define, on the one hand, persons who qualify as refugees,<sup>11</sup> the rights and the responsibilities of states when considering the grant of asylum, and, on the other hand, persons who do not qualify as refugees.<sup>12</sup>

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<sup>9</sup> See above n 7.

<sup>10</sup> Annex I, Part II of the Constitution of the International Refugee Organisation, 15 December 1946, explicitly lists persons who will not be the concern of the International Refugee Organization. This includes war criminals, quislings and traitors as well as any other persons who could be shown to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations. This further includes ordinary criminals who were extraditable by treaty. See also paragraph 7(d) of the Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950 which reads:

“Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person: In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.”

<sup>11</sup> Article 1A(2) of the 1951 Convention above n 7, provides that a person is to be considered a refugee if—

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

<sup>12</sup> Article 1F(b) of the 1951 Convention above n 7. which provides:

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

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purpose and principles of the United Nations.”

[24] Sections 3 and 4(1) of the Act are the principal provisions reflecting the inclusionary and exclusionary requirements mandated by international law. Section 3 defines persons eligible for refugee status. South Africa's exclusion clause is contained in section 4(1) of the Act and is drawn almost exclusively from article 1F(b)<sup>13</sup> of the 1951 Convention. Exclusion assessments are mandatory under international law and under the Act.<sup>14</sup> The need to determine whether a person falls under any exclusion clause is not optional. It is an integral part of the refugee determination process. The rationale behind the exclusion clause is two-fold: it protects refugee status from being abused by those who are undeserving; and it ensures that those who have committed serious crimes do not escape prosecution.<sup>15</sup>

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<sup>13</sup> Id.

<sup>14</sup> In terms of section 4(1) of the Act, a person “does not qualify” as a refugee if the exclusionary circumstances are present.

<sup>15</sup> 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 (Guideline 5) states at para 2:

“The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied ‘scrupulously’ to protect the integrity of the institution of asylum, as is recognised by UNHCR’s Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.”

See also Khan and Schreier, *Refugee Law in South Africa* (Juta & Co, Cape Town 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* (Cambridge University Press, Cambridge 2003) at 427-8:

“Reference to the travaux préparatoires shows that the exclusion clauses sought to achieve two aims. The first recognizes that refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. Due to serious transgressions committed prior to entry, the applicant is not deserving of protection as a refugee – there is an intrinsic link ‘between ideas of humanity, equity and the concept of refuge’. The second aim of the drafters was to ensure that those who had committed grave crimes in the Second World War or other serious non-political crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations, did not escape prosecution.”

[25] It is through these provisions, amongst others, that refugee law and the objectives of international criminal law and other sovereign states' domestic criminal law intersect. The exclusionary provisions serve to ensure that the grant of refugee status is not afforded to individuals who are not deserving thereof. 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.

[26] It is trite that under the Constitution, human rights cannot be denied to any person, regardless of the crimes they have committed.<sup>16</sup> This principle was affirmed by this Court in *Mohamed*.<sup>17</sup> Section 4(1)(b) does not in any way challenge or negatively impact on the right to life,<sup>18</sup> or the right to freedom and security of the person.<sup>19</sup> This is so because of the principle of *non-refoulement*<sup>20</sup> which is embodied in section 2 of the Act.<sup>21</sup>

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<sup>16</sup> *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) at 330B:

“Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights.”

See also *Jeebhai v Minister of Home Affairs* [2009] ZASCA 35; 2009 (5) SA 54 (SCA) at paras 21-2.

<sup>17</sup> *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) at paras 37-9. See also *S v Makwanyane* 1995 (3) SA 391 (CC) at paras 229-30:

“That is why, during argument, a tentative proposition was made that a person who has killed another has forfeited the right to life. Although the precise implications of this suggestion were not thoroughly canvassed, this cannot be so. The test of our commitment to a culture of rights lies in our ability to respect the rights not only of the weakest but also of the worst among us. A person does not become ‘fair game’ to be killed at the behest of the State because he has killed.

The protection afforded by the Constitution is applicable to every person. That includes the weak, the poor and the vulnerable. It includes others as well who might appear not to need special protection; it includes criminals and all those who have placed themselves on the wrong side of the law. The Constitution guarantees them their right, as persons, to life, to dignity and to protection against torture or cruel, inhuman or degrading punishment or treatment.”

<sup>18</sup> Section 11 of the Constitution.

<sup>19</sup> Section 12 of the Constitution.

<sup>20</sup> The UNHCR Executive Committee's Conclusion No. 82 (XLVIII), 1997, in relevant part, reads—

[27] The principle of *non-refoulement* has been endorsed and given effect to by this Court.<sup>22</sup> No person will be returned to her country of origin or nationality even in circumstances where there is an application for her extradition, where there is a real risk that such person will be exposed to the imposition of the death penalty or be treated or punished in a cruel, inhuman or degrading way or in any way be tortured.<sup>23</sup>

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“(d) *Reiterates*, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects:

- (i) the principle of *non-refoulement*, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.”

<sup>21</sup> Section 2 reads—

“Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.”

<sup>22</sup> *Mohamed* above n 17 at paras 55-9; *Minister of Home Affairs v Tsebe* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (*Tsebe*). In *Tsebe* it was stated at paras 67-8:

“We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the imposition and execution of the death penalty upon him. . . . If we as a society or the state hand somebody over to another state where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone. . . . [This Court] will not be party to the killing of any human being as a punishment – no matter who they are and no matter what they are alleged to have done.”

<sup>23</sup> *Tsebe* above n 22 at paras 67-8.

[28] While *Mohamed* and *Tsebe* dealt with the risk to life following the expulsion of a person to a retentionist country (one where capital punishment is permissible), the principle enunciated in both these cases involved the protection of a person's broader basic human rights. In *Tsebe* this Court restated the conclusion reached in *Mohamed* to the effect that the State, or any official in the employ of the state, does not have the power to extradite or deport or in any way remove a person from South Africa to a retentionist state, who, to its knowledge, if deported or extradited to such a state, will face the real risk of the imposition and execution of the death penalty.<sup>24</sup> This Court also confirmed that there are no exceptions to the right to life, the right to human dignity and the right not to be subjected to treatment or punishment that is cruel, inhuman or degrading.<sup>25</sup>

[29] Guideline 5 provides that an excluded person may still be protected against return to a country where she is at risk of ill-treatment by virtue of other international instruments.<sup>26</sup> For example, the 1984 Convention prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture.<sup>27</sup>

[30] In the event that the exclusion decision of the RSDO is confirmed, the question whether there is a real risk of the applicant being killed or persecuted if he were to be returned to Serbia, is one which the Executive will be compelled to determine when it considers Serbia's application for his extradition.<sup>28</sup> At that stage, the

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<sup>24</sup> Id at para 43.

<sup>25</sup> Id at para 50.

<sup>26</sup> Guideline 5 above n 15 at para 9.

<sup>27</sup> Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, UN Doc A39/46 (1984), 10 December 1984 (1984 Convention).

<sup>28</sup> Guideline 5 above n 15 at para 8:

“Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded

applicant may avail himself of the right to oppose his extradition to Serbia on account of there being a real risk that he might be killed should he be returned to Serbia.

[31] In conclusion, section 4(1)(b) must be read together with section 2 of the Act. Section 2 creates the constitutionally saving stop-gap measure for the possible constitutional defect of sending non-political offenders back to their country where there is a real risk of persecution.

*Is an exclusion decision contingent upon a decision under section 3?*

[32] The interplay between sections 3 and 4 of the Act was among the issues that arose in this matter. On 1 February 2017, the Chief Justice issued directions that the parties file submissions on whether the application of section 4(1)(b) of the Act was contingent upon an RSDO first making a determination under section 3.

[33] The applicant contends that a determination as to whether an asylum seeker qualifies for asylum under section 3 should be made either prior to, or simultaneously with, an exclusion decision under section 4(1). The applicant bases this submission on the principles outlined by this Court in *Chipu*<sup>29</sup> which, in his view, requires an RSDO to consider the persecution an asylum seeker may face if extradited against the severity of the crime committed. The respondents take the opposite view. They submit that an inquiry under section 4(1)(b) outlines the circumstances under which a person does not qualify for refugee status and if there is a finding that a person is excluded, it then becomes unnecessary to determine whether she qualifies for refugee status in terms of section 3.

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individual a stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited.”

<sup>29</sup> *Mail and Guardian Media Ltd v Chipu N.O.* [2013] ZACC 32; 2013 (6) SA 367 (CC); 2013 (11) BCLR 1259 (CC) (*Chipu*).



[34] According to the applicant, *Chipu* creates a test for an exclusion decision which an RSDO *must* apply. This is not correct. The Court in *Chipu* was not concerned with the test to be applied when making an exclusion decision but was seized with the relationship between confidentiality and asylum processes.

[35] The passage of *Chipu* upon which the applicant relies to support the creation of a test is a quotation from the Handbook<sup>30</sup> in a footnote<sup>31</sup> supporting the suggestion that there may be circumstances where a person guilty of a non-political crime may be granted refugee status.<sup>32</sup> The applicant's reliance on this passage to read into *Chipu* a binding test, which introduces consideration of the risk of persecution, cannot be sustained. In addition, the Handbook is merely a guideline and persuasive authority which can be overridden by binding law to the contrary.<sup>33</sup>

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<sup>30</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1, December 2011 (Handbook).

<sup>31</sup> *Chipu* above n 29 at fn 27 which references paras 156-7 of the Handbook:

“In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.”

<sup>32</sup> *Id* at para 30 which reads:

“A literal reading of section 4(1)(b) is that an applicant for asylum who has committed a non-political crime which, if committed in South Africa, would be punishable by imprisonment, is disqualified from refugee status. However, it may well be that section 4(1)(b) should not be read literally and rigidly. Section 4(1)(b) seeks to give effect to, among others, the [1951 Convention]. A reading of part of the [Handbook] dealing with the provisions of the [1951 Convention] reveals that the relevant provision of the convention should not be read rigidly and that there are circumstances in which a person who has committed a non-political crime may, nevertheless, qualify for refugee status.” (Footnotes omitted.)

