IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: **217/16**

In the matter between:

DOBROSAV GAVRIĆ	Applicant
and	
THE REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN	First Respondent
THE MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE	Sixth Respondent
THE PEOPLE AGAINST SUFFERING OPPRESSION AND POVERTY	Amicus Curiae

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RESPONDENTS' SUBMISSIONS IN RE: THE SUBMISSIONS ON BEHALF OF THE *AMICUS CURIAE*

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1. These written submissions are filed persuant to the directions of the Chief Justice dated 11 January 2018.

2. The *amicus curiae* ("amicus") in its written submissions, dated 19 January 2018, raise the following four issues:

    2.1. First, whether an exclusion decision is subject to an internal review or appeal under the Refugees Act 130 of 1998 ("the Act");

    2.2. Second, the scope of the principle of non-refoulement enshrined in Section 2 of the Act;

    2.3. Third, the duties of a Refugees Status Determination Officer ("RSDO") in making a decision; and

    2.4. Fourth, whether the doctrine of imputed political opinion finds application in South African Law.

3. We deal, in what follows, with each of the said issues in the same order as dealt with by the *amicus* in its written submissions.

WHETHER AN EXCLUSION DECISION IS SUBJECT TO AN INTERNAL REVIEW OR APPEAL UNDER THE ACT

4. The *amicus* contends that none of the parties to this matter appear to have dealt with the issue of whether an exclusion decision is subject to an internal

review or appeal under the Act.[1] However, as will appear from what follows, there is a sound reason for this.

5. The above issue has become moot in the present matter on account of the fact that the Applicant, through his counsel, Mr David Simonsz, consciously and deliberately took the decision not to proceed further with a review before the Standing Committee for Refugee Affairs ("the SCRA"), but rather chose to challenge in the High Court his exclusion under Section 4 of the Act.

6. The Applicant's said decision followed upon the First Respondent's having advised the Applicant in her exclusion decision as follows:

> *"(31) In terms of Section 25(1) of the Act the application for asylum will be reviewed by (sic) Standing Committee for Refugee Affairs to confirm or set aside the decision of the Refugee Status Determination Officer, as contemplated in Section 25(3)(a) of the Act."*[2]

7. The decision taken by the Applicant to abandon the review proceedings before the SCRA is manifest from the contents of an e-mail dated 30 January 2013, sent by Adv Simonsz to Mr Sloth-Nielsen, the Chairperson of SCRA, which reads as follows:

> *"Dear Mr Sloth-Nielsen*
>
> *Thank you for returning my call. I confirm that you and I discussed the matter of Dobrosav Gavric and agreed that:*

[1] Par 7 of the written submission of the *amicus*
[2] Record: Vol 1, pp 63-64

— *As per the submissions filed on behalf of Mr Gavric, the SCRA does not have jurisdiction to review exclusion decisions under section 4 of the Refugees Act.*

— *There is therefore no need for me to appear before the SCRA tomorrow.*

— *The SCRA will still take a formal decision to the above effect, and will communicate that decision to the attorney of record, Mr Juan Smuts, by Monday next week.*

— *That will be the end of the involvement of the SCRA. Mr Gavric will then pursue his legal remedies in the appropriate forum.*

If you have any difficulties with any of the above, please let me know.

I must place on record that Mr Gavric only approached the SCRA because the RSDO and other Department of Home Affairs officials in Cape Town insisted, quite strongly, that the SCRA would be the proper forum for the hearing of the review. This now appears to be incorrect advice. Mr Gavric does intend to challenge his exclusion under section 4 of the Act, and the lack of jurisdiction of the SCRA to hear his review in no way means that his application for asylum is no longer live.

Regards

David Simonsz"[3]

8. It would accordingly, be wholly inappropriate in the instant matter - where a conscious decision was taken by the Applicant not to pursue any internal remedies - to allow an argument to be proffered on his behalf, that as a matter of law, he is entitled to either an internal appeal or a review, and to have the matter remitted to the SCRA for the hearing of an internal review or the Refugee Appeal Board ("the RAB") for the hearing of an appeal.

9. A further problem which precludes any argument on the issue, is the fact that neither the SCRA nor the RAB, who are both legal *persona*[4], and interested parties, have been joined in these proceedings. They are both interested parties, to the extent that the outcome of any decision on this issue will affect their functions, rights and duties.

10. Moreover, and in any event, and assuming purely for the sake of argument, that any internal remedy does exist, this is an appropriate matter, especially where the applicant is not seeking a remittal of the matter, for this Court, pursuant to Section 7(2)(c) of the Promotion of Administrative Justice Act ("PAJA")[5], to exempt the applicant from the obligation to exhaust any internal remedy he may enjoy in terms of the Act.

11. Given the fact that the issue under consideration has for all practical purposes become metaphorically speaking, a dead letter, the general importance of the

[3] Record: Vol 4, p 357
[4] See: Section 9 (for the establishment of SCRA) and Section 12 (for the establishment of the Refugee Appeal Board).
[5] Act 3 of 2000

issue cannot override the question of the practical relevance thereof in this matter.

12. The so-called practical realities of RSDOs decisions referred to in the article by Dr Roni Amit referred to in paragraphs 9.4 and 9.5 of the heads of argument of the *amicus* are not only irrelevant for the reasons set forth above, the article itself is objectionable because it does not form part of the record and is, moreover, flawed for the following reasons:

12.1. First, the article is based on an extremely limited number of RSDO decisions, namely, 324 letters of rejection. Aside from stating (at page 461 of the article) that the rejection letters emanate from legal advice centres and further, providing a breakdown of the relevant RROs at which the letters were issued, the article does not explain:

(a) the process which was followed in selecting the letters of rejection;

(b) more particularly, whether the said process involved scrutiny of rejection decisions where the reasons advanced for the decisions were sound, and if so, how many of such decisions were so scrutinised;

(c) if letters of rejection where the reasons were sound were also scrutinised, what percentage of the full sample of rejection letters which were scrutinised, does the 324 letters of rejection represent;

(d) what percentage of the total number of RSDO decisions at all the relevant RROs over the relevant period, does the selected decisions represent.

12.2. Second, the rejection letters in question were issued over an unreasonably short period, namely, January to April 2009 and, as such, the article cannot be relied upon for demonstrating any trend in the improvement (or non-improvement) of the quality of decision-making over a reasonable period of time, such as a year or two, at the very least.

12.3. Third, the article, was not only produced in June 2011, but is, moreover, based on information dating back to 2009. It is thus outdated and cannot serve to demonstrate the quality of decision-making today.

12.4. Fourth, the Department's input was not elicited by the author of the article and thus is unquestionably one-sided in respect of the sources of information on which it relies.

12.5. Fifth, the author of the article also draws on the assistance of the Legal Resources Centre (the *Amicus*' attorneys of record) in relying on research materials. The author thus does not appear to be impartial.

13. We respectfully submit, that on their own, the rejection decisions represent nothing more than a selection of allegedly poor decisions and as such does not constitute a scientific or scholarly basis upon which it could be argued that

the said decisions are representative of the general standard of RSDO decision-making.

14. For the reasons set out above, we respectfully submit, that the Amit article has no or very little probative value and cannot be relied upon for the conclusions that the *amicus* seeks to draw.

15. Turning to the proper interpretation of the Act, we submit that in any event, there is no explicit or implicit sanctioning in the Act of an internal appeal or review following upon an exclusion decision.

16. To the extent that an exclusion decision does not deal with the merits of an asylum seeker's application for Refugee Status, but rather with the question as to whether or not the asylum seeker satisfies the requirements of Section 4(1)(c) of the Act, the exclusion decision cannot be said to fall under Section 24(3) of the Act.[6]

17. It is furthermore not correct to contend, as the *amicus* does,[7] that there is no separate statutory power given to the RSDO to exclude an application for asylum. Section 4, by necessary implication, vests such power in the RSDO by prescribing in peremptory terms that any asylum seeker does not qualify for refugee status for the purposes of the Act, if he or she satisfies the

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[6] Section 24(3) provides as follows:

"24(3) The Refugee Status Determination Officer must at the conclusion of a hearing-

(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."

[7] P 11, par 16.3 of the written submissions of the *amicus*

requirements of Sections 4(1)(a) or (b) or (c) or (d). No separate power is needed to allow an RSDO to make a decision in terms of the said section. Nor is it necessary when making such a decision, for the RSDO to say that asylum is being rejected on the basis that the application is unfounded or manifestly unfounded.

18. Significantly, Section 21(4)(a) of the Act indeed contemplates a situation where an adverse decision is taken against an asylum seeker under circumstances where there is no opportunity to exhaust any right of review or appeal.[8]

19. However, if we are wrong in our interpretation, we respectfully submit, for the reasons already advanced herein, that this is not an appropriate matter for a remittal to the SCRA or allowing the applicant an opportunity to lodge an appeal to the RAB against his exclusion decision.

THE SCOPE OF THE PRINCIPLE OF NON-REFOULEMENT ENSHRINED IN SECTION 2 OF THE ACT

20. The above issue has comprehensively been dealt with by the Respondents in their submissions to this Court's directions dated 16 August 2017.[9]

[8] Section 21(4) of the Refugees Act provides:

"Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-

(a) such person has applied for asylum in terms of subsection (1) until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
(b) such person has been granted asylum." (emphasis added)

[9] Pp 40-50, paras 17-45 of Respondents' written submissions (submission bundle)

21. For what it is worth, we repeat paragraphs 26 and 27 of the Respondents' main submissions, which read as follows:

> *"26. For the reasons, already advanced earlier herein, we submit that the provisions of Section 2 of the Refugees Act certainly apply to persons who have been excluded in terms of Section 4(1)(b) of the Refugees Act. However, it is not for the refugee status determination officer (RSDO) (the First Respondent in this matter), to make the judgment call required by Section 2 of the Refugees Act. That is the prerogative of the Minister of Justice.*
>
> *27. The RSDO's role in terms of Section 4 of the Refugees Act, is a very limited one. He or she is obliged to enquire into whether or not the facts of any particular case satisfy the requirements of the said section and as such, to make a finding that the person does or does not qualify for refugee status for the purposes of the Refugees Act."*

22. By using the words *"a judgment call"* as regards the Minister of Justice, we did not intend thereby to mean that the Minister of Justice exercises a discretion as to whether or not a person falls within the ambit of Section 2 of the Act. We accept that whether a person falls within this section is an objective inquiry – not a discretionary matter.

23. The decision of the Minister of Justice obviously finds application where an application has been made for the extradition of a person who has been excluded in terms of Section 4 of the Act. In all other cases, where no

extradition is applicable, the provisions of the Immigration Act, would apply as broadly set forth hereunder.

24. It is now settled law, that the decision to arrest and detain an illegal foreigner for the purposes of deportation is a discretionary one; it does not detract from any of the illegal foreigner's rights under Section 8 of the Immigration Act.[10]

25. Deportation to another state that would result in the imposition of cruel, unusual or degrading punishment is in conflict with the fundamental values of the Constitution.[11]

26. In sum, there are sufficient safeguards within the South African statutory framework and jurisprudence, which allow for the protection and prevention of an illegal foreigner being deported to a country where his or her life may be at risk or where he or she may be subject to cruel, unusual or degrading punishment.

27. In conclusion, the Respondents stand firm on the contention that the RSDO's role in terms of Section 4 of the Act, is a very limited one; he or she is obliged to enquire into whether or not the facts of any particular case satisfy the requirements of the said section, and as such, to making a finding that the person does or does not qualify for refugee status.

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[10] *Jeebhai v Minister of Home Affairs* 2009 (3) 4 All SA 103 (SCA); *Ulde v Minister of Home Affairs (Lawyers for Human Rights as amicus curiae)* 2009 3 All SA 332 (SCA)

[11] *Abdi v Minister of Home Affairs 2011 (3) All SA 117 (SCA);* See also *Minister of Home Affairs v Tsebe (Amnesty International as amicus curiae), Minister of Justice and Constitutional Development v Tsebe (Amnesty International as amicus curiae) 2012 (10) BCLR 1017 (CC)*

28. This being so, we agree with the submission made by the *amicus*,[12] that the question of which state official would be responsible for making the determination would have to depend in part on whether the person proposed to be returned to another country, would be effected by refusal of entry, expulsion, extradition or so on.

THE DUTIES OF AN RSDO

29. We agree that there should be high standards required of RSDOs when it comes to procedural fairness and the provision of adequate reasons.

30. However, in seeking to appraise the standard of the department's decision-making process relating to refugee status determinations, the *amicus* once more seeks to rely on the article of Dr Amit, which as already indicated herein, is fundamentally flawed and lacks probative value.