<sup>33</sup> The Handbook is published to provide “guidance” to governments and is not part of the Conventions it refers to. See Handbook above n 30 at para V where it states:

“As the Handbook has been conceived as a practical guide and not as a treatise on refugee law, references to literature etc. have purposely been omitted.”

[36] The Handbook, as was noted in *Chipu*, suggests that it is preferable for an RSDO to consider the risk of persecution before making an exclusion decision.<sup>34</sup> The answer lies in the Act. While an RSDO exercises a discretion in making a section 3 determination, no such discretion exists in respect of exclusion decisions. Once the mentioned jurisdictional facts are proven, an applicant *must* be excluded, leaving no room for a balancing test or proportionality inquiry.

[37] A purposive reading of the Act as a whole supports the textual meaning of the section. The proportionality inquiry discussed in the Handbook is, at its heart, an attempt to ensure that asylum seekers are not excluded and left to face grave persecution due to minor offences; an attempt to ensure that the harms suffered by an applicant are not disproportionate to the crime they have committed.<sup>35</sup> This is necessary because there is no proportionality inquiry built into the wording of the Convention.

[38] The situation under the Act, however, is vastly different due to the provisions of section 2 and is an important consideration in what test is needed under section 4(1). Whilst a test that takes the risk of persecution into account may be necessary under the Convention to ensure that an asylum seeker's life is not placed at risk for a minor offence, the Act builds this "proportionality" inquiry into section 2 and the *non-refoulement* provisions. However, this inquiry does not occur at the stage when the RSDO decides the asylum application but rather at the stage when the asylum seeker is facing extradition.

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<sup>34</sup> Id at para 156.

<sup>35</sup> Guideline 5 above n 15 at para 24 states:

"The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion."

[39] Section 2 creates a stop-gap measure that ensures that no person will be returned to any country where their life, physical safety or freedom will be threatened, irrespective of whether they have been excluded under section 4.<sup>36</sup> Thus, to require that an RSDO make a determination under section 3 prior to making an exclusion decision in order to factor the risk of persecution into the exclusion decision is tantamount to rendering an inquiry under section 2 superfluous. For these reasons, the applicant's view of *Chipu* must be rejected. I now consider how the relationship between sections 3 and 4 should be dealt with.

[40] The Handbook gives an indication on the interplay between inquiries on exclusion from, and eligibility for, refugee status:

“Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognised as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.”<sup>37</sup>

[41] The Handbook further stresses the need for rigorous procedural safeguards, given the grave consequences of exclusion and suggests that, in principle, exclusion decisions should be dealt with through regular refugee determination procedures rather than truncated procedures.<sup>38</sup>

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<sup>36</sup> See [26] to [31].

<sup>37</sup> Handbook above n 30 at para 141.

<sup>38</sup> Guideline 5 above n 15 at para 31 states:

“Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.”

[42] In *Tantoush*, the High Court held that section 3 is the operative provision in determining refugee status and must be read with section 2.<sup>39</sup> However, the Court avoided making a finding on whether a section 3 determination must be made before an exclusion decision.<sup>40</sup>

[43] Neither the Handbook nor *Tantoush* are prescriptive on the question whether a section 3 decision must be made before an exclusion decision. This may be indicative of the fact that there is no hard and fast rule and some degree of flexibility should be maintained. In this matter, there was no need to make a decision under section 3 because the facts supporting exclusion emerged at the outset and formed the basis of the applicant's asylum claim.

[44] Courts, and decision-makers, should favour a flexible approach that allows for an exclusion decision, irrespective of whether there has been a section 3 decision. Conversely, the fact that there has been a section 3 decision granting an applicant asylum status, should not bar an applicant from being excluded at a later stage. This flexibility should not detract from an applicant's right to have due consideration given to their application. An application process should not be truncated solely on the basis that the applicant falls to be excluded under section 4(1). It was not necessary for the RSDO to have taken a decision under section 3 either before or when excluding the application under section 4(1)(b).

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<sup>39</sup> *Tantoush v Refugee Appeal Board* [2007] ZAGPHC 191; 2008 (1) SA 232 (T).

<sup>40</sup> *Id* at para 94 which states:

“However, the tenor and line of reasoning pursued in the second respondent's written decision indicates that he was primarily concerned to determine whether the exclusion clause in section 4(1)(b) of the Act applied to disqualify the applicant from refugee status. *Though it might have been better to have determined the threshold question first, there is nothing inherently wrong with such an approach.* It does, however, offer an explanation for and insight into the line the second respondent followed in determining whether the applicant had a well-founded fear of persecution.” (Emphasis added.)

*Does a decision under section 4(1) of the Act afford an excluded asylum seeker an internal remedy?*

[45] Section 1 of the Act defines certain words and phrases. “Refugee” is defined as any person who has been granted asylum in terms of the Act. An “abusive application” is defined as, among others, an application for asylum made with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof. A “fraudulent application” is defined as an application based on facts, information, documents or representations which the applicant knows to be false and which are intended to materially affect the outcome of the application. A “manifestly unfounded application” is defined as an application made on grounds other than those on which such an application may be made under the Act.

[46] When faced with an application for asylum, in terms of section 24(3) of the Act, an RSDO only has four options. She can grant asylum.<sup>41</sup> She can reject the application as manifestly unfounded, abusive or fraudulent,<sup>42</sup> or she can reject the application as unfounded.<sup>43</sup> The fourth option is that she can refer any question of law to the Standing Committee.<sup>44</sup> The Act sets out two different internal remedies where an application is rejected. If an application is rejected as manifestly unfounded, abusive or fraudulent, then it is automatically reviewed by the Standing Committee.<sup>45</sup> Where an application is rejected as unfounded, an applicant may lodge an appeal with the Refugee Appeal Board.<sup>46</sup>

[47] The section does not expressly provide for an internal remedy where an RSDO takes a decision to exclude an application under section 4(1). The respondents

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<sup>41</sup> Section 24(3)(a) of the Act.

<sup>42</sup> Section 24(3)(b) of the Act.

<sup>43</sup> Section 24(3)(c) of the Act.

<sup>44</sup> Section 24(3)(d) of the Act.

<sup>45</sup> Section 24(3)(c) read with section 25(1) of the Act.

<sup>46</sup> Section 26(1) of the Act.

contend that a person whose asylum application is rejected because she is held to have been excluded under section 4 is not entitled to an internal remedy.

[48] The approach contended for by the respondents raises considerable concerns. The problems inherent in this approach are particularly significant given the acute vulnerability of asylum seekers and refugees.<sup>47</sup> Many asylum seekers will in practice have little knowledge of the law and often face language difficulties. Yet they will face exclusion on the exercise of judgement by a single official, with no right of internal review or appeal by the Standing Committee or Refugee Appeal Board.

[49] Providing for internal remedies is eminently sensible given the complex and specialised legal and factual issues that may arise; the number of cases concerned; the need to ensure that applicants for asylum are given a proper hearing and ventilation of their case; and the drastic and catastrophic consequences that may result if an applicant is wrongly refused asylum. This approach is consistent with the value ascribed to internal remedies by this Court in *Koyabe*:

“Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact finding and hence require a fully developed factual record.

The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law.”<sup>48</sup> (Footnotes omitted.)

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<sup>47</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at paras 28-30.

<sup>48</sup> *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at paras 37-8.

[50] It would be untenable if a decision to reject an application on exclusion grounds could be left to a single RSDO without any internal review or appeal, whereas a rejection on other substantive grounds results in an automatic review by the Standing Committee or a right of appeal to the Refugee Appeal Board. This cannot represent a correct interpretation of the Act. Moreover, there appears to be no textual reason for this conclusion. As already mentioned, section 24(3) of the Act sets out the options available to the RSDO in adjudicating an application. The application must be granted; rejected as manifestly unfounded, abusive or fraudulent; rejected as unfounded or referred to the Standing Committee.

[51] The issue then becomes which internal remedy process is most appropriate. Manifestly unfounded, fraudulent and abusive applications are, after being rejected under section 24(3)(b), sent to the Standing Committee on automatic review. The nature of such applications is defined in the Act and an exclusion decision does not fall within these definitions. The Act does not define “unfounded applications”. Unfounded applications could comfortably be read to include applications which have been excluded under section 4(1).

[52] A textual reading of the Act, along with a purposive interpretation of sections 24(3)(c) and 4(1) that gives due regard to the constitutional right to fair administrative action would support an interpretation that an application excluded under section 4 falls within the ambit of section 24(3)(c). In addition, such an interpretation is aligned with international best practice and guidelines.<sup>49</sup>

[53] It follows that exclusion decisions are thus subject to the internal remedies of the Act and an applicant may appeal to the Refugee Appeal Board.

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<sup>49</sup> Guideline 5 above n 15 at para 31 reads: “Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure”.

*Are there exceptional circumstances under PAJA?*

[54] Section 7(2) of the Promotion of Administrative Justice Act<sup>50</sup> (PAJA) creates an obligation upon applicants to exhaust all internal remedies before a court or tribunal may review any administrative action.<sup>51</sup> The section reads:

- “(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[55] This obligation to exhaust internal remedies has been considered by this Court twice and on both occasions it held that a party *must* exhaust internal remedies unless an application is made and granted under section 7(2)(c).<sup>52</sup> In *Koyabe* this Court unequivocally confirmed that the purpose of the obligation in section 7(2)(a) is to ensure the autonomy of the administrative process:

“First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures

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<sup>50</sup> 3 of 2000.

<sup>51</sup> Section 7(2)(a) of PAJA.

<sup>52</sup> See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) (*Dengetenge*) and *Koyabe* above n 48.



suites to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution.”<sup>53</sup>

[56] However, it was also recognised by this Court that the obligation to exhaust internal remedies should not be rigidly imposed or used by administrators to frustrate an applicant’s efforts to review administrative action. In *Koyabe* this Court took the view that the application envisaged in section 7(2)(c) was intended to imbue the obligation with a degree of flexibility:

“The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless.”<sup>54</sup>

[57] This Court has found that there is an internal remedy available to an asylum seeker who is excluded under section 4(1)(b) of the Refugees Act. The case proceeded in the High Court on the assumption that there were no internal appeal remedies to exhaust. In the circumstances, the applicant cannot be faulted for failing to exhaust his internal remedies. However, this does not exempt the applicant from requiring exemption in terms of section 7(2)(c) of PAJA.<sup>55</sup>

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<sup>53</sup> *Koyabe* above n 48 at para 36.