31. In the circumstances, and based on the special facts of this case, we respectfully submit, that there is no need for this Court to issue a homily as to how RSDOs ought to conduct themselves when exercising their powers under the provisions of the Refugees Act.

IMPUTED POLITICAL OPINION

32. It is not correct as contended by the *amicus*, that the Respondents in their main written submissions, appear to avoid the question as to whether the doctrine of imputed political opinion forms part of our law. We have, in our

[12] Written submissions of the *amicus*, p 12-13, par 22

written submissions, made it clear what the present state of the law is regarding the said doctrine.[13]

33. We agree with the contention of the *amicus* that the Tsebe judgment makes it quite clear that when it comes to the prospect of sending someone to face death or persecution, our Constitution does not distinguish between different kinds of people or what they have done. It insists that our government will not be party to people being killed or persecuted, under any circumstances.

34. However, we persist with our contention as imbodied in our main written submissions[14] that Section 4 of the Refugees Act enjoys primacy over Section 3, and hence the issue concerning perceived political opinion, and the concomitant risk to life or limb which accompanies it, is not a justiciable issue at this juncture, but rather a matter for the consideration and decision at a later stage of the Minister of Justice, when the extradition application by the Serbian government, is considered.

CONCLUSION

35. In light of the aforegoing, we submit, that the written submissions on behalf of the *amicus*, does not take the case of the Applicant any further and accordingly, we further submit, that the Applicant's application for leave to appeal stands to be dismissed with costs, which costs shall include those occasioned by the employment of two counsel.

[13] Pp 53-54, paras 55-57 of the Respondent's main written submissions (submissions bundle)
[14] Respondents' main written submission, p 54, para 56 (submission bundle)

M A ALBERTUS SC

G R PAPIER

Counsel for Respondents

Chambers

CAPE TOWN

25 January 2018

LIST OF AUTHORITIES

1. Jeebhai v Minister of Home Affairs 2009 (3) 4 All SA 103 (SCA)
2. Ulde v Minister of Home Affairs (Lawyers for Human Rights as *amicus curiae*) 2009 3 All SA 332 (SCA)
3. Abdi v Minister of Home Affairs 2011 (3) All SA 117 (SCA)
4. Minister of Home Affairs v Tsebe (Amnesty International as *amicus curiae*), Minister of Justice and Constitutional Development v Tsebe (Amnesty International as *amicus* curiae) 2012 (10) BCLR 1017 (CC)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case number: 217/16
SCA case number: 582/16
WCD case number: 3474/13

In the matter between:

DOBROSAV GAVRIĆ Applicant

and

THE REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN First Respondent
THE MINISTER OF HOME AFFAIRS Second Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Fourth Respondent
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Fifth Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE Sixth Respondent

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APPLICANT'S WRITTEN SUBMISSIONS

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1. These written submissions are filed pursuant to the directions of the Chief Justice, dated 1 February 2017 ("*the Directions*"), to provide answers to the questions set out below.

Direction 1.1: What is the current status of the Applicant?

2. The Applicant has no lawful status in South Africa. As a person excluded from refugee status in terms of section 4(1)(b) of the Refugees Act 130 of 1998 ("*the Refugees Act*"),[1] he has neither an asylum seeker permit in terms of section 22(1) of the Refugees Act, nor a refugee permit in terms of section 24(3)(a) of the Refugees Act. He does not hold any visa or permit under the Immigration Act 13 of 2002 ("*the Immigration Act*").

3. The Applicant is held in detention at Helderstroom Correctional Centre. He has been in detention since 27 December 2011, over a half a decade ago.

Direction 1.2: Do the mechanisms and processes contained in the Extradition Act 67 of 1962 ("*Extradition Act*") afford appropriate safeguards in preventing potential violations of constitutionally protected rights?

4. No.

5. The Extradition Act is not (necessarily) unconstitutional or inadequate in the safeguards it provides. But it is designed to achieve different outcomes, using different mechanisms

[1] Section 4(1)(b) provides:

> **"A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-**
>
> . . . .
>
> **(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment".**

and processes, and applies to different categories of persons, to those contemplated in the refugee system. Thus, the protections it offers are not adequate, bearing in mind the status (or lack thereof) and risks faced by asylum seekers and refugees.

6. First, only the Refugees Act can grant persons in the position of the Applicant a lawful status and right to remain in South Africa. The Extradition Act does not provide such rights; it deals only with the processes by which persons (even South African citizens) in South Africa can be surrendered to a different State to face criminal charges or sanctions.

7. Without a right to remain in South Africa, a foreign person's status and safeguards in South Africa is inherently and inevitably insecure, because he or she would be an illegal foreigner in terms of the Immigration Act.[2] Illegal foreigners shall depart or "*shall be deported*".[3]

8. Deportation is distinct from extradition,[4] and it has no safeguards or procedures which prevent an illegal foreigner from being deported even when he or she has a well-grounded fear of facing persecution and/or widespread disruption in his or her home country.[5]

9. In other words, if persons in the position of the Applicant are not given protection by the Refugees Act, then the protections in the Extradition Act – no matter how robust – are irrelevant, because such persons will be liable to be deported under the Immigration Act, not the Extradition Act.

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[2] Section 1 of the Immigration Act defines "*Illegal foreigner*" as "*a foreigner who is in the Republic in contravention of this Act*".
[3] Section 32 of the Immigration Act.
[4] *Mohamed v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) ("*Mohamed*") at paras 28-29.
[5] See section 34 of the Immigration Act; see also *Lawyers for Human Rights v Minister of Home Affairs and Others* 2016 (4) SA 207 (GP) (currently before this Court for confirmation under CCT case number 38/16).

10. But even within the scheme of the Extradition Act, the protections it offers are not adequate compared to the equivalent protections in the Refugees Act. There is a protective spirit and purpose[6] in the Refugees Act that manifests in its specific criteria and standards of evidence.

11. The relevant provisions in the Extradition Act are sections 11(b)(iii)[7] and (iv).[8]

12. Section 11(b)(iii) creates a wide discretion not to surrender a person if it would be "*unjust or unreasonable or too severe a punishment*". But the Minister or magistrate[9] does not have to consider the criteria set out in section 3 of the Act. And the focus is on the punishment the person faces during or as a result of the criminal sanction he or she is extradited to face, not on the persecution he or she may face outside the criminal system (or, in the case of the Applicant, the fact that he is almost certain to be killed in jail by other in-mates).

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[6] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at paras 28-29.
See also *Tshiyomba v Members of the Refugee Appeal Board and Others* 2016 (4) SA 469 (WCC) at para 44.

[7] Section 11(b)(iii) provides that the Minister may order that a person shall not be surrendered "*at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned*". A substantively-similar provision appears at section 12(2)(c)(i) of the Extradition Act, save that it applies to extraditions to associated States and allocated the power to magistrates. As regards the relationship between sections 10 and 12 of the Extradition Act, see *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC) ("*Robinson (CC)*") at para 9.

[8] Section 11(b)(iv) provides that the Minister may order that a person shall not be surrendered "*if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion*". The corresponding provision for extraditions to associated States appears at section 12(2)(c)(ii) of the Extradition Act.

[9] Depending on whether the extradition is to a foreign or associated State, as defined in section 1 of the Extradition Act.

13. Section 11(b)(iv) of the Extradition Act does focus on the prejudice the foreign person may face, but only at "*his or her trial in the foreign State*". Again, forms of prejudice external to the trial are not included. Also omitted is protection against "*external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole*" of the country of origin, as provided for in section 3(b) of the Refugees Act

14. And the criteria set out in section 11(b)(iv) of the Extradition Act are less extensive than those in sections 2 and 3 of the Refugees Act. Section 11(b)(iv) refers to "*gender, race, religion, nationality or political opinion*". But sections 2 and 3 of the Refugees Act refer to "*race, religion, nationality, political opinion or membership of a particular social group*" (emphasis added). This final category expands the protection provided by the Refugees Act far beyond that of the Extradition Act, to include, *inter alia*, discrimination on the basis of sexual orientation, disability, class, or caste.[10]

15. Whereas the Refugees Act, depending on the social group in question, protects all previously disadvantaged groups covered in section 9(3) of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*"), the Extradition Act does not.

16. The standards of proof that an asylum seeker must meet under the Refugees Act are also lower than the usual civil standard, because "*in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents*".[11] Asylum seekers must show only a reasonable possibility of

[10] See the definition of "*social group*" in section 1 of the Refugees Act; *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T) at 458B-460E. See also Khan & Schreier (eds.) Refugee Law in South Africa (Juta) at 68-73.
[11] The United Nations High Commissioner for Refugees ("*UNHCR*") Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ("*UNHCR Handbook*") at paras 195-205.

persecution,[12] whereas a person seeking to halt extradition processes would face the significantly more difficult task of demonstrating on a balance of probabilities that the trial he or she will face will be tainted by prejudice.

Direction 1.3.1: What is the scope of application of the principle of *non-refoulement* enshrined in section 2 of the Refugees Act? Is such protection available to persons who have been excluded in terms of section 4(1)(b) of the Refugees Act?

17. There is no clear answer to this question in South African law. No court has purported to address this issue, which extends far beyond the case of the Applicant to include all persons who might be excluded in terms of section 4(1)(b) of the Refugees Act.

18. This is one reason why, it is respectfully submitted, it is in the interests of justice that this Court grant leave to appeal: so that this issue may be ventilated and argued in full.

19. The Applicant submits that the answer to the above question is yes. Even a person who is not a "refugee" as defined in section 3 of the Refugees Act is protected against *non-refoulement* if he or she meets the requirements of section 2 of the Refugees Act. This is the plain wording of section 2:

> **"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-**

[12] *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) at para 97.

(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."

(Emphasis added.)

20. The sole *dicta* on this issue come from this Court in *Chipu*.[13] At paragraph 30 of *Chipu*, this Court stated:

> **"A literal reading of s 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. <u>However, it may well be that s 4(1)(b) should not be read literally and rigidly</u>. Section 4(1)(b) seeks to give effect to, among others, the 1951 Refugee Convention. A reading of part of the United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) dealing with the provisions of the 1951 Refugee Convention reveals that the relevant provision of the convention should not be read rigidly and that <u>there are circumstances in which a person who has committed a non-political crime may, nevertheless, qualify for refugee status</u>."**
>
> (Emphasis added.)

21. And at paragraph 30, footnote 27 of *Chipu*, this Court quoted with approval from the UNHCR Handbook at paragraphs 156-157:

> **"<u>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</u>. 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**

[13] *Mail & Guardian Media Ltd v Chipu NO* 2013 (6) SA 367 (CC) ("*Chipu*").

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."

(Emphasis added.)

22. The UNHCR Guidelines on International Protection 5: Application of the Exclusion Clauses ("*Guideline 5*") provide further support for this "*Chipu principle*":

"The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. <u>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</u>. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. <u>It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a)</u>."

(Emphasis added.)

23. The constitutionality of law is determined objectively, not with reference to the facts of specific litigants. So section 4(1)(b) of the Refugees Act must be considered from a principled perspective, and not only with regard to its application to the Applicant.

24. Regard must be had to section 4(1)(b)'s international origins. It is drawn almost directly from Article 1F(b) of the United Nations 1951 Convention Relating to Status of Refugees ("*the Convention*").[14] Guideline 5 states at paragraph 2:

[14] Article 1F provides:

> **"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."[15]**
>
> (Emphasis added.)

25. But it is submitted that at least part of this rationale behind Article 1F – arising as it did in the early years after the Second World War – is not consistent with the modern conception of human rights as enshrined in the Constitution.

> **"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 purposes and principles of the United Nations."**
>
> (Emphasis added.)

See also the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("*the OAU Convention*") at Article 1(4)(f).

[15] See also Khan and Schreier at 93; G. Gilbert "*Current Issues in the Application of the Exclusion Clauses*" in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection Feller, Türk and Nicholson (eds.) (Cambridge University Press, 2003) at 427-428:

> **"Reference to the *travaux preparatoires* 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."**

26. Under the Constitution, human rights cannot be denied to any person, regardless of what crimes they have committed.[16]

27. It is no longer constitutionally compliant to say, as section 4(1)(b) does, that only "deserving" persons will be protected from the violation of their fundamental rights.

28. For example, there is no rule of customary international law prohibiting States from imposing the death penalty on criminals. Yet the Constitution prohibits the death penalty in South Africa.[17]

29. The words of Langa J (as he then was) at paragraphs 229-230 deserve mention:

> **"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. <u>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.</u>**
>
> **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**

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[16] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at para 25:

> **"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 s 10 of the Bill of Rights."**

Mohamed at para 52:

> **"But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, ss 10 and 11 of the Bill of Rights are implicated."**

See also *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) at paras 21-22.