<sup>54</sup> *Id* at paras 38-9.

<sup>55</sup> *Id* at para 48 where this Court made it clear that irrespective of the circumstances surrounding non-compliance with section 7(2)(a) – even if such non-compliance was the fault of the Executive – it would only be possible for the matter to be heard if exemption is granted:

“This is not to say, however, that if an aggrieved party had made an attempt in good faith to exhaust internal remedies, but had been frustrated in his or her efforts to do so, a court would be prevented from granting the exemption. It is for the court to determine, on a case by case basis, whether circumstances exist for judicial intervention.”

[58] Has the applicant met the requirements of section 7(2)(c)? These requirements are not rigid and, as mentioned above, should not serve to “shield the administrative process from judicial scrutiny” or frustrate an applicant who, in good faith, attempts to comply with section 7(2)(a). Section 7(2)(c) is explicit in requiring two jurisdictional facts to be present in order for an exemption to be granted. There must be exceptional circumstances and an application for exemption from the obligation of exhausting internal remedies.

[59] The applicant did not make an explicit application for exemption. However, his application in the High Court and in this Court, was brought under PAJA and sought to make out a case for exceptional circumstances that warrant this Court making a substitution order under section 8(1)(c)(ii) of PAJA.<sup>56</sup>

[60] This Court in *Dengetenge*, where an applicant had failed to exhaust internal remedies, emphasised that the courts should not place form above substance and order remittal where this would be a futile exercise.<sup>57</sup>

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<sup>56</sup> Section 8(1)(c)(ii) reads, in relevant part, as follows:

“The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders . . . setting aside the administrative action and . . . in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation”.

<sup>57</sup> *Dengetenge* above n 52 at paras 135-6 where it was stated:

“It is apparent from the special circumstances of this case, set out fully in the main judgment, that if Southern Sphere had applied for exemption, in all probability the high court would have granted it. *In these circumstances to remit the matter to the high court for an application for an exemption to be made would be tantamount to placing form above substance.* This is so because *Dengetenge* has conceded on the merits that the rights were granted to it unlawfully and in contravention of an interdict.

Therefore, on the present facts, a remittal to the high court would serve no purpose other than granting an exemption which is already justified on record. Accordingly, I hold that a remittal solely for that purpose is neither justified nor warranted. Ordering a remittal here would constitute a waste of time and resources. Scarce judicial resources must not be spent on mere formalities which are not dispositive of a real dispute in particular litigation.” (Emphasis added.)

[61] In his founding affidavit, the applicant, relying on *Trencon*,<sup>58</sup> argued that the circumstances of this case militated in favour of granting a substitution order in that:

- (a) the Court is in as good a position as the administrator to make the decision;
- (b) the decision of the administrator is a foregone conclusion;
- (c) there has been a significant delay by the decision makers to the prejudice of the applicant; and
- (d) there has been bias and incompetence by the decision maker.

[62] In addition, it is worth noting that the RSDO's decision which is the subject of this appeal was, in fact, the result of an internal appeal to the Standing Committee.<sup>59</sup> The applicant's asylum application has twice been considered by the Standing Committee. The first time was when he appealed an RSDO decision, which rejected his application as manifestly unfounded and which gave rise to an automatic review. The second time was when the applicant attempted to review the RSDO decision excluding him under section 4(1)(b).

[63] At the hearing of this matter, counsel for the applicant conceded, and correctly so, that it was not the applicant's case that he had been deprived of his right to an internal review or appeal against the decision of the RSDO. The applicant opportunistically latched onto this relief after the point was raised by the amicus. The amicus was entitled, even obliged, to raise the lack of an internal remedy.<sup>60</sup>

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<sup>58</sup> *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 47.

<sup>59</sup> High Court judgment above n 5 at para 78.

<sup>60</sup> *In re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) (*In re: Certain Amicus Curiae Applications*) at para 5 which reads:

Counsel for the applicant fastidiously maintained during the hearing that this Court should remit the applicant's application to enable him to exhaust his internal appeal to the Refugee Appeals Board under section 24(3)(c) of the Act. However, the main relief sought by the applicant in the High Court, the Supreme Court of Appeal as well as in this Court, was to have the decision of the RSDO reviewed and set aside. That is the case the respondents have come to court to meet.

[64] In my view, the applicant has, in substance, made out a case which would justify the grant of exemption. To require a formal application – in these exceptional circumstances where not even the decision maker was aware of the internal remedy and there is, in essence, an application before us – would be “tantamount to placing form over substance”.<sup>61</sup> A referral to either the Refugees Appeal Board or the Standing Committee in order for him to exhaust his internal remedies will be a futile exercise.

[65] In addition, there have been significant delays in this matter. The applicant was arrested on, and has been in detention since, 27 December 2011. He has been in prison, separated from his family, for almost six years now. If this matter is remitted for a re-hearing, it will be the third time that the applicant will be heard by an RSDO in six years and in the interim, the applicant will remain in detention – in a state of legal and actual limbo as processes are stayed pending the outcome of possible further reviews. The circumstances of this case are sufficiently exceptional to relax the requirement of a formal application and justify the grant of an exemption under section 7(2)(c).

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“The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, *an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court.* The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.” (Emphasis added.)

<sup>61</sup> *Dengetenge* above n 52 at para 135.

*Should the decision of the RSDO be reviewed and set aside?*

[66] The applicant advanced a number of grounds in support of the contention that the RSDO erred. I will consider only two, namely the paucity of the reasons she provided and whether there was procedural unfairness in that the exclusion decision was made on the basis of documents that were not provided to the applicant and on which he was not afforded an opportunity to make representations.

*Reasons provided by the RSDO*

[67] Asylum seekers are entitled to administrative action that is lawful, reasonable and procedurally fair.<sup>62</sup> A decision on an asylum application constitutes administrative action.<sup>63</sup> Counsel for the applicant and respondents were agreed that the rejection of an application for refugee status must be accompanied by adequate reasons which, at the least, satisfy the requirement of rationality.

[68] In *Koyabe* this Court set out the factors to be taken into account when determining the adequacy of reasons:

“[T]he factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be ‘full written reasons’; the ‘briefest pro forma reasons may suffice’. Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.”<sup>64</sup>

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<sup>62</sup> Section 33 of the Constitution.

<sup>63</sup> Section 1 of PAJA.

<sup>64</sup> *Koyabe* above n 48 at para 64, referring with approval to *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) at 480.

[69] The Supreme Court of Appeal in *Phambili* explained the value of giving reasons as enabling an aggrieved person to understand why the decision went against her and decide whether or not to challenge the decision.<sup>65</sup> It is clear from *Phambili* that the reasons should consist of more than mere conclusions, and should refer to the relevant facts and law, as well as the reasoning processes leading to those conclusions.<sup>66</sup> In this matter the RSDO provided mere conclusions, not reasons. The RSDO failed to consider a fundamental question, namely, is the alleged crime political in nature.

[70] It must be noted, as the amicus has mentioned, that many of the applicants for asylum who deal with RSDOs are unrepresented, vulnerable and lacking in the necessary language and legal skills to have a meaningful engagement with them and ensure that the RSDOs' adhere to their duties.<sup>67</sup> It is therefore imperative that RSDOs fulfill their functions properly. This is especially the case given the catastrophic consequences that can result if an application for asylum is wrongly rejected. An RSDO's failure to properly exercise her powers can have devastating consequences for the applicant concerned.

[71] Having regard to the context in which RSDOs make decisions and the potential consequences thereof for an applicant, they are required to adhere to the principles

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<sup>65</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) (*Phambili*) at para 40 where the Supreme Court of Appeal added:

“This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions.”

<sup>66</sup> Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 477. See also *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (8) BCLR 844 (E) at 856D-E.

<sup>67</sup> See *Curtis Francis Doebller v Sudan* Communication No. 235/00 (2009) AHRLR 208. In this case, the African Commission took the view that it was not reasonable to expect refugees to seize the Sudanese courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation. See also *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 16541/2013 (19 September 2013) at para 6, where the High Court listed the following “language difficulties, a shortage of meaningful skills due to conditions of their country of origin, competition from local job seekers, and xenophobic prejudice”.

of administrative justice. In this matter, the reasoning of the RSDO fell short of the required standard in that, at the very least, the RSDO ought to have provided some reasoning for her conclusions.

*Procedural unfairness*

[72] The applicant alleges that in making the exclusion decision, the RSDO acted unlawfully and unfairly by relying upon documents and information that were not disclosed to him. He alleges that there are potentially two such sets of documents. First, the RSDO insists that she considered the Serbian judgments<sup>68</sup> in making the exclusion decision. There is some debate about whether the RSDO in fact had regard to the Serbian judgments. I proceed on the assumption that the RSDO did have regard to these judgments in making her decision. Second, in her exclusion decision, the RSDO refers to “the research information at [her] disposal” and then includes a quotation on the legal system in Serbia which, according to the footnote in the exclusion decision, derives from “Apps.american.org/rol/publication/Serbia-legalsystem-eng.pdf”.

[73] Section 24(1) of the Act provides that an RSDO may, when considering an asylum application, request further information from an applicant, the Refugee Reception Officer or the United Nations High Commissioner for Refugees (UNHCR) representative.<sup>69</sup> The Handbook recognises that it may be necessary for

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<sup>68</sup> “Serbian judgments” refer to the decisions of the Serbian Belgrade District Court under case number K.br.715/02 (2006), and the Serbian Supreme Court under case number Kz.I 1056/07 (2007). The District Court convicted and sentenced the applicant to 30 years’ imprisonment, on appeal the Serbian High Court increased the sentence to 35 years’ imprisonment.