[17] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) ("*Makwanyane*").

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."

(Emphasis added.)

30. This Court has repeatedly held that South Africa may not extradite persons to countries where there is a real risk that they will face the death penalty.[18] In *Tsebe*,[19] this Court was called upon to decide whether two murderers could be extradited to Botswana when Botswana had not given any assurances that it would not impose the death penalty.

31. This Court, per Zondo AJ, held at paragraphs 67-68:

"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. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.

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's decision in Mohamed said that what the South African authorities did in that case was not consistent with the kind of society

[18] *Mohamed* at paras 55-59.
[19] *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) ("*Tsebe*").

that we have committed ourselves to creating. <u>It said in effect that we 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</u>."

(Emphasis added.)

32. It is submitted that similar considerations arise in this matter, when section 4(1)(b) is assessed, as arose in *Makwanyane* and *Tsebe*. It makes no difference that in *Tsebe*, the entity executing the accused persons was the State.

33. The point is that in this case, as in *Tsebe*, there is a <u>real risk</u> that if the Applicant is returned, deported, extradited or otherwise sent to Serbia <u>he will be killed</u>. His right to life will be utterly and finally violated as a result of the conduct of the South African government. This cannot be allowed.

Direction 1.3.2: What is the scope of application of the principle of *non-refoulement* enshrined in section 2 of the Refugees Act? Is such protection available to persons who do not otherwise qualify for refugee status?

34. No. Persons who do not, on a full and fair consideration of all facts, face persecution such that they would qualify for refugee status in terms of section 3 of the Refugees Act, are not protected by the principle of *non-refoulement*.

35. The *raison d'etre* of the principle of *non-refoulement* is protection. If a person does not face persecution or public disruption, then there is nothing to be protected from, and the principle of *non-refoulement* does not apply.

Direction 1.4: Are there additional mechanisms in South African law that protect an unsuccessful applicant for refugee status from *refoulement*?

36. No, not for all (or even most) asylum seekers or refugees.

37. The relevant mechanisms of the Extradition Act are dealt with above. There is nothing in the Immigration Act entitling persons to remain in South Africa (or to prevent their deportation) based on the persecution and/or public disruption they would face in their home country.

38. The only possible exceptions are, first, that a person with "*substantial grounds*" for believing that he or she will be subjected to torture may not be returned to the State where he or she will face torture.[20]

39. Secondly, this Court held in *Tsebe* that "*no matter what the crime*" South Africa will not be party to "*killing as a punishment*".[21]

40. It is submitted that although the Applicant will not be executed by the government of Serbia, his death, should he be returned to Serbia, is no less certain.[22] This Court should

[20] Section 8 of the Prevention and Combating of Torture of Persons Act 13 of 2013 ("*the Torture Act*") provides:

> **"(1) No person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.**
>
> **(2) For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."**

[21] *Tsebe* at paras 67-68.

[22] Even if the Court concludes that the Applicant will not be persecuted in Serbia, the decision to exclude him cannot stand. Instead, he should be found not to be a refugee at all. This is a critical distinction, bearing in mind the precedent that this case will set as to the procedures and purpose of exclusion decisions in terms of section 4(1)(b) of the Refugees Act.

protect his rights in terms of section 10 and 12 of Constitution by, *inter alia*, declaring that he may not be extradited, deported, or otherwise returned to Serbia.

Direction 1.5: Is the applicability of section 4(1)(b) of the Refugees Act contingent on a previous finding by the Refugee Status Determination Officer that the person qualifies for refugee status in terms of section 3 of the Refugees Act?

41. Yes, although it is submitted that the assessment by the Refugee Status Determination Officer ("*RSDO*") as to whether an asylum seeker qualifies in terms of section 3 of the Refugees Act can also be made together, or simultaneously, with an assessment as to exclusion.

42. The important principle, as this Court set out in *Chipu* (quoted above), is that the RSDO must consider the persecution the asylum seeker may face in his or her home country, and weigh that in the balance against the crime the asylum seeker is supposed to have committed.

43. In this case, the RSDO failed to give any consideration whatsoever to the persecution – indeed, the near certain death – that the Applicant will face in Serbia. For this reason, her decision in terms of section 4(1)(b) of the Act was unlawful.

Direction 1.6: In the event that an application for refugee status is rejected, are there minimum requirements which must be satisfied in the reasoning in order for the decision to be deemed adequate?

44. We answer in two different ways, addressing the questions:

    44.1. Are there minimum requirements in the reasoning which must be satisfied in order for the decision to be reasonable? And

    44.2. Are there minimum requirements for the reasons given for the decision?

45. The answer to both questions is yes, there are such minimum requirements.

46. Asylum seekers are entitled in terms of section 33 of the Constitution to administrative action which is "*lawful, reasonable, and procedurally fair"*. A decision on an asylum application constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

47. Asylum seekers are accordingly entitled to the full protection of South African law insofar as it relates to reasonable decisions. There is extensive jurisprudence on reasonableness as, *inter alia*, a ground of review,[23] and it would overburden these papers to address this further.

48. Asylum seekers are also entitled to "*adequate*"[24] reasons for the decisions made against them. This is of particular relevance in this matter, in which the RSDO failed to even ask – let alone answer – basic questions: Did the Applicant commit the alleged crime? Was the alleged crime political in nature? And does the severity of the crime outweigh the persecution the Applicant will face in Serbia?

[23] See, *inter alia, Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paras 42-49.
[24] Section 5(2) of PAJA.

49. In *Koyabe,*[25] this Court held at paragraphs 63 that:

> **"Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal."**

50. This Court proceeded to 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, <u>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</u>.'**
>
> **. . . .**
>
> **The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one"[26]**

51. The Supreme Court of Appeal in *Phambili*[27] explained the value of giving reasons as enabling "*a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide*

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[25] *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC).
[26] *Koyabe* at para 64 (emphasis added), referring with approval to *Commissioner, South African Police Service, and Others v Maimela and Another* 2003 (5) SA 480 (T) ("*Maimela*") at 480.
[27] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) ("*Phambili*").

whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging. "[28]

52. The Supreme Court of Appeal concluded:

> **"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. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."[29]**

53. Hoexter[30] argues that two main propositions emerge from, *inter alia*, *Phambili*:[31]

53.1. That adequate reasons should be specific, be written in clear language and be of a length and detail appropriate to the circumstances; and

53.2. The reasons should consist of more than mere conclusions, should refer to the relevant facts and law, as well as the reasoning processes leading to those conclusions.

54. It is submitted that the facts of this case are an example of when a decision-maker provides mere conclusions, not reasons, and not adequate reasons.

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[28] *Phambili* at para 40.
[29] *Phambili* at para 40, referring with approval to Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 at 507 (lines 23 - 41).
[30] Hoexter Administrative law in South Africa 2nd ed. (Juta) at 477.
[31] See also *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (8) BCLR 844 (E) at 856D-E.

55. The RSDO stated only that "*I conclude that your asylum application is excluded in terms of section 4(b) [sic] of the Act"*, and then proceeded to quote section 4(1)(b). She did not gives reasons, let alone adequate reasons, as to why she concluded that, for example, the Applicant's alleged crime was political.

56. Did she conclude that he assassinated Arkan as part of a gang-related killing, and therefore it was not a political crime? Or did she conclude that he assassinated Arkan on the orders of Serbian President Milosevic, but that he did so for money and therefore his role was non-political? Did she conclude that he carried out the killing on someone else's orders (President Milosevic's son, Marko, is one suspect)? Or did she think that he did so for personal reasons?

57. There are no answers to these questions. This is impermissible, and leaves the Applicant in an unfairly disadvantaged position when it comes to understanding and/or challenging the decision against him.

Direction 1.7: Does the *audi alteram partem* principle apply where a Refugee Status Determination Officer considers information obtained from a source beyond the information in the papers?

58. Yes. *Audi alteram partem* is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the

Constitution.[32] All persons, including asylum seekers, are entitled to it, unless their constitutional rights are limited by a justifiable law of general application, in terms of section 36 of the Constitution. No such law exists in this case.

59. In *Zondi*,[33] this Court, at paragraph 112, emphasised the importance of the *audi* principle:

> **"<u>The right to notice before an adverse decision is made is a fundamental requirement of fairness</u>. Notice provides a person affected with the opportunity to make representations as to why an adverse decision should not be made. <u>It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations</u>. A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained. The reasonable opportunity to make representations can generally be given by ensuring that reasonable steps are taken to bring the fact of the decision-making to the attention of the person to be affected by the decision."**
>
> (Emphasis added.)

60. But the right to a reasonable opportunity to make representatives is meaningless unless the person knows the substance or gist of the case against him or her.[34] Otherwise, he or she cannot know what facts to refute, or what factors may weigh against his or her interests.[35]

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[32] *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) at paras 74-75. See also *Walele v City of Cape Town* 2008 (6) SA 129 (CC) (dissenting judgment of Jafta AJ, but not on this point) at paras 27-28.
[33] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) ("*Zondi*").
[34] *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* 2010 (5) SA 574 (KZP) ("*Sokhela*") at para 58; *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) ("*Du Preez*") at 231H-232C; *Earth Life Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C) ("*Earth Life*") at para 52-53.
[35] *Du Preez* at 231H-232C; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 651D.

61. This includes any extraneous documents, information,[36] or policies that form a material part of the case against the affected person.[37] These, too, must be disclosed.

62. If this principle is not upheld, it is submitted that serious injustices would occur. RSDOs could, for example, adopt a policy that asylum seekers from a certain country never qualify for asylum. Well-founded asylum seekers from that country would never be able to challenge that policy, as they will not be aware of it.

63. It is no defence to say that the affected person might have nothing to say in defence to the undisclosed information.[38] The "*no difference*" principle has no place in South African law.[39]

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[36] *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W) ("*Foulds*") at 148J-149B:

> **"The South African Aliens Control Act 96 of 1991 does not expressly or by implication provide that an applicant for a permanent residence permit would not be entitled to be informed of adverse information and that he would not be afforded an opportunity to reply to such adverse information . . . The Board is clearly expected to exercise its discretion to grant or refuse the application only after proper consideration of the application. Proper consideration of an application where adverse information has been obtained from sources other than the applicant requires that, if possible under the circumstances, the response of the applicant be obtained in respect of the adverse information."**
>
> (Emphasis added.)

[37] *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T) at 178F-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. The first respondent's reliance on the alleged widespread dissemination of the policy among the public (which seems to me inherently improbable), and the duty cast on claims officers to apprise applicants of its contents, does not avail the Board. There is no basis for concluding that the present applicant was made aware of the policy - which is the only relevant consideration.**
>
> **. . . .**
>
> **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."**
>
> (Emphasis added.)

Sokhela 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 and Others* 1998 (3) SA 228 (C) at 235C;

[38] *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) ("*My Vote Counts*") at para 176:

64. It is submitted that this case illustrates the unfairness and prejudice that can arise when these basic tenets of administrative justice are not followed. The Applicant was never given an opportunity to respond to the adverse information relied upon by the RSDO against him, as contained in, *inter alia*, the judgments of the Belgrade District Court and Supreme Court of Serbia ("*the Serbian judgments*").

65. If he had had such an opportunity, he may at the least have been able to demonstrate that such judgments have been superseded by later confessions and judicial findings (against criminals associated with Arkan), and, in any event, did not demonstrate that the crime which he was supposed to have committed was not a political crime.

Direction 1.8: Does the doctrine of imputed political opinion find application in South African law for the purposes of the application of section 3 of the Refugees Act?

66. Yes. An applicant for refugee status does not need to actually be a member of the persecuted group in question: it is sufficient if he or she is perceived or imputed to be a member by the persons carrying out the persecution.

> **"Authority tells us that even in an apparent 'open and shut' case, an affected party must be given an opportunity to meet the case advanced by an adversary. Parliament has been denied that opportunity. We cannot resist the eloquence of Megarry J in *John v Rees*:**
>
> > **'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"**

[39] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency* 2014 (1) SA 604 (CC) ("*Allpay*") at paras 25-26; *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) ("*Zenzile*") at 37C-F; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at paras 85 and 87; *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C) at 970C.

67. This proposition is widely recognised in foreign[40] and international law.[41] The "*seminal*"[42] case is that of *Ward*.[43]

68. In *Ward*, a member of the Irish National Liberation Army ("*INLA*") was ordered by the INLA to execute hostages. He could not do so, and let them escape. Fearing punishment by the INLA, he fled to Canada, and claimed asylum on the basis that the INLA would perceive him as having betrayed their political goals. The Supreme Court of Canada ultimately concluded at paragraphs 91-93:

> **"[T]he political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.**
>
> **Ward's fear of being killed by the INLA, should he return to Northern Ireland, stems initially from the group's threat of executing the death sentence imposed by its court-martial. The act for which Ward was so punished was his assistance in the escape of the hostages he was guarding. From this act, a political opinion related to the proper limits to means used for the achievement of political change can be imputed. Ward had many reasons to go through with the assassination order and only one, that of acting in conformity with his beliefs, for doing what he eventually did. Ward recognized the risk of serious**

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[40] See the authorities cited in Khan and Schreier at 67.

[41] UNHCR Guidelines on International Protection No. 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ("*Guideline 1*") at para 29:

> **"Thus, a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".**
>
> (Emphasis added.)

Goodwin-Gill The Refugee in International Law (3rd ed.) at 87.

[42] Khan and Schreier at 66.

[43] *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 ("*Ward*").

retribution by the INLA upon being caught, as reflected in his testimony before the Immigration Appeal Board".[44]

69. South African courts have upheld refugee claims based on perceived political opinions,[45] or, even when dismissing the claim, have never expressed doubt that the doctrine of imputed political opinion applies in South Africa.[46]

70. It is submitted that the doctrine of imputed political opinion (indeed, of imputed membership of any persecuted group) must or ought to be part of South African refugee law. A conclusion to the contrary would lead to unfortunate results. It would mean that a person wrongly perceived by persecutors as belonging to a targeted group – be it a religious group, a political group, a racial group, or any other – could be sent back to face inhumane and cruel treatment. It is precisely to avoid such an outcome that refugee law, both internationally and in South Africa, exists.

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[44] *Ward* at paras 91-92, referred to with approval by Khan and Schreier at 65-66 (emphasis added); and in *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T) ("*Fang*") at 459J, with regard to the nature of a "*particular social group*".

[45] For example, in *Tambwe v The Chairperson of the Refugee Appeal Board & Others* (WCD 2401/2010) 14 November 2016 ("*Tambwe*") the applicant was a young woman from the Democratic Republic of Congo ("*DRC*") whose sister-in-law was Rwandan (and therefore seen as an enemy of the DRC). The Court found, at paragraph 15, that "*Applicant's family were associated, rightly or wrongly being irrelevant, with the political views of [the sister-in-law]*". The Court concluded at paragraph 14 that "*I am satisfied that the applicant has presented uncontroverted facts that she fled the DRC as a result of a well-grounded fear of being persecuted by reason of her perceived political opinions or affiliations*". The Court (based partly on the great delay experienced in the case) ultimately declared her to be a refugee. Should a copy of this judgment be required by this Court, it can be made available by the Applicant's attorneys. See also *Dorcasse v Minister of Home Affairs and Others* [2012] 4 All SA 659 (GSJ) at para 35.

[46] *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2015] 1 All SA 100 (WCC) at paras 30 and 37;

Chambers, Cape Town

14 February 2017

LIST OF AUTHORITIES

Statutes and Regulations

1) Refugees Act 130 of 1998, cited throughout
2) Immigration Act 13 of 2002, cited throughout
3) Extradition Act 67 of 1962, cited throughout
4) Constitution of the Republic of South Africa, 1996, cited throughout
5) Prevention and Combating of Torture of Persons Act 13 of 2013, cited at page 13
6) Promotion of Administrative Justice Act 3 of 2000, cited at pages 15

Case authorities

7) *Mohamed v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), cited at pages 3, 10, 11
8) *Lawyers for Human Rights v Minister of Home Affairs and Others* 2016 (4) SA 207 (GP), cited at page 3
9) *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC), cited at page 4
10) *Tshiyomba v Members of the Refugee Appeal Board and Others* 2016 (4) SA 469 (WCC), cited at page 4
11) *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC), cited at page 4
12) *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T), cited at page 5
13) *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T), cited at page 6
14) *Mail & Guardian Media Ltd v Chipu NO* 2013 (6) SA 367 (CC), cited at pages 7, 14

15) *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA), cited at page 10

16) *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA), cited at page 10

17) *S v Makwanyane and Another* 1995 (3) SA 391 (CC), cited at pages 10, 12

18) *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC), cited at pages 11, 12, 13

19) *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), cited at page 15

20) *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC), cited at page 16

21) *Commissioner, South African Police Service, and Others v Maimela and Another* 2003 (5) SA 480 (T), cited at page 16

22) *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA), cited at page 17

23) *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (8) BCLR 844 (E), cited at page 17

24) *Masetlha v President of the RSA* 2008 (1) SA 566 (CC), cited at page 19

25) *Walele v City of Cape Town* 2008 (6) SA 129 (CC), cited at page 19

26) *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), cited at page 19

27) *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* 2010 (5) SA 574 (KZP), cited at page 20

28) *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), cited at page 20

29) *Earth Life Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C), cited at page 20

30) *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A), cited at page 20

31) *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W), cited at page 20

32) *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T), cited at page 20

33) *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C), cited at page 20

34) *Nisec (Pty) Ltd v Western Cape Provincial Tender Board and Others* 1998 (3) SA 228 (C), cited at page 20

35) *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC), cited at page 21

36) *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency* 2014 (1) SA 604 (CC), cited at page 21

37) *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A), cited at page 21

38) *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC), cited at page 21

39) *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C), cited at page 21

40) *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T), cited at page 22

41) *Tambwe v The Chairperson of the Refugee Appeal Board & Others* (WCD 2401/2010) 14 November 2016, cited at page 22

42) *Dorcasse v Minister of Home Affairs and Others* [2012] 4 All SA 659 (GSJ), cited at page 23

43) *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2015] 1 All SA 100 (WCC), cited at page 23

International and foreign instruments or authorities

44) United Nations High Commissioner for Refugees ("*UNHCR*") Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, cited at pages 5, 7

45) UNHCR Guidelines on International Protection 5: Application of the Exclusion Clauses, cited at page 8

46) United Nations Convention Relating to Status of Refugees, 1951, cited at page 8

47) Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, cited at page 9

48) *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500, cited at page 17

49) UNHCR Guidelines on International Protection No. 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, cited at page 22

50) *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 ("*Ward*"), cited at pages 22, 23

Academic authorities

51) Khan & Schreier (eds.) Refugee Law in South Africa (Juta), cited pages 5, 9, 22, 23

52) G. Gilbert "*Current Issues in the Application of the Exclusion Clauses*" in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection Feller, Türk and Nicholson (eds.) (Cambridge University Press, 2003), cited at page 9

53) Hoexter Administrative law in South Africa 2nd ed. (Juta), cited at page 17

54) Goodwin-Gill The Refugee in International Law (3rd ed.), cited at page 22

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Date: 6 February 2018

CCT number: 217/16

WCD case number: 3474/13

In the matter between:

DOBROSAV GAVRIĆ	Applicant
and	
THE REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN	First Respondent
THE MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE	Sixth Respondent

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APPLICANT'S WRITTEN ARGUMENT

CONTENTS

I. INTRODUCTION

1. This application raises important and novel questions about the ambit of the protection South African law offers to foreigners under the Refugees Act 130 of 1998 ("*the Act*") and under the Constitution of the Republic of South Africa, 1996 ("*the Constitution*").

2. The Applicant is a Serbian national (wrongly) convicted of assassinating the infamous Serbian warlord and gangster Zeljko Raznatovic, known as "Arkan".[1] The Applicant fled to South Africa and applied for asylum on the basis that he is falsely imputed to be a member of the social and/or political group that orchestrated Arkan's assassination, and that if he is returned to Serbia, Arkan's allies will have him killed much as they have killed many others suspected of involvement in Arkan's death.

3. The Applicant's asylum application was refused by the First Respondent ("*the RSDO*"), on the basis that the Applicant is "excluded" from being protected as a refugee because he committed a non-political crime in terms of section 4(1)(b) of the Act ("*the exclusion decision*").[2]

4. Section 4(1)(b) of the Act excludes persons from being recognised as refugees if there is reason to believe that they have "*committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment*".

[1] The full factual background of the Applicant is set out at R: 1: 12-34 paras 15-100. In these written submissions, references to the record will made in the form "R: X: Y", where X denotes the volume number and Y the page number.
[2] R: 1: 56-64.

5. The Applicant applied to the Western Cape Division of the High Court, Cape Town (per Mantame J) ("*the High Court*"), *inter alia*, to review and correct the exclusion decision, which application was dismissed on 6 April 2016 ("*the Judgment*").[3] The High Court refused leave to appeal to the Supreme Court of Appeal ("*the SCA*").[4]

6. An application to the SCA was dismissed on 19 August 2016, despite that Court finding that that there were "*aspects of the [High Court] judgment appealed against that are open to criticism*".[5]

7. In this application, the Applicant seeks leave to appeal, and in the appeal:

   7.1. First, to review and set aside the decision of the RSDO.

   The Applicant submits that the RSDO committed a wide variety of material procedural and substantive errors in making the exclusion decision, including failing to consider whether the Applicant's supposed crime (of assassinating Arkan) would have been a political crime, failing to consider relevant documentation, and she was biased against him.

   7.2. Secondly, the Applicant seeks an order declaring section 4(1)(b) of the Act to be inconsistent with the Constitution and invalid.

   Section 4(1)(b) effectively allows foreigners to be sent back to their home countries to face death, torture, rape, and other forms of unacceptable and unconstitutional

[3] R: 10: 933 *et seq.*
[4] R: 10: 988.
[5] R: 10: 1028.

persecution on the sole basis that they committed a non-political crime. This is inconsistent with South Africa's jurisprudence in terms of which foreign criminals will never[6] be extradited or deported to face the death penalty, no matter their crime.

7.3. Thirdly, the Applicant seeks to be declared to be a refugee in terms of the Act, as there is compelling evidence that he will be killed due to his imputed political opinion if he returns to Serbia.

7.4. Fourthly, in the alternative, the Applicant seeks orders that even if he cannot be recognised as a refugee, that he nevertheless may not be returned to Serbia due to the risk to his life. It is submitted that even if the Act does not extend to protecting the Applicant from being returned to Serbia, the Constitution grants him such protection for the reasons set out herein.

8. These issues are addressed in turn below. It is submitted that in addressing these issues, the High Court erred, and furthermore that they raise arguable points of law that are of general public importance.

9. Leave to appeal accordingly ought to be granted in terms of section 167(3)(b) of the Constitution. In this regard the Applicant stands by the contentions set out in his application for leave to appeal to this Court.[7] The Applicant further stands by the written submissions filed pursuant to this Court's directions of 1 February 2017.[8]

[6] That is, in the absence of an undertaking from the State requesting extradition that it will not impose the death penalty.
[7] R: 10: 984 *et seq*, and see in particular R: 10: 990-998 paras 1-32.
[8] Submissions bundle, pages 1-25.

II. GROUNDS OF REVIEW

10. In making the exclusion decision, the RSDO erred in the following six respects:

10.1. The paucity of reasoning – the decision fails to ask, let alone answer, the questions necessary to make an exclusion decision in terms of section 4(1)(b) of the Act;

10.2. A material error of law – the RSDO failed even to consider the possible persecution that the Applicant will face, as required by this Court in *Mail & Guardian Media Ltd v Chipu NO* 2013 (6) SA 367 (CC) ("*Chipu*");

10.3. The failure to consider relevant information, notably 26 crucial documents provided to her by the Applicant at the hearing of 25 September 2012 ("*the omitted documents*");

10.4. Bias – the RSDO made her decision on a flawed and/or incomplete record, which she then attempted to conceal from him;

10.5. Procedural unfairness – the exclusion decision was made on the basis of documents that have never been provided to the Applicant and on which he was never granted the opportunity to make representations; and

10.6. The unconstitutionality of section 4(1)(b) of the Act. This is dealt with separately in the chapter concerning the constitutional challenge.

11. It is submitted that any and all of these grounds of review, considered individually or cumulatively, is sufficient for the setting aside of the exclusion decision.

The paucity of reasoning in the exclusion decision

12. A striking feature of the exclusion decision is not what it says, but what it does not say.

13. It is submitted that the exclusion decision unlawfully, unreasonably and irrationally fails to provide any reasons for its conclusion that the Applicant committed a serious non-political crime.[9] It simply ignores the key questions: Did the Applicant commit the crime? Was the crime political in nature? Did it justify exclusion? What persecution does the Applicant face in Serbia?