<sup>69</sup> Section 24 of the Act provides:

- “(1) Upon receipt of an application for asylum the Refugee Status Determination Officer—
- (a) in order to make a decision, may request any information or clarification he or she deems necessary from the applicant or Refugee Reception Officer;
  - (b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and
  - (c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.”

the RSDO to assist an applicant in obtaining relevant information in order to properly determine the application. This is premised on the factual reality that persons fleeing their country often arrive with the barest necessities and often cannot afford legal representation.<sup>70</sup>

[74] Regulation 12 provides:

- “(1) With exception of cases decided under section 35(1) of the Act, each eligibility determination will be made on a case-by-case basis, taking into account the specific facts of the case and conditions in the country of feared persecution or harm. In making a determination on eligibility, the [RSDO] may—
- (a) request information or clarification from the applicant or Refugee Reception Officer;
  - (b) consult with and invite a UNHCR representative to provide information and, with the permission of the asylum seeker, provide the UNHCR representative with any information requested by the UNHCR, pursuant to sub-sections 24 (b) and (c) of the Act;
  - (c) consider country conditions information from reputable sources; and
  - (d) refer any question of law to the Standing Committee pursuant to section 24(3)(d) of the Act.”<sup>71</sup>

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<sup>70</sup> The Handbook above n 30 at para 196 states:

“It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”

<sup>71</sup> Regulations in terms of section 38 of the Refugees Act, GN R366 GG 21075, 6 April 2000.



[75] Regulation 12(1)(c) authorises the RSDO to consider information about country conditions, when considering an application for asylum. The only criterion is that this information must be from a reputable source.

[76] Country reports are essays that describe and analyse data for each country. The UNHCR describes Country Conditions Reports as reports that cover the general conditions, state of human rights, major events of countries, and attitudes towards human rights and issues like religion, sexual orientation, occupation and gender.<sup>72</sup> The UNHCR has a number of Country Conditions Reports which are available on their database.<sup>73</sup> These reports are not prepared by the UNHCR but by governments and non-governmental organisations like Human Rights Watch and Amnesty International.<sup>74</sup>

[77] In the United States, the Executive Office for Immigration Review compiles Country Pages on aspects of country conditions that have relevance in removal

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<sup>72</sup> UNHCR, “Country Conditions Reports” available at <http://www.unhcr.org/country-reports.html>. The UNHCR website states:

“Country Conditions Reports may be newspaper articles, government reports, non-governmental organization reports, among others. This information may assist in supporting an applicant's claim of suffered persecution or fear that they will suffer persecution.”

See, for example, the UNHCR Country Conditions Report on Afghanistan which discusses human rights violations by state actors as well as the risk profiles for individuals with disabilities, women, members of a minority religious group, blood feuds and sexual orientation. See also the UNCHR Background Paper on Guatemala which discusses the prevailing security conditions, developments in respect of certain human rights such as the right to life and land rights as well as the situation of a variety of persons including union members, journalists, bus drivers, homosexual persons and victims of human trafficking. See UNHCR, “Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan” (19 April 2016), available at <http://www.refworld.org/pdfid/570f96564.pdf> and Worby “UNHCR Guatemala Background Paper” UNHCR (October 2013), available at <http://www.unhcr.org/5953a8994.pdf> respectively.

<sup>73</sup> UNHCR, “Country Condition Reports” above n 72.

<sup>74</sup> For example, the Amnesty International Report 2017/8: the State of the World’s Human Rights at 325 contains information on the conditions of detainees in the country:

“In May, the Kosovo Rehabilitation Centre for Torture Victims, authorized to monitor the treatment of the people in detention, was refused access to prison hospitals after these had been transferred to the Ministry of Health. Some detainees were held for long periods before and during trial; one defendant was detained for over 31 months, in violation of the Criminal Procedure Code. The Ministry of Justice failed to provide an explanation for the death in detention of Astrit Dehari, a member of the Vetëvendosje opposition party, in November 2016.”

hearings before Immigration Judges and the Board of Immigration Appeals. All content is compiled from publicly available documents. There is however a disclaimer that inclusion of materials should not be construed as an endorsement of their content.<sup>75</sup>

[78] The Serbian judgments do not relate to information about country conditions and should not have been relied upon by the RSDO. The source and nature of the additional research the RSDO did is unclear and has not been provided to this Court. It is not possible to establish whether the information falls within the ambit of the regulation. It must thus be assumed that this information does not fall within the ambit of the regulation and thus the RSDO should not have considered this additional research.

[79] It is nevertheless necessary to state that a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her.<sup>76</sup> This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests.<sup>77</sup> This is in accordance with the maxim *audi alteram partem* (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.<sup>78</sup>

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<sup>75</sup> The United States Department of Justice, “Country Conditions Research” available at <https://www.justice.gov/eoir/country-conditions-research>.

<sup>76</sup> *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C) (*Earthlife*) at paras 52-3.

<sup>77</sup> *Du Preez v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A) at 231H-232C.

<sup>78</sup> *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 74-5; and *Zondi v MEC for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 112.

[80] In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way.<sup>79</sup> In *Foulds*, Streicher J held that a decision maker was under an obligation to disclose adverse information and adverse policy considerations, and give an affected person an opportunity to respond thereto.<sup>80</sup> If an administrator is minded to reject the explanations of an interested party, she should at least inform the party why she is so minded, and afford that party the opportunity to overcome her doubts.<sup>81</sup>

[81] The Serbian judgments, and in particular, the additional research undertaken cannot be said to align with these principles as they were never provided to the applicant and the latter was not even provided to this Court. On the basis of the paucity of the reasons provided by the RSDO and the procedural unfairness, the decision of the RSDO was invalid and must be set aside.

*Should the matter be remitted to the RSDO?*

[82] The test to be applied in determining whether this Court may make a substitution order and step into the shoes of an RSDO was outlined in *Trencon*:

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<sup>79</sup> *Earthlife* above n 76 at para 53.

<sup>80</sup> *Foulds v Minister of Home Affairs* 1996 (4) SA 137 (W) at 149H-J and *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C) at 965B-C.

<sup>81</sup> *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T) at 178E-179A:

“Perhaps the policy is a sound one, but if a statutory body considers that such a consideration is so material as of itself to determine the fate of an application, then it should at the very least afford an applicant the opportunity of dealing with its difficulty and not keep the policy to itself: cf *Roux v Minister van Wet en Orde en Andere* 1989 (3) SA 46 (T) at 57G. To hold otherwise would be to countenance injustice, since persons who might otherwise be fully able to justify their application would be deprived of the opportunity of doing so. . . . It is beyond question administratively unfair to fail to draw to the attention of an applicant that a board relies upon a particular policy and by such failure to deprive the applicant of the opportunity of making submissions as to why he should be treated as one who qualifies within the terms of that policy.”

See also *Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal)* 2010 (5) SA 574 (KZP) at para 58; *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C) at 198D; *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 (3) SA 228 (C) at 235B-C.

“To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.”<sup>82</sup> (Footnotes omitted.)

[83] The applicant contends that the criteria for substitution are met. He submits that this Court is in a better position than the RSDO to determine the matter having more information at its disposal. He also relies on the significant delays in this matter. The reasons provided are sufficient for this Court to find that the matter ought not to be remitted for the exhaustion of internal remedies. The outcome is not a foregone conclusion for reasons that will be discussed below but this factor is not dispositive. I find that the threshold for this Court to make a substitution order is met in this matter.

*Should the applicant be declared a refugee?*

[84] Is there reason to believe that the applicant has committed a crime which is not of a political nature and which, if committed in South Africa, would be punishable by imprisonment?

[85] Although the Serbian judgments were not properly before the RSDO, they were part of the Rule 53<sup>83</sup> record in the High Court and in this Court. A court can rely

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<sup>82</sup> *Trencon* above n 58 at para 47.

<sup>83</sup> Rule 53(1) of the Uniform Rules of Court reads:

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer

on documents contained in the record when deciding a matter.<sup>84</sup> This is the position even where these documents did not form part of the initial reasons for the decision provided by the decision-maker.<sup>85</sup> This principle was recognised by this Court in *Zondi*.<sup>86</sup>

[86] In this matter, not only was the applicant aware of the Serbian judgments – and the RSDO’s purported reliance thereon – the applicant had the opportunity to and did make submissions on the RSDO’s reliance. While the RSDO may have been precluded from relying on the Serbian judgments, this Court is not as the applicant has been afforded a right of reply.

[87] The evidentiary value to be given to decisions of foreign courts was considered in *Tantoush*. There the Court stated:

“Courts are generally reluctant to rely upon the opinion or findings of a court in a foreign jurisdiction about factual issues not ventilated, tried or tested before them. All the same, it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or

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performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

...

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.”

<sup>84</sup> See *Helen Suzman Foundation v Judicial Service Commission* [2016] ZASCA 161; 2017 (1) SA 367 (SCA) at para 14:

“It is settled law that the rule is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings and to avoid review proceedings being launched in the dark. The rule essentially confers the benefit that: . . . all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.”

<sup>85</sup> *Democratic Alliance v President of the Republic of South Africa* [2016] ZAWCHC 66; 2016 (8) BCLR 1099 (WCC) at paras 73-5.

<sup>86</sup> *Zondi* above n 78.

to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights. In *Kaunda and Others v President . . .* Chaskalson CJ, commenting on reports by Amnesty International and the International Bar Association on the human rights situation in Equatorial Guinea, said as follows: ‘Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.’<sup>87</sup>

[88] Though there has been a reluctance to rely on the factual findings of decisions of a foreign court, it is open to a Court to take judicial notice of the human rights situation evidenced by these decisions.

[89] Section 4(1)(b) of the Act states that a person is not eligible for refugee status if there is “reason to believe” that she has committed a non-political crime punishable by imprisonment in South Africa. Evidence of a conviction is not necessary for an individual to be excluded but there should be clear and credible evidence that a serious, non-political crime was committed. Nor does the criminal standard of proof need to be met. In this respect, Guideline 5 accepts confessions and testimony of witnesses, provided they are reliable.<sup>88</sup>

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<sup>87</sup> *Tantoush* above n 39 at paras 19-20.

<sup>88</sup> Guideline 5 above n 15 at para 35 reads:

“In order to satisfy the standard of proof under Article 1F, clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met. Confessions and testimony of witnesses, for example, may suffice if they are reliable. Lack of cooperation by the applicant does not in itself establish guilt for the excludable act in the absence of clear and convincing evidence. Consideration of exclusion may, however, be irrelevant if non-cooperation means that the basics of an asylum claim cannot be established.”

[90] Article 1F has been interpreted by the Home Office in the United Kingdom through a guidance note.<sup>89</sup> Though this note is not binding, it offers guidance on how a conviction from another country can be treated:

“Whichever clauses of Article 1F apply, the person does not have to have been prosecuted or convicted of any offence in any country. Equally, evidence of the acquittal of a person accused of a crime or a pardon following conviction, does not necessarily mean that exclusion cannot or should not be applied. Each case must be considered on its individual merits. Evidence of a conviction will usually provide serious reasons for considering that they have committed the crime and decision makers will not normally need to examine at length the evidential basis for the conviction.”<sup>90</sup>

[91] The European Asylum Support Office Practical Guide on Exclusions is also useful.<sup>91</sup> It suggests that consideration must be given to whether the prosecution was legitimate and whether the applicant was prosecuted or convicted for political reasons.

*What is a political crime?*

[92] It is not necessary to determine the meaning of a “serious” crime as the Act has defined it using an objective metric, namely, a crime punishable by imprisonment in the Republic. Consequently, what needs to be considered is how to establish whether a crime is “political”.

[93] In the absence of a definition or list of political crimes, this is a vexing and challenging question. Few crimes are necessarily and inherently political.<sup>92</sup> In *T v*

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<sup>89</sup> Home Office, “Exclusion (Article 1F) and Article 33(2) of the Refugee Convention” (1 July 2016).

<sup>90</sup> *Id* at 13.

<sup>91</sup> European Asylum Support Office “EASO Practical Guide: Exclusion” (January 2017) at 20 reads:

“The case officer should examine whether the prosecution was legitimate and the applicant was not, for example, prosecuted and/or convicted for political reasons. The case officer should also be aware that a certain behaviour may be considered as a criminal act in the country of origin but not in their State. A criminal conviction would not automatically mean that exclusion clauses are to be applied.”

*Secretary of State*,<sup>93</sup> Lord Lloyd referred to the caution previously expressed that finding a definitive answer to the question of what constitutes a “political crime” was almost impossible.<sup>94</sup> According to Guideline 5, a serious crime is non-political when motives such as personal reasons or gain as opposed to political reasons, are the predominant feature for the commission of the crime. Where there is no clear link between the crime and its alleged political objective, then non-political motives are predominant.<sup>95</sup> This is referred to as the “predominance test”.

[94] Egregious acts of violence, such as acts commonly considered to be of a “terrorist” nature that are wholly disproportionate to any political objective, will be unlikely to pass the predominance test. In addition to the predominance test, the Handbook suggests that factors such as the motivation, context, methods and proportionality of a crime to its objectives, ought to be considered in order to determine whether the crime is of a political nature. Guideline 5 emphasises that for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles.<sup>96</sup>

### *Foreign jurisdictions*

In practice, characterisation of an offence as “political” is left to the authorities of the State from which extradition is requested and is one in which political considerations

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<sup>92</sup> Goodwin-Gill and McAdam, *The Refugee in International Law*, 3 ed (Oxford University Press, Oxford 2007) at 121.

<sup>93</sup> *T v Secretary of State for Home Department* [1996] 2 All ER 865 (*Secretary of State*) at 899 states: “The most that can be attempted is a description of an idea.”

<sup>94</sup> *Id* at 899 referring to *Schtraks v Government of Israel* [1962] 3 All ER 529. However, the need for courts to create a workable description was highlighted in *Schtraks* per Lord Reid at 539:

“I am ready to agree in the advantage so long as it is recognised that the meaning of such words as “a political offence”, while not to be confined within a precise definition, does nevertheless represent an idea which is capable of description and needs description if it is to form part of the apparatus of a judicial decision.

Generally speaking, the courts’ reluctance to offer a definition has been due, I think, to the realisation that it is virtually impossible to find one that does not cover too wide a range.”

<sup>95</sup> Guideline 5 above n 15 at para 15.

<sup>96</sup> *Id*.



will usually be involved.<sup>97</sup> The offence should have been committed in the course of some political dispute or conflict, and have been related to the promotion of political ends. Intention or motive is not conclusive, however, and there is a presumption against classifying as political those offences which may be loosely described as common law crimes, such as murder and robbery. Inherent limitations on the category of political offences, by reference to their nature and circumstances, are increasingly accepted.

[95] Various jurisdictions have attempted to create tests to determine whether a crime is political. It would be useful to consider these tests.

#### *European countries*

[96] In 2011, the European Union issued a directive<sup>98</sup> which contained an exclusion clause.<sup>99</sup> The Court of Justice of the European Union, when interpreting the meaning of “serious non-political crime” has held that terrorist acts, which are characterised by violence towards civilian populations, even if committed with a political objective, fall to be regarded as serious non-political crimes.<sup>100</sup> The Qualification Directive is a useful source of guidance. All members of the European Union have a duty to implement the Qualification Directive and a number of European Union Member States have already adapted their domestic legislation accordingly.<sup>101</sup>

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<sup>97</sup> Goodwin-Gill and McAdam above n 92 at 226-8.

<sup>98</sup> Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (13 December 2011) (Qualification Directive).

<sup>99</sup> Article 12(2)(b) of the Qualification Directive provides that a person is excluded from being a refugee where there are serious reasons for considering that she has committed a serious non-political crime outside the country of refuge.

<sup>100</sup> Court of Justice of the European Union, *Bundesrepublik Deutschland v B and D*, joined cases C-57/09 and C-101/09, 9 November 2010, at para 81.

<sup>101</sup> Article 78(1) of the Treaty on the Functioning of the EE, 26 October 2012 stipulates that the European Union shall develop a common policy on asylum.

[97] This adaptation has occurred in the Czech Republic<sup>102</sup> and Austria<sup>103</sup> through specific legislation. The incorporation, however, varies from mirroring the language of article 1F – as was the case in Austria – to listing specific crimes. Under Czech law the predominance test<sup>104</sup> is used to determine whether a crime is considered “political”. This requires at least a clear link between a crime and its political objective. In addition, the crime must be proportionate to the political objectives to fall within the scope of a political crime.

[98] Switzerland is not a member of the European Union and consequently takes a different approach.<sup>105</sup> Swiss law uses a two-step process, first ascertaining whether the crime is serious and, thereafter, whether it is of a political nature. A crime is considered to be of a political nature if it pursues a political goal and if it is proportional.<sup>106</sup>

[99] The Federal Supreme Court of Switzerland (*Tribunal Fédéral*) has held that a crime is political if four requirements are met.<sup>107</sup> First, the offence must be

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<sup>102</sup> Asylum Act No. 314/2015 Coll.

<sup>103</sup> Austria: Federal Law Concerning the Granting of Asylum, 2005 Asylum Act.

<sup>104</sup> See [93]

<sup>105</sup> The definition of a political crime is largely informed by extradition law, and article 3(1) of the Federal Act on International Mutual Assistance in Criminal Matters which reads:

“[A]n act which, in the Swiss view is of a predominantly political nature, constitutes a violation of the obligation to perform military or similar service, or appears to be directed against the national security or military defence of the requesting State” (official english translation).

<sup>106</sup> *Tribunal Administratif Fédéral*, Case E-7772, 22 June 2007, at para 4.4.

<sup>107</sup> *Tribunal Fédéral*, case ATF 106 Ib 307 where the Court held:

“According to the case law of the Federal Tribunal, a common-law crime or offence constitutes a relatively political offence if the act has a predominantly political character according to the circumstances, namely the motives and aims of the perpetrator. A predominantly political character is to be assumed if the offence took place in the context of a struggle for power in the state or if it was committed in order to deprive someone of the compulsion of a state which excludes any opposition. There must be a close, direct and clear relationship between such deeds and the goals sought. In addition, it is necessary that the infringement of foreign legal interests be proportionate to the political objective pursued and

committed on the grounds of a real and genuine political commitment and to reach a clearly defined political objective and not for personal gain. Second, the act has to be the result of a political motivation and there must be a direct causal link to a specific political goal. Third, the means must be proportional to the prejudice caused. Finally, the interests concerned must be of sufficient importance that the crime is “understandable” in that a decision maker can understand, rationally, why the crime was committed.

*African Commission on Human and Peoples’ Rights (the Commission)*

[100] The issue whether amnesty for political crimes violates article 7(1)(a) of the African Charter<sup>108</sup> came before the Commission after the Senegalese Parliament passed a law, known as the Ezzan law, which provided automatic amnesty for crimes related to general or local elections and which were committed with political motivations.<sup>109</sup> The complaint was that the law violated article 7(1)(a) of the African Charter because it made it impossible for the perpetrators of crimes to be brought to book. The Commission decided the matter on the basis that domestic remedies had not been exhausted and did not pronounce on the validity of the law.

*Algeria*

[101] The President of Algeria passed a similar decree in 2006, which gave persons involved in the internal conflict immunity from any legal proceedings.

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that the interests involved are sufficiently important to make the act at least somewhat understandable.” (Translation from German.)

<sup>108</sup> Article 7 reads:

- “1. Every individual shall have the right to have his cause heard. This comprises:
  - a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”

<sup>109</sup> *FIDH v Senegal* (2006) AHRLR 119 (ACHPR 2006).

Specifically, the law provided that no legal proceedings could be initiated against individuals or entities who had “contributed to saving Algeria and protecting the nation’s institutions”.<sup>110</sup>

[102] As in South Africa, both Senegal and Algeria have anchored their definitions of political crimes to specific events and time periods. This is indicative that the historical and political context in which a crime was committed is relevant when determining whether the crime is political in nature. However, the criticism these amnesty laws were met with suggests that a content-neutral test is not sufficient. One country may consider a crime political and deserving of amnesty, while another may not.

### *South Africa*

[103] The definition of a political crime was something our own country had to grapple with when amnesty was provided for acts “associated with a political objective” during the Truth and Reconciliation Commission.<sup>111</sup> Section 20(3) of

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<sup>110</sup> Presidential Decree titled “Measures in Recognition of the Artisans of Safeguarding the Democratic and Popular Republic of Algeria” was passed in 2006. The decree provides:

“Article 44: Citizens who, through their involvement or their determination, contributed to saving Algeria and protecting the nation’s institutions, performed acts of patriotism.