14. These necessary questions are not only not answered – they are not even asked.

15. The bulk of the exclusion decision (paragraphs 1 to 21 and 26 of the 31 paragraphs)[10] is a repetition of the allegations of the Applicant. These allegations – even though the RSDO fails to mention many material facts – all support the Applicant's case.[11]

16. The RSDO does not reject these facts, whether by providing countervailing facts or by analysing the Applicant's version of events and revealing inconsistencies.

17. There is only one point where the RSDO includes new facts (paragraph 22) from "*the research information at [her] disposal"*.[12]

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[9] C.f. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) at paras 45-48.

[10] R: 1: 56-63.

[11] For example, at paragraph 3 [R: 1: 57] it is recorded "*You further stated that people were killed between 2000 and 2006 because they were also implicated in killed Arkan. You stated that you decided to leave Serbia because you were scared for your life inside and out of prison*".
At paragraph 12 [R: 1: 58] it is recorded: "*You further asserted that you were kept in solitary confinement because the State wanted to keep you safe to avoid any danger happening to you*".
At paragraph 16 [R: 1: 59] it is recorded: "*You further presented evidence that shows that Luka who testified against you was a soldier and he was involved in killing people*".

[12] Which are no more than a Wikipedia article and an American article of uncertain provenance.

18. But these "new facts" do not deal with any of the material elements of the Applicant's claim. They do not prove or disprove whether the Applicant will be killed or placed at risk of serious harm if he returns to Serbia, nor do they assess whether the assassination of Arkan would qualify as political or not. They are either irrelevant or a repetition of the facts already on record.

19. Paragraphs 23 to 25 and 27[13] of the exclusion decision are a largely trite list of refugee law principles and quotations from the Act. They do not deal the Applicant's individual case, nor do they reveal any insight into the reasoning of the RSDO.

20. At paragraph 28,[14] the RSDO – without any reasoning at all – makes the following finding:

> *"In this case there is nothing that suggests that you will be persecuted should you return to Serbia. There is no evidence in the country information that supports your claim."*

21. It is submitted that this is an unsupportable and unlawful conclusion. It ignores the wealth of information provided by the Applicant[15] plausibly demonstrating that there has been a systematic campaign of revenge and persecution directed towards those persons associated with then-President Slobodan Milosevic's assassination of Arkan.

22. But it is not merely that the RSDO relies on contradictory information to reject the Applicant's contentions. She fails even to refer to such information, or to set out her

[13] R: 1: 61-63.
[14] R: 1: 63.
[15] R: 1: 29-30 paras 79-83; R: 4: 381-394 paras 26-59; R: 8: 802-806 paras 118-132.

reasoning in any cognisable fashion. This is beyond justification and by itself merits the review and setting aside of the exclusion decision.

23. Also without explanation is the conclusion at paragraph 29 of the exclusion decision:

> *"However, I conclude that your asylum application is excluded in terms of section 4(b) of the Act which provides that 'Act shall not apply to any person with respect to whom there are serious reasons for considering that s/he has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment'."*
>
> (Emphasis from the original.)

24. Prior to this finding, the RSDO mentions the word "exclusion" (or any variant thereon) only once: when quoting section 4(1)(b) in paragraph 24. There is no assessment whatsoever of why the Applicant should be excluded.

25. It is submitted that in order to reach a rational, justifiable conclusion on whether to exclude the Applicant from refugee status, the RSDO would at the very least have to answer or attempt to answer the following questions:

25.1. Were there serious[16] reasons to believe that the Applicant had committed the crime of murdering Arkan?

The Applicant denies that he did, and the facts quoted by the RSDO are all the facts which support his case. The RSDO does not put forward any facts which

[16] Section 4(1)(b) of the Act refers to "*reason to believe*", but Article 1F of the United Nations 1951 Convention Relating to Status of Refugees ("*the Convention*"), with which section 4(1)(b) must be read [see section 6(1)(a) of the Act] refers to "*serious reasons*".

contradict the Applicant, nor does she provide any reason at all for rejecting his version of events.

25.2. If there were serious reasons to believe that the Applicant did commit the crime of murdering Arkan, was the crime "*political*"?[17]

The RSDO seems to ignore this aspect entirely. There is no discussion on what might constitute a political crime. There is no attempt to determine what the Applicant's motive might be. There is no assessment of the relationship between Arkan and Milosevic, despite the extensive evidence put before the RSDO by the Applicant, or any attempt to explain why the assassination of one politician by another in order to secure the latter's position as head of state does not, at least, have a political component.

25.3. Does the Applicant face persecution in Serbia on the basis of his imputed political opinion and/or imputed membership of a particular social group?

The RSDO simply fails to deal with the evidence that many people have been killed as a result of their presumed links to Milosevic and the death of Arkan.[18]

[17] UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("*UNHCR Guideline 5*") state at paragraph 15:

> *"A serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant. The motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature. The fact that a particular crime is designated as non-political in an extradition treaty is of significance, but not conclusive in itself. Egregious acts of violence, such as acts those commonly considered to be of a "terrorist" nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective. Furthermore, for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles."*

[18] R: 1: 29-30 paras 79-83; R: 4: 381-394 paras 26-59; R: 8: 802-806 paras 118-132.

She does not refer to the Zemun Clan, or Sretko Kalinic, or the lists of identified killings done in the name of Arkan. There is no assessment of why the Applicant would not face the same persecution if he was returned to Serbia.

26. Given that these questions are not only not answered, but are not asked, it is submitted that the exclusion decision is not only unreasonable but irrational, and falls to be set aside for this reason alone.

27. The High Court, in failing to uphold this ground of review, committed a further error of its own. It appears from, *inter alia*, paragraphs 70[19] and 74[20] of the Judgment that the High Court assumed that the RSDO relied in significant part on the judgments of the Belgrade District Court and Supreme Court of Serbia ("*the Serbian judgments*"), in which the Applicant was found guilty.

28. The approach of the High Court appears to be that the facts and reasoning in the Serbian judgments can be substituted for or inserted into the exclusion decisions.

29. It is submitted that the High Court committed a material error in this regard, on the basis of at least three grounds.

30. First, the RSDO did not as a fact rely on the Serbian judgments in making her decision. The Serbian judgments are not included in the Rule 53 record,[21] and are not listed by the

[19] R: 10: 967.
[20] R: 10: 969.
[21] R: 2: 134-137.

RSDO in her answering affidavit where she lists all the items she took into consideration.[22]

31. In her answering affidavit in the applications for leave to appeal to the SCA, the RSDO claimed (for the first time) that the Serbian judgments appeared as item 17 to the Rule 53 record.[23] This was not correct,[24] and in the answering affidavit filed before this Court, the RSDO conceded that "*it now appears that they did not form part of the Rule 53 record*".[25]

32. No decision-maker can add *ex post facto* reasoning or factors to support his or her decision. They must stand or fall on the reasons provided for the decision before litigation commenced.[26]

33. And by failing to refer to them in the Rule 53 record, the RSDO further deprived the Applicant of a fair opportunity to challenge the (supposed) reliance on the Serbian judgments in his supplementary affidavit.

34. Secondly, if the RSDO is correct in her claim that the Serbian judgments were among the documents before her when she made her decision, this constitutes an unfair process, as the Applicant was unfairly denied an opportunity to make representations concerning the

[22] R: 6: 533-534 para 20. At R: 6: 549-551 paras 56-60, the RSDO refers to the Serbian judgments. But she does not claim to have taken them into account or had sight of them prior to making the exclusion decision. And she refers to them only after concluding (in paragraph 56) that she had reasonable grounds to exclude the Applicant in terms of section 4(1)(b) of the Act. It appears to be an addendum to her finding, not a basis for it.
[23] R: 10: 1005 para 61.
[24] The document which she claimed was the Serbian judgments, is a segment of a judgment against, *inter alia*, Luka Bojovic and Sretko Kalinic, members of the Zemun Clan criminal gang and close associates of Arkan ("*the Bojovic judgment*") [R: 3: 230-243].
[25] R: 11: 1102 para 34.
[26] *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27; *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 55, footnote 85; *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and others; Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and others* [2014] 3 All SA 171 (GJ) at paras 94-97.

Serbian judgments prior to the making of the exclusion decision.[27] This is dealt with further below.

35. Thirdly, in the content of the exclusion decision, there is no reference (even by implication) to the findings of the Serbian judgments. And if the exclusion decision did not take into account these findings, then the Serbian judgments are irrelevant.

36. The only references to the findings of the Serbian judgments in the exclusion decision are at paragraph 22 of the exclusion decision:[28]

> *"Furthermore, the research information at my disposal indicated that:*
>
> *(i) 'You pleaded innocent and never admitted to committing the crime. You were found guilty and sentenced to 19 years in prison. Your accomplices received from 3 to 15 years each, after a year-long trial in 2002. However the district court verdict was overturned by the Supreme Court because of "lack of evidence and vagueness of the first trial process".*
>
> *(ii) On October 26, a Belgrade Court sentenced former policeman (you) Dobrosav Gavric to 20 years in prison and two of his associates to 15 years each for the January 200 killing of indicted war criminal Zelkjo Raznatovic, also known as 'Arkan'. You were tried by Serbian Court for murder of Arkan in 2002'."*

37. This does not deal at all with the facts of the case, the evidence against the Applicant, or the critical question of whether the assassination of Arkan was a political crime. Neither paragraph appears to refer to the final judgment of the Serbian Supreme Court. And both paragraphs are taken directly from a Wikipedia article on Arkan, not from the judgments themselves.

[27] R: 8: 779-780 paras 17-23.
[28] R: 1: 60.

38. It is accordingly submit that, if anything, the content of the exclusion decision indicates that the RSDO as a fact did not take into account the Serbian judgments.

39. For each these separate reasons, the exclusion decision falls to be reviewed and set aside.

A material error of law

40. A consequence of the RSDO's paucity of reasoning is that she failed to apply her mind to an important legal question: if there are serious reasons for considering that Applicant did commit the supposedly non-political crime of assassinating Arkan, did the severity of this crime outweigh the persecution he would face in Serbia?

41. That this is a vital legal question is apparent from this Court's *dictum* in *Chipu*:

> *"A literal reading of s 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 s 4(1)(b) should not be read literally and rigidly. Section 4(1)(b) seeks to give effect to, among others, the 1951 Refugee Convention. A reading of part of the United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) dealing with the provisions of the 1951 Refugee 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."*[29]
>
> (Emphasis added.)

[29] *Chipu* at para 30.

42. In footnote 27 to that paragraph, this Court quoted with approval from the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ("*UNHCR Handbook*") at paragraphs 156-157, as follows:

> *"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.*
>
> *In evaluating the nature of the crime presumed to have been committed, all the relevant factors — including any mitigating circumstances — must be taken into account."*

43. The RSDO failed to apply at all the balancing exercise required by *Chipu*. This is a fundamental misdirection and error of law, that vitiates the exclusion decision as a whole.[30]

44. The High Court engages with *Chipu* and this ground of review at paragraph 89 of the Judgment,[31] where it stated:

> *"Even if Section 4(1)(b) could not be read literally or rigidly as per dicta in Chipu (supra), in my view there can be no justification for this Court to deviate from the findings of first respondent."*

[30] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency* 2014 (1) SA 604 (CC) ("*Allpay*") at paras 22-30.
[31] R: 10: 978.

45. It appears that the High Court is applying a "no difference" test; that is, that even though the RSDO may not have followed *Chipu*, it would have made no difference because even then, the decision of the RSDO was justified.

46. But the "*no difference*" approach to administrative matters has been repeatedly rejected and held by this Court to be unconstitutional and incorrect. In *Allpay*,[32] this Court held at paragraphs 25-26:

> *"Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.*
>
> . . . .
>
> *Even under the common law the possible blurring of the distinction between procedure and merit raised concerns that the two should not be confused:*
>
> > *'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly.''*[33]
>
> (Emphasis added.)

[32] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency* 2014 (1) SA 604 (CC) ("*Allpay*").

[33] See also *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at paras 85 and 87:

> *"For good reasons, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. Whilst procedural fairness and the audi principle is strictly upheld, substantive fairness is treated differently.*
>
> . . . .
>
> *The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision."*
>
> (Emphasis added.)

47. In *Zenzile* at 37C—F,[34] the Appellate Division held:

> *"'It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the enquiry whether he is entitled to a prior hearing.*
>
> . . . .
>
> *The learned author goes on to cite the well-known dictum of Megarry J in John v Rees [1970] Ch 345 at 402:*
>
> > *"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."'"*[35]
>
> (Emphasis added.)