Article 45: No legal proceedings may be initiated against an individual or a collective entity, belonging to any component whatsoever of the defence and security forces of the Republic, for actions conducted for the purpose of protecting persons and property, safeguarding the nation or preserving the institutions of the Democratic and Popular Republic of Algeria. The competent judicial authorities are to summarily dismiss all accusations or complaints.”

<sup>111</sup> Section 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act). Section 20(2)-(3) specifically dealt with the meaning of the phrase “act associated with a political objective”. While section 20(2) dealt with the persons covered, subsection (3) outlined the criteria to be considered and read as follows:

- “(3) Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:
- (a) The motive of the person who committed the act, omission or offence;
  - (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course

the Reconciliation Act outlined the criteria to determine whether an act was political. Among these criteria was the motive of the person who committed the act, whether the act was part of a political uprising, the gravity of the act, the objective of the act and whether it was directed at private persons and property or State personnel and property. The section also took into consideration whether the act was committed at the behest or with the approval of the liberation movement or political organisation the offender supported or belonged to. Notably, it included a proportionality inquiry and considered the directness and proximity of the relationship between the act and the object pursued. Acts committed for personal gain or out of personal malice or spite were explicitly excluded.

[104] Against this background, it is important to recall that during apartheid, many administrative offences – such as a failure to carry a passbook – became part of the struggle and were transformed into acts of political defiance. Further, certain political parties were considered terrorist organisations and their actions, in

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of or as part of a political uprising, disturbance or event, or in reaction thereto;

- (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
- (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
- (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
- (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted–
  - (i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
  - (ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.”

fighting against the apartheid regime, were labelled as terrorist and illegal activities.

[105] This raises the concern that one nation's terrorist may be another's freedom fighter. This is particularly true where an organisation advances the values of human rights, freedom and tolerance against a despotic or intolerant government. A content-neutral test is helpful in outlining relevant factors but fails to take these important contextual considerations into account.

[106] The approach to establishing whether a crime is political should be flexible, not overly inclusive or exclusive, and also take into account our own historical context. In this inquiry, the following factors should be considered:

- (a) Was the motive behind the offence a real and genuine political commitment to reach a clearly defined political objective rather than for personal or financial gain?
- (b) Was there a direct link between the crime, the political motivation and the specific political goal?
- (c) Was the means used to commit the crime and harm caused, proportional?
- (d) Is the political goal in line with—
  - (i) the protection and promotion of fundamental human rights including the right to life, equality, human dignity, political participation, non-racism and non-sexism.
  - (ii) the rule of law.
  - (iii) the protection and advancement of freedoms of the person, religion, belief, opinion, expression, conscience and association.
  - (iv) the creation of an open and democratic society.

*Does the applicant fall to be excluded under section 4(1)(b)?*

[107] Section 4(1)(b) disqualifies an asylum seeker from obtaining refugee status where there is a reasonable belief that she committed a crime that is not of a political nature, and if committed in South Africa, would carry a term of imprisonment. Before determining whether the crime concerned is of a political nature, it is necessary to consider whether there is a reasonable belief that the applicant has committed a crime. Though a conviction may inform such a belief, it is important to note that a conviction is not necessary to meet this threshold. Conversely, the fact of a conviction, where such conviction was politically motivated, may militate against a “reasonable belief” that an offence was actually committed.

[108] The applicant asserts that he was falsely implicated in the murder of Arkan and his bodyguards and that he was wrongly convicted. He further asserts that the Judge who presided over his trial and who had sentenced him to 30 years’ imprisonment, had borrowed money from a certain Mr Dusan Spasojević, who was a one-time leader of the Zemun Clan, a criminal organisation. Since he was wrongly implicated in the murder of Arkan, an indicted war criminal with strong criminal connections, the applicant fears that Arkan’s criminal associates may avenge his death by killing him, whether in or out of prison. He claims that he did not disclose his true identity on arrival in South Africa because he was afraid that he and his family would be targeted if his identity and whereabouts became public knowledge. He also alleges that a number of persons who were suspected of being associated with the assassination of Arkan, had already been murdered.

[109] The Serbian judgments, which were considered by the RSDO and placed before this Court, cannot simply be accepted as determinative proof but, at the same time, may be taken into account when deciding if there is a reasonable likelihood that the applicant has committed a crime. The criminal proceedings against the applicant were lengthy and underwent a number of appeals. In effect, four decisions were made

in respect of the charges against the applicant and a further decision was made by the ECHR.<sup>112</sup>

[110] It appears that the applicant received due process throughout these legal proceedings. By his own admission, he was initially detained but released after three years as required by Serbian law. The applicant has not presented any evidence which can disturb the prima facie evidence that the rule of law was upheld during his trials and appeals. The standard employed is not beyond a reasonable doubt but merely whether there is a reasonable belief that a crime was committed. Counsel for the applicant conceded, in light of the Serbian judgments and the information received from the ECHR, that the threshold of the reasonable belief test had been met. I am satisfied that there is a reasonable likelihood that the applicant committed the crimes he was convicted of. I now consider whether the crimes were of a political nature.

[111] The applicant has denied complicity in the murder of Arkan and his bodyguards. He was thus not in a position to place any information before this Court regarding the motivation for the commission of the offences, the context in which they were committed, its objectives, whether the crimes were committed with a political purpose or goal, and what interests were being protected for this Court to determine the political nature, if any, of the offences. Without the benefit of this information, this Court is unable to determine whether, in particular, there is a clear link between the objective and the crime, and whether the political goals sought to be achieved align with our fundamental values.

[112] The contention by the applicant that Mr Milošević was behind the killing of Arkan is of little significance and cannot be sustained. This remains speculation given that there is no evidence to support his involvement in the murders. Various articles

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<sup>112</sup> The applicant was convicted by the Serbian District Court and this conviction was overturned by the Serbian Supreme Court and remitted to the District Court. The applicant was convicted again in the Serbian District Court and this was upheld in the Serbian Supreme Court as per the Serbian judgments.



and publications were placed before the RSDO from which it could be gathered that there was much speculation as to the person(s) behind the killing of Arkan and the motive for his killing.<sup>113</sup>

[113] In the circumstances, there is no evidence to support the applicant's contention that the murder of Arkan and his two bodyguards, was politically motivated. In addition, and for what it is worth, the evidence as it appears from the Serbian judgments points in the opposite direction. The Serbian District Court concluded that the assassination of Arkan was for monetary gain. The Serbian Supreme Court did not deal with the motivation for committing the offence but confined itself to assessing whether the objective elements of the crime had been proven.

[114] The applicant has, throughout these proceedings maintained his innocence and denied any involvement in the assassination of Arkan. However, the applicant has, on the other hand, insisted that the crime was committed for political reasons. These two positions cannot be treated with equal consideration. If the applicant maintains his innocence, he can have no knowledge of the motive behind the crime. His contentions regarding the motive for the crime are not direct evidence but rather speculation.

[115] It is recognised that an asylum seeker will not always be able to support the statements she makes with documentary proof.<sup>114</sup> However, in this matter, the applicant has failed to provide information within his knowledge about the commission of the offences. There are no objective or proven facts from which this Court can conclude or draw the inference that the offences were political.<sup>115</sup>

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<sup>113</sup> "Serbian Warlord shot dead" *BBC News* (15 January 2000); Rowland, "Reporting on a violent death" *BBC News* (20 January 2000); Erlanger, "The World; In a Land of Glitz And Crimes, He Stood Out" *New York Times* (23 January 2000).

<sup>114</sup> Handbook above n 30 at para 196.

<sup>115</sup> *Snap-On Africa (Pty) Ltd v Joubert* [2015] ZAGPPHC 821 at para 63:

"Inferences to be drawn when circumstantial evidence is utilised must be carefully distinguished from conjecture or speculation. There can be no inference lest there are

Instead, the applicant has relied on speculative newspaper articles to make the case that the crime was politically motivated. All that is before us is speculation and conjecture as to the motives behind the crime. Consequently, while there is credible evidence to support a reasonable belief that the applicant has committed a serious crime (murder), there is no basis upon which this Court can find that this crime was politically motivated.

[116] This does not close the door to the applicant's contention that he may face persecution on the basis of imputed political opinion. As discussed above, it may arise in extradition proceedings aimed at returning the applicant to Serbia, that question does not arise in this matter.

#### *Costs*

[117] The applicant also sought to appeal against the costs order of the High Court. The High Court did not deal with costs in any detail save to award costs against the applicant.<sup>116</sup> Though the award of costs is a discretionary exercise, the High Court did not give due regard to the fact that the matter concerned a constitutional challenge to section 4(1)(b) of the Act.

[118] It has been held by this Court that where a litigant is unsuccessful against the State they should not, as a general rule, be made to pay costs.<sup>117</sup> However, this general rule is not absolute and in certain circumstances, an adverse costs order may be made against a party litigating against the State, such as where the

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objective facts from which to infer other facts which it is sought to establish. If there are no positive proven facts from which the inference can be made, the method of inference falls away and what is left is mere speculation or conjecture.”

See also *Makhetha v Minister of Police* [2015] ZAGPPHC 928; *S v Mogale* 2011 JDR 0787 (GSJ) at para 103.

<sup>116</sup> The only mention of costs in the High Court judgment is at para 101: “In the result, applicant's application is dismissed with costs.”

<sup>117</sup> See *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

litigation is vexatious or frivolous. This Court considered the circumstances in which an adverse costs order might be justified in *Biowatch*:

“[C]ourts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it. . . . [W]hen departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.”<sup>118</sup>

[119] The bar for departing from the general rule is not insurmountable but, where a court elects to make an adverse costs order, this must be motivated and supported with adequate reasons. The High Court failed to articulate the basis upon which it made an adverse costs order. This failure is sufficient to warrant intervention by this Court.

[120] On the basis of the principles articulated in *Biowatch*, the applicant’s appeal against the costs order from the High Court is upheld.

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<sup>118</sup> Id at paras 24-5.

[121] As for costs in this Court, ordinarily, costs follow the result. The applicant was partially successful in his appeal to this Court. The respondents too, were also partially successful. In my view, it would be appropriate to make no order as to costs.

*Order*

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the High Court, Western Cape Division, Cape Town, is set aside.
3. The decision of the first respondent, Ms Nompakamiso C. Xesha, is set aside.
4. It is declared that the applicant, Mr Dobrosav Gavrić, is excluded from refugee status in terms of section 4(1)(b) of the Refugees Act 130 of 1998.
5. There is no order as to costs.

JAFTA J (Dlodlo AJ concurring):

[122] I have had the benefit of reading the judgment written by my colleague, Theron J (first judgment). I agree that leave to appeal should be granted but disagree with the additional order proposed. I do not think that this is the sort of case in which this Court should itself exercise the administrative powers conferred on administrative functionaries.

[123] It is now settled that this Court does not sit as a court of first and last instance unless there are compelling reasons justifying such a course.<sup>119</sup> The High Court did not consider exercising the power conferred on the RSDO by the Act because that Court dismissed the application on the ground that none of the review grounds was established. Consequently, if this Court were to determine whether the applicant should be granted asylum, it would be deciding this issue as a court of first and last instance.

[124] The consequence of this Court deciding matters as a court of first and last instance is that parties are denied their right to appeal and this is not consonant with the Constitution which guarantees such right to every litigant. In addition, this Court would be denied the views of other courts on issues like the meaning of a non-political crime envisaged in section 4 of the Act. Since a crime that is not of a political nature is not defined in the Act, the meaning of this expression is not easily ascertainable. What compounds the issue is the fact that the parties did not address these issues in their written and oral submissions. Therefore, if this Court were to determine whether the applicant was convicted of a crime of a non-political nature, it would decide the issue without the benefit of oral argument. All these factors illustrate that it is not in the interests of justice for this Court to sit as a court of first and last instance in the present matter.

[125] The parties have asked that the matter be remitted to the administrative functionaries. The fact that the applicant in his affidavit filed in this Court, had asked for a substitution is not an impediment to requesting that the matter be remitted. At the hearing of the matter the applicant specifically asked for remittal when it became clear that the impugned decision was subject to an internal appeal to the Appeal Board.

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<sup>119</sup> *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at paras 147 and 154; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2012] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 64 and *Lane and Fey NNO v Dabelstein* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5.

[126] The Appeal Board is a specialist body where members are required to possess expertise and experience suitable to the performance of the functions of the Appeal Board.<sup>120</sup> At least one of the three members should be legally qualified. Therefore, this suggests that a court may not have some of the expertise and experience required for the performance of the functions of the Appeal Board. In *Koyabe* this Court cautioned against judicial intervention before internal remedies have been exhausted and stated:

“The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in the Constitution. Courts have often emphasised that what constitutes a ‘fair’ procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow the executive agencies to utilise their own fair procedures is crucial in administrative action.”<sup>121</sup>

[127] As far back as 20 years ago this Court declared that it was not in the interests of justice for it to sit as a court of first and last instance and deprive litigants the right to appeal. And this principle has been followed since then. In *Bruce* the principle was formulated in these terms:

“It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of

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<sup>120</sup> Section 13 of the Act provides:

“(1) The Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly.

(2) At least one of the members of the Appeal Board must be legally qualified.”

<sup>121</sup> *Koyabe* above n 48 at para 36.

challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.”<sup>122</sup>

[128] The fact that this Court received no argument at the hearing on the meaning of a non-political offence must weigh heavily against the determination of this issue. In *Magajane*<sup>123</sup> this Court declined to adjudicate an issue that was not decided by the High Court and the Supreme Court of Appeal and where no extensive argument was presented. In that case, Van der Westhuizen J stated:

“While the comments in *Bruce* were made in the context of an application for direct access, they apply equally to this case in which the substantive constitutional issue was not considered by the High Court and the case was not heard by the Supreme Court of Appeal.

The Court has also not had the benefit of comprehensive argument from all concerned parties. While the issue of provincial and national competence is complex, the applicant did not properly canvass the substantive issue in his written submissions and the respondents did not discuss it at all in theirs.

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My conclusion is that it is not in the interests of justice for this Court to consider the challenge to section 65(3) without the benefit of judgments from the High Court or the Supreme Court of Appeal, of extensive argument by the parties and of the opinions and reasoning of other interested parties.”<sup>124</sup>

[129] None of the parties has established factors, and the first judgment does not point to any, which show that present litigants must be deprived of the constitutional right to appeal. Nor can I think of any reason why, in the present matter, this Court should depart from the well-established principle that it does not

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<sup>122</sup> *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8.

<sup>123</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) (*Magajane*).

<sup>124</sup> *Id* at paras 30-2.

sit as a court of first and last instance, except where there are special circumstances compelling it to do so.

[130] The deprivation of the right to appeal is not the only factor that militates against reaching the merits. The Constitution confers jurisdiction on the High Court and the Supreme Court of Appeal to decide matters such as the present. Deciding the merits here would deprive those Courts of the exercise of their constitutional jurisdiction. This will not be in the interests of justice. In *Christian Education South Africa*, this Court said:

“[The] exclusion of the other courts from the exercise of a jurisdiction given to them by the Constitution would clearly not be in the general interests of justice and the development of our jurisprudence.”<sup>125</sup>

[131] However, it is true that in appropriate cases, the other courts may be bypassed. But for that to happen, there must be cogent reasons justifying such a course. The overarching principle is that if the interests of justice so demand, this Court will entertain a matter brought to it directly. The conclusion that it is in the interests of justice must be reached after weighing up various factors. Here no factors have been identified which favour the adjudication of the merits. On the contrary, the applicant sought remittal and this Court did not have the benefit of argument on the meaning of a crime of a non-political nature, contemplated in section 4 of the Act.

[132] There are two additional reasons militating against the determination of the application for asylum by this Court. The first is the opportunity to exhaust domestic remedies and the second is whether a case has been made out for substitution. These are separate enquiries that lead to different destinations. The first is concerned with an appeal to the Appeal Board and the second addresses the exercise of the power to determine the application for asylum afresh.

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<sup>125</sup> *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR (CC) 1449 at para 9.



*Appeal*

[133] I agree with the first judgment that, properly construed, the Act affords an appeal to the Appeal Board against the decision of the RSDO which was based on section 4 of the Act. This is the appeal which the applicant wishes to pursue. He did not do so in the past because the RSDO's ruling expressly advised him that he could appeal to the Standing Committee. But when he approached that Standing Committee, he was told that it had no jurisdiction over the matter. Thus the applicant's desire to appeal was thwarted. Faced with this difficulty, the applicant thought that the only option available to him was an application for review, hence the institution of the current review proceedings.

[134] It was only during the hearing in this Court that it became apparent that an appeal lies to the Appeal Board and that the applicant wishes to exercise his right of appeal. The mere existence of the internal appeal means that under the PAJA, the applicant was obliged to exhaust domestic remedies before he approached the High Court on review. Section 7(2) of PAJA is framed in mandatory terms and obliges a court to require that internal remedies be exhausted before it can entertain a review application. The section provides that no court shall review an administrative action unless internal remedies have first been exhausted.<sup>126</sup>

[135] Of course, the exercise of the courts' authority to review administrative decisions is subject to one exception. This is where exceptional circumstances

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<sup>126</sup> Section 7(2) of PAJA provides:

- “(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

justifying the determination of the review without exhausting internal remedies exist. But even then the existence of such circumstances alone is not sufficient. In addition to the exceptional circumstances, it must be in the interests of justice for the court to entertain the review application if domestic remedies are not exhausted. In *Nichol* the Supreme Court of Appeal said:

“It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c). Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given.”<sup>127</sup>

[136] The interpretation of section 7(2) of PAJA in *Nichol* was endorsed by this Court in *Koyabe* which was later reaffirmed in *Dengetenge*.<sup>128</sup> The first judgment places heavy reliance on the statement that the statutory requirement to exhaust domestic remedies should not be applied rigidly to shield administrative process from judicial scrutiny or to frustrate efforts of an aggrieved person.

[137] This statement is not appropriate here. There is not even a scintilla of evidence showing that compliance with the requirement to exhaust domestic remedies would shield administrative process from scrutiny or frustrate the applicant’s efforts in challenging the decision of the RSDO. On the contrary, it is the applicant who seeks to exercise his right to an internal appeal to the Appeal Board.

[138] Moreover, the statement must be understood in its proper context. By requiring flexibility in the application of section 7(2) in *Koyabe*, this Court did not suggest that the conditions in section 7(2)(c) should be discarded. What was meant was that in determining whether exceptional circumstances exist, a court should not set the bar too high to a level where the review of administrative action would be

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<sup>127</sup> *Nichol v Registrar of Pension Funds* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) at para 15.

<sup>128</sup> *Dengetenge* above n 52.

frustrated. The point made was simply that section 7(2) should not be construed in a manner that excludes the courts' jurisdiction from reviewing administrative action as such meaning would be unconstitutional.

[139] This is evident from the later parts of the judgment in *Koyabe* where the Court dealt specifically with the proper interpretation of section 7(2) of PAJA. In construing the section Mokgoro J stated:

“Section 7(2)(a) of PAJA provides that a court shall review administrative action only when all relevant internal remedies provided for in any other law are exhausted. The provision therefore does not preclude courts from exercising their judicial review jurisdiction. *A court must exercise its judicial review powers once one of two circumstances arises: when all available internal administrative remedies are found to have been exhausted or when exceptional circumstances are found to exist.*”<sup>129</sup>

[140] A proper reading of *Koyabe* shows that where internal remedies have not been exhausted, a court may entertain a review application only if the existence of exceptional circumstances has been established and that it is in the interests of justice to adjudicate the review application. The exceptional circumstances have not been shown to exist here and the first judgment does not mention any. Reliance on *Dengetenge* is misplaced. That case dealt with a situation where the existence of exceptional circumstances was not in dispute and the applicant wished to be granted exemption in terms of section 7(2)(c) of PAJA in this Court, without a formal application having been made in the High Court. In that context this Court held:

“In these circumstances to remit the matter to the High Court for an application for an exemption to be made would be tantamount to placing form above substance. This is so because Dengetenge has conceded on the merits that the rights were granted to it unlawfully and in contravention of an interdict. Therefore, on the present facts, a

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<sup>129</sup> *Koyabe* above n 4 at para 46.

remittal to the High Court would serve no purpose other than granting an exemption which is already justified on record.”<sup>130</sup>

[141] Here there is nothing on record which shows that an exemption is justified. It bears repeating that the applicant does not wish to be granted an exemption. Consequently there can be no justification for granting the exemption in this matter.