48. The High Court's approach to this issue is not consistent with this Court's jurisprudence. The RSDO was required by *Chipu* to apply her mind to the possible persecution that the Applicant may face in Serbia. She failed to do so.[36] It is not for the courts, in a review application, to make their own decision as to what the RSDO would have found had she followed the correct process and applied her mind to the *Chipu* issues. Accordingly this ground, in and of itself, is sufficient for the review to succeed; there is "*no room for shying away from it*".[37]

Failure to consider relevant considerations

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[34] *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) ("*Zenzile*").
[35] *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) ("*My Vote Counts*") at para 176.
[36] Indeed, the submissions filed by the Respondents in response to this Court's directions of 16 August 2017 ("*the Respondents' submissions*") contend [submissions bundle at page 50, paragraph 46] that there is no need to assess an excluded person's refugee claims.
[37] *Allpay* at para 25.

49. Amplifying the above errors, it is submitted that the RSDO failed to consider 26 vital documents provided to her by the Applicant at the hearing of 25 September 2012 (defined above as "*the omitted documents*").[38]

50. That the RSDO failed to consider the omitted documents is apparent from the following factors:

    50.1. These documents were omitted from the record filed by the RSDO in terms of Rule 53 of the Uniform Rules.[39]

    50.2. The RSDO did not refer to any of these documents in any way in her reasons for the exclusion decision.[40]

    50.3. The Applicant kept a handwritten index which recorded that the omitted documents were given to the RSDO.[41]

    50.4. The list of omitted documents on the handwritten index correlates perfectly with the documents provided by the Applicant.[42]

    50.5. The Applicant's wife confirmed that she provided the omitted documents to the Applicant so that he could give them to the RSDO at his hearing.[43]

    50.6. The omitted documents are referred to in the manual transcript kept by the RSDO,[44] and match the description of the annexures in the manual transcript.[45]

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[38] R: 4: 378 para 12. The documents are listed at R: 4: 401; see also R: 8: 797 para 100. Concerning the role and importance of the record filed in terms of Uniform Rule 53, see *Helen Suzman Foundation v Judicial Service Commission* 2017 (1) SA 367 (SCA) at para 13 and the authorities cited therein.
[39] R: 4: 378 para 13.
[40] R: 4: 378 para 14.
[41] R: 4: 401; R: 4: 379 paras 19-20; R: 8: 788 para 61.
[42] R: 8: 797-798 paras 100-101.
[43] R: 9: 929 para 4.
[44] R: 6: 598-606; R: 8: 789 para 66. The annexures referred to in the manual transcript could not be those attached to the answering affidavit or those listed in the Rule 53 record [c.f. R: 6: 586 para 108.2], because the descriptions of the documents do not match. See R: 8: 789-791 paras 66-76.
[45] R: 8: 794 para 90.

50.7. The reliability of the RSDO in making a crucial decision affecting the Applicant's life is undermined by the appalling state of her notes and record-keeping:

50.7.1. The manual transcript verges on unintelligible and cannot serve as a comprehensive compilation of the evidence of the Applicant.[46]

50.7.2. The RSDO contradicts herself about which annexures she received, claiming that she both did, and did not, receive some annexures.[47]

50.7.3. The RSDO mixes up some documents with others, and then incorrectly claims not to have received them.[48]

50.8. Some of the omitted documents were included under an incorrect heading in the Rule 53 record, so the documents must have been delivered to the RSDO.[49]

50.9. The RSDO refers in her interview notes to "Dermot Groome",[50] which is a name that appears in only two places: on two of the omitted documents forming part of the indictment of Jovica Stanisic and Franko Simatovic.[51] Dermot Groome is listed as a Senior Trial Attorney with the International Criminal Tribunal for the Former Yugoslavia. The RSDO could have found this name nowhere but in the documents which she claims she never received.

51. For all of the above reasons, it is submitted that the RSDO failed to read and consider the omitted documents. In other words, she failed to consider relevant considerations as required by the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") and section 33 of the Constitution.

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[46] R: 6: 598-606; R: 8:789 para 68; R: 8: 781 para 27.
[47] Notably she states that she both did, and did not, receive annexure DG20 [R: 6: 584 and 6: 590 paras 105.1(a) and 116]. See R: 8: 791 paras 77-81.
[48] R: 8: 792-794 paras 84-89. The RSDO denied that she received annexure DG19 [R: 6 :590 para 115], but included part of DG19 mixed together with another document as item 18 to the Rule 53 record [R: 8: 793 para 85; R: 9: 842].
[49] *Ibid*.
[50] R: 3: 259.
[51] R: 9: 860; R: 9: 881.

52. The High Court did not engage at all with this ground of review in its judgment. No reason was given for this serious omission.

53. *Tantoush*[52] dealt with a similar matter where, in applying for asylum, an applicant placed documents before the RSDO which were then ignored.[53] The High Court held that the consequences of such an omission were:

> *"By focusing her attention in a limited way upon the credibility of the applicant's reasons for leaving Pakistan, the RSDO appears not to have given consideration to any risk of torture, detention or an unfair trial that the applicant might face in Libya. The applicant's submission in the supplementary affidavit that she ignored the documentation handed to her in support of that contention has not been denied. The absence of any specific reference to the Country Condition Reports in her written decision lends credence to the inference that she paid them little heed. Finally, her questionable declaration that the applicant's deportation from Indonesia was illegal would seem also to be an irrelevant consideration, albeit that the extent of its influence upon her is uncertain. All these factors taken together leave little doubt that her decision was fatally vitiated by irregularity and must be set aside."*
>
> (Emphasis added.)

54. For similar reasons, the exclusion decision is fatally defective and must be set aside for this reason alone.

Bias

[52] *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) ("*Tantoush*").

[53] Paragraph 72 of *Tantoush*:

> *"In the supplementary affidavit the applicant placed much emphasis on the fact that he furnished the RAB, among other documentation, with the Amnesty International Country Condition Reports in support of his belief that he will suffer persecution on account of his political opinion if forced to return to Libya. Referring to the absence of any noteworthy discussion of this material in the majority decision, and its exclusion from the rule 53 record, he underlined that this relevant information was for the most part ignored by the first and fifth respondents. His assertion is not denied by either the RAB or the RSDO. It must therefore be held that such information was in fact ignored."*

55. It is submitted that the RSDO was biased against the Applicant, or at least is reasonably suspected of being biased.[54]

56. In addition to the grounds above demonstrating that the RSDO was not entirely truthful about which documents she received from the Applicant, the following facts give rise to at least a reasonable suspicion of bias:

    56.1. On 12 October 2012, the Applicant met the RSDO at the Cape Town Magistrates' Court.[55]

    56.2. The RSDO claimed that she had her decision, but before the Applicant could receive it, he had to sign the record of the hearing he had before her.[56]

    56.3. This in itself is suspicious: there is no reason in law or logic why the Applicant should have to confirm the record before receiving a decision <u>that had already been made</u>.[57]

    56.4. The RSDO also showed the Applicant her dictaphone, and claimed that the content of her decision was based on the recording on the said device.[58]

    56.5. But the RSDO must have known, if she had listened to or analysed the contents of the dictaphone in making her decision, that it had not been properly activated and contained nothing.[59]

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[54] To the extent that any of the averments pertaining to the RSDO's bias were raised in reply, the principles set out in the following cases apply: *Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (Tk) at 550E-G; *Pretoria Portland Cement Co Ltd v Competition Commissioner* 2003 (2) SA 385 (SCA) at para 63; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 868G-869E; *Thint (Ply) Ltd v NDPP: Zuma v NDPP* 2008 (2) SACR 421 (CC) at para 325 and footnote 112 (Ngcobo J, dissenting).
[55] R: 8: 781 para 25.
[56] R: 8: 781 para 26.
[57] The RSDO made her decision on 10 October 2012; see R: 6: 525 para 6.
[58] R: 8: 783 para 36; R: 9: 839.
[59] R: 6: 566 para 84.4.

56.6. Thus in telling the Applicant that the dictaphone contained the record on which the exclusion decision was based, the conclusion is inescapable that the RSDO must have been lying.

56.7. In any event, the Applicant refused to sign the record as it was self-evidently inadequate and unintelligible.[60]

56.8. The RSDO then refused to give the Applicant her decision, claiming that she needed time to prepare the record properly.[61]

56.9. But if the Applicant had not objected, the RSDO would have delivered to him the flawed record and the decision based on that record.[62]

56.10. This is further evidence of bias: why could she not have given him her decision, and delivered an improved record later? The inescapable inference is that she knew her decision was open to challenge if the record was not accepted *holus bolus*. The fact that she was nevertheless willing to deliver her defective decision is evidence of an improper attitude towards the Applicant's asylum claim.

57. Yet more evidence of bias arises from:

57.1. The fact that the RSDO has, since the exclusion decision, gone out of her way to find new evidence/information in an attempt to shore up her decision.[63] It is improper and evidence of bias and partiality for a supposedly-independent

[60] R: 8: 781-782 paras 27-28.
[61] R: 8: 783 para 33.
[62] R: 8: 783 para 35.
[63] Annexures NX13 and NX14 [R: 7-8: 655-765] were not part of the Rule 53 record. See also R: 8: 779 paras 17-20.

decision-maker to take such steps to oppose an application to review its decision.[64]

57.2. The RSDO sought advice from officials of the Department of Home Affairs ("*the Department*") on how to handle the Applicant's refusal to sign her record.[65]

57.3. Department officials had given the RSDO a decision made under the Immigration Act 13 of 2002 ("*the Immigration Act*") that declared the Applicant and his family to be prohibited and undesirable persons. Such decision is unrelated to the RSDO's duties and functions under the Act, yet she not only accepted the decision but also failed to bring it to the attention of the Applicant.[66] It was clearly *ultra vires* for her to even consider matters under the Immigration Act.

57.4. At the court hearing of 12 October 2012, the Applicant's attorney obtained a copy of the RSDO's manual transcript from her. But a week or so later, the RSDO called the attorney and requested that he delete or return the transcript.[67] It is submitted that this is highly unusual, and indeed indicative of an attempt to conceal previous errors.

58. This ground of review was not analysed or assessed by the High Court in its reasoning at all.

59. For each of and all of the above reasons, it is submitted that there is reasonable cause to suspect the RSDO of bias, and her decision is accordingly susceptible to review.

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[64] *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (Ck) at 353, approved in *Tantoush* at para 87.
[65] R: 8: 782 para 28; R: 8: 829. C.f. *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) at paras 40-44; *Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C) at 57-62.
[66] R: 8: 782 paras 29-31.
[67] R: 8: 785 paras 44-46.

Procedural unfairness

60. It is submitted that in making the exclusion decision, the RSDO acted in an unlawful and unfair manner when she relied upon documents and information that were not disclosed to the Applicant. There are potentially two such sets of documents.

61. First, as set out above, the RSDO insists that she considered the Serbian judgments in making the exclusion decision.

62. If this is accepted as true, then the exclusion decision is in any event unlawful, as the Applicant was never provided with an opportunity to respond to the Serbian judgments.[68] As they purportedly played a material role in the exclusion decision, this is a significant and reviewable irregularity.

63. Secondly, at paragraph 22 of the exclusion decision,[69] the RSDO refers to "*the research information at [her] disposal*" and then includes a lengthy quote on the legal system in Serbia which, according to the footnote in the exclusion decision,[70] derives from "*apps.american.org/rol/publication/Serbian-legalsystem-eng.pdf*".

64. This document, whatever it is, was never provided to the Applicant.[71] Nor does it appear from the Rule 53 record.[72]

[68] R: 8: 780 para 23.
[69] R: 1: 60.
[70] Footnote 5 at R: 1: 61.
[71] It is not a working link.
[72] R: 8: 824-827.

65. By failing to provide the Applicant with a chance to comment on the abovementioned two sets of documents, the RSDO adopted an unfair procedure.

66. A person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance or gist of the case against him or her.[73] This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against his or her interests.[74] This in accordance with the maxim *audi alteram partem*, 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.[75]

67. 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.[76]

68. In *Foulds v Minister of Home Affairs and Others*,[77] 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.[78] If an administrator is minded to reject the explanations of an interested party he should at least inform them of why he is so minded, and afford them the opportunity to overcome his doubts. [79]

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[73] *Earth Life Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C) ("*Earth Life*") at para 52-53.
[74] *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231H-232C.
[75] *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) at paras 74-75. See also *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) at para 112 and *Walele v City of Cape Town* 2008 (6) SA 129 (CC) (dissenting judgment of Jafta AJ, but not on this point) at paras 27-28.
[76] *Earth Life* at para 53.
[77] *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W).
[78] At 149J. See also *Yuen v Minister of Home Affairs and Another* 1998 (1) SA 958 (C) at 965B.
[79] *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T) at 178F-179A:

69. The RSDO failed to disclose information and adverse considerations relied upon by her to the Applicant. This unfairness by itself vitiates the exclusion decision.

The exclusion decision is otherwise unconstitutional

70. The final ground of review is that the exclusion decision is otherwise unlawful and/or unconstitutional as contemplated in section 6(2)(i) of PAJA.

71. The basis on which the exclusion decision is impugned is that section 4(1)(b) of the Act itself is unconstitutional.

III. THE CONSTITUTIONALITY OF SECTION 4(1)(b) OF THE ACT

72. It is submitted that section 4(1)(b) of the Act is unconstitutional and invalid on two bases. First, because it creates a situation where a person might face inhumane persecution – including death, torture, or cruel, inhuman and degrading treatment –

> *"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. The first respondent's reliance on the alleged widespread dissemination of the policy among the public (which seems to me inherently improbable), and the duty cast on claims officers to apprise applicants of its contents, does not avail the Board. There is no basis for concluding that the present applicant was made aware of the policy - which is the only relevant consideration.*
> . . . .
> *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."*
>
> (Emphasis added.)

Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others 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 and Others* 1998 (3) SA 228 (C) at 235C.

simply because he or she has committed a serious non-political crime in another country. Secondly, because insofar as it evades the above difficulty, it does so through an overbroad, vague, and unguided discretion granted to RSDOs to determine which persons will be allowed to seek refugee status and which persons will be excluded (and such discretion is not, unlike other decisions made by RSDOs, capable of being appealed or reviewed to a higher body in terms of the Act).

73. The purpose of section 4(1)(b) is clear: it denies a person refugee status based on the crimes that he or she is believed, for serious reasons, to have committed.

74. The potential consequence of this (subject to the submissions below on the alternative declaratory relief sought) 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.[80]

75. This case is illustrative: the Applicant is at risk of being sent to Serbia, and then being killed by Arkan's supporters, because he (allegedly) committed murder. A person who committed armed robbery could be sent back to face degrading treatment that would be unconstitutional in South Africa. Another person could be sent back to face

[80] Section 3 of the Act.

discrimination and persecution on the basis of their race, because, for example, they had previously committed arson.

76. It is submitted that these consequences are unconstitutional. There are forms of conduct and persecution – death, torture, racial discrimination – that the Constitution never condones.

77. As section 4(1)(b) facilitates exposing persons to such conduct, it runs counter to the spirit, purport and values of the Constitution and the Bill of Rights and is invalid. At the very least, section 4(1)(b) infringes on the rights to, *inter alia*, life, dignity, equality and freedom and security of the person in terms of the Constitution.

78. The question accordingly arises: can section 4(1)(b) be justified in terms of section 36 of the Constitution? The five factors to be considered under section 36 of the Constitution are:

78.1. What is the nature of the right?

78.2. What is the importance of the purpose of the limitation?

78.3. What is the nature and extent of the limitation?

78.4. What is the relation between the limitation and its purpose?

78.5. Are there less restrictive means to achieve the purpose?

79. Concerning the nature of the right: while the rights at issue in each case will depend on the facts of that case, as a general rule the rights that are most likely to be at risk in

refugee claims are the rights to life, dignity, equality, and freedom and security of the person.

80. It is submitted that it is trite that these are rights of great importance. In terms of section 37 of the Constitution, they are non-derogable during states of emergency.[81] The rights to dignity and equality, as well as non-racialism and non-sexism, are founding values of the Constitution.[82]

81. Concerning the purpose of section 4(1)(b), regard must be had to the its international origins: Article 1F(b) of the Convention.[83]

82. Concerning Article 1F, the UNHCR Guideline 5 states at paragraph 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*

[81] For the right to equality, only with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language – but these largely overlap with the grounds set out in section 3(1) of the Act (race, tribe, religion, nationality, political opinion or membership of a particular social group). For the right to freedom and security of the person, only the rights not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way are non-derogable.

[82] Sections 1(a) and (b) of the Constitution.

[83] Article 1F of the Convention 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 purposes and principles of the United Nations."*
>
> (Emphasis added.)

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."[84]

(Emphasis added.)

83. But it is submitted that at least part of this rationale behind section 4(1)(b) – arising as it did in the early years after the Second World War – is not consistent with the modern conception of human rights as enshrined in and made binding by the Constitution.

84. Under the Constitution, certain fundamental human rights cannot be denied to any person, regardless of what crimes they have committed.[85] It is no longer

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[84] See also Khan & Schreier (eds.) Refugee Law in South Africa (Juta) at 93; G. Gilbert "*Current Issues in the Application of the Exclusion Clauses*" in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection Feller, Türk and Nicholson (eds.) (Cambridge University Press, 2003) at 427-428:

> *"Reference to the travaux preparatoires 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."*

And see paragraph 24 of UNHCR Guideline 5:

> *"The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. 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. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a)."*

(Emphasis added.)

[85] *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) ("*Watchenuka*") at para 25:

> *"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 s 10 of the Bill of Rights."*

Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) ("*Mohamed*") at para 52:

> *"But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the*

constitutionally compliant for, as section 4(1)(b) permits and as the High Court found in paragraph 89 of the Judgment,[86] that only "*deserving*" persons will be protected from the violation of their fundamental rights.[87]

85. The ultimate question is, and must always be, whether the Constitution allows for the person to be returned. If the Constitution prohibits the return of an individual, the fact that such return may be permissible under international law is irrelevant.[88]

86. For example, there is no rule of customary international law prohibiting States from imposing the death penalty on criminals. Yet the Constitution prohibits the death penalty in South Africa.[89] For this reason, the Constitutional Court has repeatedly held that South Africa may not extradite persons to countries where there is a real risk that they will face the death penalty.[90]

87. The facts of *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) ("*Tsebe*") illustrate this constitutional guarantee. In *Tsebe*, this Court was called upon to decide

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removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, ss 10 and 11 of the Bill of Rights are implicated."

See also *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) at paras 21-22.

[86] R: 10: 978.

[87] South Africa, and the world, have already begun to recognise that there are some forms of persecution to which a person cannot be sent, regardless of their crimes. For example, there is now a global acknowledgement that torture is never acceptable, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("*CAT*") states at Article 3(1) that "*No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*". See *National Commissioner of Police v SAHR Litigation Centre* 2015 (1) SA 315 (CC) ("*SAHRLC*") at para 35:

"Torture, even if not committed on the scale of crimes against humanity, is regarded as a crime which threatens 'the good order not only of particular states but of the international community as a whole'. Coupled with treaty obligations, the ban on torture has the customary international-law status of a peremptory norm from which no derogation is permitted."

This absolute prohibition has been incorporated into South African domestic law by section 8 of the Prevention and Combating of Torture of Persons Act 13 of 2013.

[88] Sections 231(4) and 232 of the Constitution.

[89] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) ("*Makwanyane*").

[90] *Mohamed* at paras 55-59.

whether two murderers could be extradited to Botswana when Botswana had not given any assurances that it would not impose the death penalty.

88. This Court, per Zondo AJ, held at paragraphs 67-68:

> *"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. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.*
>
> *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's decision in Mohamed said that what the South African authorities did in that case was not consistent with the kind of society that we have committed ourselves to creating. It said in effect that we 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."*
>
> (Emphasis added.)

89. It is submitted that similar considerations arise in this matter, when section 4(1)(b) is assessed, as arose in *Tsebe*. It makes no difference that in *Tsebe*, the entity executing the accused persons was the State.

90. The point is that in this case, as in *Tsebe*, there is a real risk that if the Applicant is sent to Serbia he will be killed. His right to life will be utterly and finally violated as a result of the conduct of the South African government, albeit indirectly. This cannot be allowed.

91. Concerning the nature and extent of the limitation: section 4(1)(b) contemplates a total exclusion from refugee status. It is as drastic a limitation as is possible.

92. The only way in which section 4(1)(b) could be read not to create a total exclusion is if, as is submitted in the alternative declaratory relief sought below, the Act can be interpreted to provide protection even to persons that are not recognised as refugees.

93. Concerning the relation between the limitation and its purpose, the principle laid down in *Chipu* and the UNHCR Handbook is relevant, namely that a balance must be struck between the nature of the offence presumed to have been committed and the degree of persecution feared.

94. But the "*Chipu* approach" cannot alter the fundamental effect of section 4(1)(b) of the Act: that a person may be sent to face unconstitutional forms of persecution due to their previous offences. It still makes a person's rights contingent upon their behaviour – which is not consistent with the Constitution.

95. The *Chipu* approach also amplifies another constitutional deficiency within section 4(1)(b): its vagueness and the overbroad discretion it grants to the decision-maker.

96. In *Dawood*, the right of the spouses of South African citizens and permanent residents to obtain visas (in other words, to co-habit with their families in South Africa) were made contingent on the exercise of discretion by Department officials.

97. This discretion was unbounded and unguided by the relevant legislation, which this Court held was unconstitutional. This Court stated at paragraphs 46-47 and 57-58 of *Dawood*[91] that:

> *"There is, however, a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.*
>
> . . . .
>
> *It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.*
>
> . . . .
>
> *As also stated earlier, it is for the Legislature, in the first instance, to determine what those circumstances will be and to provide guidance to administrative officials to exercise their discretion accordingly.*
>
> . . . .
>
> *The privilege is dependent upon the grant of a valid temporary permit. However, the statutory provisions contemplate the refusal of such a permit, but contain no indication of the considerations that would be relevant to such refusal. Whatever the language and purpose of*

[91] *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) ("*Dawood*").

s 25(9)(b), its effect is uncertain in any specific case because of the discretionary powers contained in s 26(3) and (6). <u>The failure to identify the criteria relevant to the exercise of these powers in this case introduces an element of arbitrariness to their exercise that is inconsistent with the constitutional protection of the right to marry and establish a family</u> . . . There is no government purpose that I can discern that is achieved by the complete absence of guidance as to the countervailing factors relevant to the refusal of a temporary permit. In my view, therefore, s 25(9)(b), as read with s 26(3) and (6), of the Act is unconstitutional."[92]

(Emphasis added.)

98. It is submitted that as in *Dawood,* so too is the exercise of discretion under section 4(1)(b) of the Act undefined and overbroad – particularly when the *Chipu* approach is followed.

99. RSDOs seeking to make exclusion decisions must now determine – without any guidance from the legislature – what kind of past crimes justify being sent back to face persecution. There will inevitably be an element of arbitrariness in making such a difficult decision.

100. Can an armed robber be sent to a country where his racial group or tribe are oppressed and threatened with death and torture? Can a rapist be sent to a country which is experiencing civil war? Can a murderer be returned to be murdered?

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[92] See also *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 33-34:

"Nor is there anything that prevents Parliament from conferring upon the Director-General the discretion to determine those conditions.

. . . .

However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. <u>Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision</u>."

(Emphasis added.)

101. And what if much time has passed since the crime and the alleged perpetrator has changed his ways? How much does it weigh in the balance if the perpetrator has already been punished? Or – as in this case – if the "victim" of the crime was himself the perpetrator of gross war crimes?

102. It is submitted that these questions push section 4(1)(b) of the Act into uncharted and ill-defined territory. The section is accordingly vague, overbroad and unconstitutional.

103. The final consideration is whether less restrictive means exist to achieve the purpose.

104. It is submitted that such means do exist.

105. The purposes of section 4(1)(b) have historically, as set out above, been two-fold: to deprive those guilty of heinous acts of refugee protection, and to ensure that the asylum system is not abused by those who wish to avoid being held legally accountable for their crimes.

106. The first purpose should, for the reasons set out above, be discarded. The Constitution does not make the protection of human rights contingent on a person's conduct.[93]

107. The second purpose retains some value. However, this purpose is achieved not by any exclusion clause but by proper implementation and assessment of whether an applicant meets the requirements of refugee status. If an applicant does meet the requirements,

[93] *Makwanyane*, *Mohamed*, and *Tsebe* (*supra*).

then granting him or her refugee status is not an abuse. If he or she does not, then no "exclusion" is needed; the claim simply fails on its own merits.

108. It must be borne in mind that it is already well-established that punishment for a criminal offence does not, by itself, amount to persecution.[94] A person seeking to evade the lawful punishment for an offence must show something more – some more egregious persecution that meets the criteria in the Act.

109. Thus, if an asylum application is properly adjudicated, there is no prospect that an applicant can abuse the asylum system to avoid legal accountability.

110. It is submitted that all of the above five considerations, individually and cumulatively, support the conclusion that section 4(1)(b) of the Act unjustifiably infringes constitutional rights.

111. Section 4(1)(b) violates fundamental rights, for reasons that are not consistent with the modern constitutionally-mandated approach to human rights, in a vague and overbroad fashion, and in a manner that could be achieved in a less restrictive way.