[142] If the conclusion reached by the first judgment on the review of the impugned decision is anything to go by, the applicant certainly has good prospects of success in the internal appeal. The first judgment holds that he did not receive a fair hearing before the RSDO. It is said that the decision was based on documents in respect of which the applicant was not afforded a chance to comment on or make representations. That procedural failure goes to the root of the decision and may not be cured on appeal because in our law “a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body”.<sup>131</sup> The applicant was entitled to a procedurally fair administrative decision in terms of section 33 of the Constitution. It appears that the procedure followed by the RSDO fell short of this standard.

### *Substitution*

[143] Since the review of administrative action is governed by PAJA and not the common law, reference must be made to PAJA in determining whether in a particular case the reviewing court may replace the decision of the administrative functionary with its own. Section 8(1) of PAJA provides:

“(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders

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<sup>130</sup> *Dengetenge* above n 12 at para 135.

<sup>131</sup> *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 658F-H.

- (a) directing the administrator-
  - (i) to give reasons; or
  - (ii) to act in the manner the court or tribunal requires;
- (b) prohibiting the administrator from acting in a particular manner;
- (c) setting aside the administrative action and-
  - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
  - (ii) in exceptional cases-
    - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    - (bb) directing the administrator or any other party to the proceedings to pay compensation”.

[144] It is apparent from the text of section 8(1)(c) that the main remedy where administrative action is set aside is to remit the matter to the decision-maker for reconsideration, subject to directions the court may make. It is only in exceptional cases that the court may substitute, vary or correct a defect in the administrative action. The guiding principle, of course, is that the court must grant a just and equitable order.

[145] The language of section 8(1)(c) is consonant with the right approach to the review of administrative decisions. The primary role played by courts in relation to administrative action is to ensure that the Constitution is followed by administrative functionaries when they exercise public power. To emphasise this point in *Koyabe* this Court stated:

“Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been

performed or taken in compliance with the relevant constitutional and other legal standards.”<sup>132</sup>

[146] This statement was affirming a principle that was pronounced in *Bato Star* where this Court cautioned that a court “should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government”.<sup>133</sup> Recently, the principle was reaffirmed in *Trencon* where Khampepe J said:

“In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.”<sup>134</sup>

[147] This is the context in which the language of section 8(1)(c) of PAJA must be read and understood. In its proper context, this provision confers a discretionary remedial power on a reviewing court. But the discretion to substitute is exercisable only if the case is exceptional. This means that the exceptionality requirement is a condition precedent to the exercise of the power to substitute. For this requirement to be met the case must contain unusual or extraordinary features. The mere presence of the common law factors is not enough.<sup>135</sup>

[148] Where common law factors are relied on for the proposition that the court should grant substitution, it must be shown not only that those factors are present

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<sup>132</sup> *Koyabe* above n 48 at para 36.

<sup>133</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

<sup>134</sup> *Trencon* above n 58 at para 43.

<sup>135</sup> Under the common law factors like the court is in as good a position as the administrators and that the decision to be taken is a forgone conclusion may justify substitution.

but also that their combined effect renders the case exceptional. Once this is established, the enquiry must proceed to the next leg. This is to determine a just and equitable order in the circumstances of a particular case. It seems to me that if this enquiry yields a range of such orders which include substitution, the court must consider opting for other orders. For example, a variation of the administrative action or a correction of a defect in it.

[149] It is only where other orders will not meet the requirement of justice and equity that a court may replace the impugned decision with its own decision. Put differently, substitution must be granted if it is the only just and equitable order in the circumstances of a particular case. That approach to substitution is consistent with the principle of separation of powers and the recognition of the fact that the exercise of an administrative power is entrusted to the other arms of government. Moreover, where as here, the repository of the power is required to possess special expertise and knowledge, a court should be slow to grant substitution and may do so if it is the only order that is just and equitable.

[150] Seen in its correct context, section 8(1)(c) empowers courts to avoid an injustice that may flow from orders they issue. The section permits flexibility that is required in remedying defects in administrative actions because more often than not, circumstances might have changed by the time of the judicial decision on review.

[151] The first judgment does not conclude that the procedural unfairness it identifies constitutes an exceptional case envisaged in section 8(1)(c). Nor could it properly so conclude on the facts on record. In support of the request for substitution, the applicant's affidavit filed in this Court lists a number of factors, some of which are mentioned without any substantiation. Without any supporting facts, the applicant accused the RSDO of incompetence and bias. In the absence of a factual foundation, this accusation cannot be sustained. Moreover, the High Court had rejected it.

[152] The applicant also averred that this Court “is in as good a position as the administrator to make the decision, if not better”. He continued to state that a determination of an application for asylum requires no specialist expertise and that all the evidence he placed before the RSDO is on record. This is flawed. Section 8(2) of the Act makes it plain that RSDOs must hold qualifications, experience and special knowledge on refugee matters which make them capable of performing their functions. Therefore, the Director-General is required to appoint only candidates with those qualifications as RSDOs. Courts do not possess these attributes. It is doubtful that in these circumstances it can be said that a court is in as good a position as the administrator to make the decision. Moreover, when the RSDO determines an application for asylum he or she is not restricted to the evidence placed before him or her by the applicant. This much is clear from section 24 of the Act.<sup>136</sup>

[153] Section 24(1) mandates the RSDO to call for information from the applicant or the Refugee Reception Officer and where necessary to consult or solicit information from a UNHCR representative before deciding an application for asylum. It does not appear that a court of law is equipped to make determination on whether the provisions of section 24(1) should be invoked in a particular case. This manifestly illustrate that a court may not be in a position as good as the RSDO to determine an application for asylum.

[154] The applicant asserted further that it is a forgone conclusion that he meets the requirements of refugee status. He said there are few applications which were as

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<sup>136</sup> Section 24(1) of the Refugees Act provides:

- “(1) Upon receipt of an application for asylum the RSDO—
- (a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer;
  - (b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and
  - (c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.”



detailed as his. This reveals that the applicant hopelessly misunderstood *Trencon* on which he relied. There is nothing foregone about his application meeting the necessary requirements. The concept of a foregone conclusion as used in *Trencon* relates to the administrator's decision and arises where there is only one outcome of the exercise of discretion. In this regard *Trencon* says:

“A finding that the IDC's decision is a foregone conclusion depends on whether there was only one proper outcome of the exercise of its discretion and remittal would serve no purpose. In other words, if the matter were to be remitted, the IDC would not have any discretion left to exercise. In my opinion, the award of the tender to *Trencon* is a foregone conclusion. It is common cause that *Trencon* was the highest points earner and that the IDC's Support Services; Procurement Committee; Quantity Surveyors; and principal agent, Snow Consultants, all recommended that it be awarded the tender. It is also common cause that, but for an error of law regarding *Trencon*'s price escalation for the delayed site handover, *Trencon*'s bid would not have been declared non-responsive.”<sup>137</sup>

[155] The present is not such a case. This is evident from the outcome reached by the first judgment on the merits of the application for asylum.

[156] Lastly, the applicant complained of significant delays in the finalisation of his application and mentioned that he was arrested and detained on 27 December 2011 and that his daughters were growing up in his absence. There is no merit in this contention. In it the applicant seeks to link unrelated issues. These are his application for asylum and his arrest and detention.

[157] As the first judgment shows, there have been no undue delays in processing the application for asylum. This matter must be seen in the context of its facts. Following his conviction of the murder of three people in Serbia in 2007, the applicant unlawfully entered South Africa using a false name and passport. He lived in this country for four years without applying for asylum. It was only after

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<sup>137</sup> *Trencon* above n 58 at para 59.

he was arrested for fraud and possession of drugs that his true identity was revealed and immediately Serbia sought his extradition. He was detained pending the finalisation of his criminal trial and the extradition proceedings.

[158] The application for asylum was made a month after Serbia had requested his extradition and whilst he was in detention. The first application was unsuccessful but that decision was set aside on review by the Standing Committee. Thereafter, he submitted the current application which was refused on the ground that he was excluded from refugee status in terms of section 4 of the Act, on account of his convictions in Serbia. He attempted to appeal this decision before the Standing Committee which pointed out that it lacked jurisdiction.

[159] He launched the current review proceedings in an attempt to have the decision set aside. The application failed in the High Court and he approached this Court. From the moment he lodged his application for asylum, the applicant was automatically entitled to an asylum seeker permit which would allow him to remain in this country until his application for asylum was finalised. And on the authority of this Court in *Saidi*, the temporary permit would have been extended until his case was finally decided by this Court.<sup>138</sup>

[160] This demonstrates that the delays flowing from the judicial process did not in any way affect the applicant in a negative way. If the matter is remitted he will continue to be protected against deportation.

[161] The arrest and detention he complains about is not related whatsoever to the application for asylum. He was arrested for committing crimes and also for purposes of extraditing him to Serbia, which may only be authorised by a

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<sup>138</sup> *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 37.

Magistrate upon conclusion of extradition proceedings. Consequently, his arrest and detention have no bearing on whether or not substitution is appropriate.

[162] Moreover the grounds on which the RSDO's decision is set aside in the first judgment warrants remittal of the matter. The first ground was that the reasons furnished by the RSDO were inadequate. Section 8(1) of PAJA explicitly authorises a court to direct an administrator to give reasons. I can think of no reason why such order would fail to meet the requirements of justice and equity in this matter.

[163] The second ground is procedural unfairness. The first judgment holds, correctly so, that it was unfair for the RSDO to take into account documents without affording the applicant an opportunity to make representations pertaining to those documents. These include the Serbian judgments. Ordinarily remittal is granted where an administrative decision was taken without hearing the party adversely affected by it. It is for all these reasons that I think that substitution is not justified in this matter and that it is not appropriate for this Court to determine the merits of the application for asylum.

For the Applicant:

A Katz SC and D Simonsz instructed  
by Chris Watters Attorneys

For the Respondent:

M A Albertus SC and G R Papier  
instructed by the State Attorney, Cape  
Town

For the Amicus Curiae

S Budlender and L Siyo instructed by  
the Legal Resources Centre