Findings of the High Court on constitutionality

[94] See paragraph 56 of the UNHCR Handbook:

"Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice."

112. The High Court did not address these issues. Instead, it found (in paragraph 89)[95] that it was possible to resolve this matter without reaching any constitutional point. It did so by finding that:

112.1. There is no evidence that the Applicant is at risk of persecution in Serbia, and so his human rights are not at risk (see, *inter alia*, paragraphs 84[96] and 88[97] of the Judgment); and

112.2. The question of whether there is a "real risk" to the Applicant's life is best ventilated as part of his extradition proceedings (paragraph 87 of the Judgment).[98]

113. It is submitted that in both respects, the High Court erred.

114. The claim that the Applicant has nothing to fear in Serbia is baseless, particularly bearing in mind the lower standard of proof required of asylum seekers.[99] The Applicant has produced an overwhelming quantity of material in support of his

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[95] R: 10: 977.
[96] R: 10: 975.
[97] R: 10: 977.
[98] R: 10: 977.
[99] Asylum claims are not assessed on a balance of probabilities, but on whether there is a "real possibility" of persecution. This is a much lower test. As stated in *Tantoush* at paragraph 97:

> *"The RAB's finding that the applicant was required to prove a real risk on a balance of probabilities is not correct. The appropriate standard is one of 'a reasonable possibility of persecution' - see Immigration and Naturalization Service v Cardoza-Tonseca 480 US 421 (1987) at 440. Two decisions of this division have concluded similarly, namely Fang v Refugee Appeal Board and Others 2007 (2) SA 447 (T) and Van Garderen NO v Refugee Appeal Board (supra). In the latter Botha J stated:*
>
> > *'In my view by simply referring to the normal civil standard, the RAB imposed too onerous a burden of proof. It is clear . . . that allowance must be made for the difficulties that an expatriate applicant may have to produce proof. It is also clear that there is a duty on the examiner himself to gather evidence.'*
>
> *Later in the judgment the learned judge added:*
>
> > *'All this confirmed my view that the normal onus in civil proceedings is inappropriate in refugee cases. The inquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle.'"*
>
> (Emphasis added.)

reasonable fears, both from his personal experiences of constant threats and attempts on his life in Serbia,[100] and from independent sources such as the confessions and witness testimony of Zemun Clan members concerning the many people that they killed to avenge Arkan.[101] He was even kept in a separate wing of a prison for three years, isolated from other prisoners, because the Serbian government feared that the other prisoners would kill him.[102]

115. It is emphasised that to counter this evidence, the RSDO produced nothing but bald, unsubstantiated, speculative denials.[103] She has no knowledge of events in Serbia.[104] She produced no documentation or other evidence that contradicted the Applicant's claims.[105] The disputes she purports to raise over the threat of persecution to the Applicant do not deserve to be treated as genuine disputes,[106] and the High Court erred in accepting the RSDO's version of events.

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[100] R: 8: 802-806 paras 118-132.
[101] R: 4: 383-388 paras 30-34.
[102] R: 1: 26 para 68.
[103] See for example R: 6: 549 para 55.3, where the RSDO claims that there were no attempts on the Applicant's life while he worked with his father for three years. This can only be described as made up: see R: 8: 805 paras 128.3-128.8.
[104] See *Director-General, Department of Home Affairs and Others v Dekoba* 2014 (5) SA 206 (SCA) ("*Dekoba*") at para 6:

> *"The facts as set out by and on behalf of Ms Dekoba were not seriously disputed. The deponent to the answering affidavit on behalf of the appellants one Newton John Booysen, a Chief Control Immigration Officer in the department of Home Affairs in Maitland, Cape Town, had no personal dealings with or knowledge of her case. He repeatedly said that he had no knowledge of the facts as set out by or on behalf of Ms Dekoba, but then denied them. That was improper, as he advanced no facts justifying his denials. There was no appreciation on his part that a deponent, who denies the facts deposed to on oath by witnesses for the other party, accuses those witnesses of lying and lying on oath is a serious criminal offence. One expects greater care on the part of a senior government official when deposing to an affidavit. As it is these denials can be disregarded".*
>
> (Emphasis added.)

See also *Kalil NO v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) at paras 30-32:
[105] The RSDO also made the false claim that the Applicant returned to Serbia to collect his wife and children [R: 6: 536 para 26]. This has also been shown to be incorrect [R: 8: 810-811 paras 152-159].
[106] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D-H.

116. The second finding of the Court, that the question of the persecution of the Applicant is premature and should be determined via extradition processes, also appears in the Respondents' submissions.

117. The Respondents and the Applicant are *ad idem* that "*the provisions of section 2 of the Refugees Act certainly apply to persons who have been excluded in terms of section 4(1)(b)*"[107] and that "*South Africa's jurisprudence is clearly to the effect that no individual will be returned to his or her country of origin or nationality even in circumstances where there is an application for his or 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 tortured*".[108]

118. Where the parties disagree is that the Respondents contend that it is for the Minister of Justice, in extradition processes, to make the "*judgment call*" as to when section 2 of the Act protects an individual.[109]

119. It is submitted that this is incorrect. It is under the Act, and no other statute, that persons can be granted asylum based on their well-founded apprehension of persecution based on, *inter alia*, imputed political opinion. There is a protective spirit and purpose[110] in the Refugees Act that manifests in its specific criteria and standards of evidence. This is the heart and purpose of the Act. Section 2 and section 3 of the Act

[107] Submissions bundle at page 44 para 26.
[108] Submissions bundle at page 48 para 39.
[109] Submissions bundle at page 44 para 26.
[110] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at paras 28-29; see also *Tshiyomba v Members of the Refugee Appeal Board and Others* 2016 (4) SA 469 (WCC) at para 44.

are designed and intended to operate together. Both the RSDO and the High Court erred in trying to avoid the obligations and determinations required by the Act.

120. Furthermore, section 2 of the Act cannot depend for its implementation on the Extradition Act 67 of 1962 ("*the Extradition Act*"), because many – indeed, most – asylum seekers will not be the subject of extradition processes. They will instead (if finally denied or excluded (without appeal or review) from asylum in South Africa) face deportation under the Immigration Act. If it was for the Minister of Justice under the Extradition Act to enforce/implement section 2 of the Act, these persons would be at serious risk of being deported in violation of section 2 of the Act.

121. For all of the above reasons, it is submitted that section 4(1)(b) of the Act should be declared to be inconsistent with the Constitution and invalid.

IV. SUBSTITUTION

122. It is further submitted that instead of remitting this application back to an RSDO for what would be a third hearing,[111] the Court should recognise the Applicant as a refugee.

123. This Court is empowered to make substitution orders of this type, in exceptional circumstances, by section 8(1)(c)(ii)(aa) of PAJA.

[111] After the first decision was overturned by the SCRA on 18 April 2012 [R: 4: 349], and then the instant matter which also falls to be set aside.

124. This Court, in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) ("*Trencon*"), set out the test for substitution orders in detail.[112] This Court held at paragraph 47:

> *"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."*

125. It is submitted that all four of the criteria set out in *Trencon* militate in favour of granting a substitution order.

126. First, the Court is in as good a position as the administrator to make the decision. All the documents that were before the RSDO – and more – are before the Court. There is no specialised industry knowledge or polycentric complexities required to determine this matter. The elements that must be met for a refugee claim to succeed are legal ones, and are well-known. The Court has the benefit of written and oral legal argument by the parties. Indeed, it is submitted that this Court is in a superior position to determine this matter compared to the RSDO.

[112] See also *University of the Western Cape and Others v MEC for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131D-H; *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C) at 63-65; *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C).

127. Secondly, it is a foregone conclusion that the Applicant meets the standards of persecution required for a successful refugee claim. Few other refugee claims can have such detailed evidence of persecution, in which the applicant can name exactly who else in their position has been killed, and why, and by whom.

128. It is emphasised that refugee claims are not determined on a balance of probabilities, but instead whether there is a "reasonable possibility" of persecution.[113] This is a much lower and more liberal test, which is appropriate and deliberate given the context and nature of asylum decisions.

129. It is submitted that there is at least a reasonable possibility that the Applicant meets the requirements for refugee status:

129.1. He has provided extensive evidence of approximately 40 persons linked to Arkan's death being killed in order to avenge Arkan;[114]

129.2. He has had his life threatened repeatedly in Serbia;[115]

129.3. He has even identified the persons responsible for the assassinations – although Arkan had many followers and admirers among paramilitary and criminal elements throughout Serbia.[116]

129.4. If he were returned to Serbia, he would be imprisoned together with Arkan's former comrades (i.e. those with the greatest motive to kill him).[117]

129.5. During his trial, the risk to his life in prison was so great that he was kept in solitary confinement in a separate wing for three years.[118]

[113] *Tantoush* at paras 94-99.
[114] R: 5: 490.
[115] R: 8: 805 para 128.
[116] R: 4: 381-382 para 26.
[117] R: 8: 806 paras 130-131.

129.6. The most convincing explanation for Arkan's death is that it was ordered by Serbian President Slobodan Milosevic. It was hence an assassination of one political figure on the orders of another, in order to shore up the latter's position. It has an inescapably political nature.[119]

130. Although the Applicant claims not to have killed Arkan, it is sufficient for a refugee claim that he be imputed or presumed to be part of Milosevic's organisation/conspiracy that organised Arkan's death and sought to profit from it. This proposition is widely recognised in foreign[120] and international law.[121]

131. South African courts have upheld refugee claims based on perceived political opinions,[122] or, even when dismissing the claim, have never expressed doubt that the doctrine of imputed political opinion applies in South Africa.[123]

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[118] R: 1: 26 para 68.
[119] R: 8: 807-810 paras 133-151
[120] *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 ("*Ward*"); Khan and Schreier at 67.
[121] UNHCR Guidelines on International Protection No. 1: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ("*Guideline 1*") at para 29:

> *"Thus, a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".*
>
> (Emphasis added.)

Goodwin-Gill The Refugee in International Law (3rd ed.) at 87.
[122] For example, in *Tambwe v The Chairperson of the Refugee Appeal Board & Others* (WCD 2401/2010) 14 November 2016 (unreported) ("*Tambwe*") the applicant was a young woman from the Democratic Republic of Congo ("*DRC*") whose sister-in-law was Rwandan (and therefore seen as an enemy of the DRC). The Court found, at paragraph 15, that "*Applicant's family were associated, rightly or wrongly being irrelevant, with the political views of [the sister-in-law]*". The Court concluded at paragraph 14 that "*I am satisfied that the applicant has presented uncontroverted facts that she fled the DRC as a result of a well-grounded fear of being persecuted by reason of her perceived political opinions or affiliations*". The Court (based partly on the great delay experienced in the case) ultimately declared her to be a refugee. See also *Dorcasse v Minister of Home Affairs and Others* [2012] 4 All SA 659 (GSJ) at para 35.
[123] *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2015] 1 All SA 100 (WCC) at paras 30 and 37;

132. It is submitted that the doctrine of imputed political opinion (indeed, of imputed membership of any persecuted group) must or ought to be part of South African refugee law. A conclusion to the contrary would lead to unfortunate results. It would mean that a person wrongly perceived by persecutors as belonging to a targeted group – be it a religious group, a political group, a racial group, or any other – could be sent back to face inhumane and cruel treatment. It is precisely to avoid such an outcome that refugee law, both internationally and in South Africa, exists.

133. Thirdly, there has been significant delay in this matter, to the great prejudice of the Applicant. The Applicant was arrested on, and has been in detention since, 27 December 2011.[124] 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 all the while he is kept in detention.

134. It is submitted that this situation ought not be allowed to continue. This Court should bring this asylum claim to finality by making a substitution order.

135. Fourthly, the RSDOs handling the Applicant's case have shown bias and incompetence. The first decision by an RSDO was set aside by the Standing Committee for Refugee Affairs on 18 April 2012.[125] The RSDO responsible for the exclusion decision committed the following errors:

[124] R: 1: 13 para 17.
[125] R: 4: 349; R: 1: 32 paras 89-91.

135.1. The exclusion decision itself fails to ask, let alone answer, vital and basic questions. Its reasoning is so bare that the conclusion it reaches is not merely unreasonable but is irrational.

135.2. The RSDO's transcripts are virtually unintelligible.[126]

135.3. The RSDO failed to consider important documents given to her, and failed to refer to these documents in the exclusion decision.

135.4. The RSDO contradicts herself as to which documents she had before her, and denies receiving documents which are actually included in the Rule 53 record.

135.5. The RSDO lied about which documents she was given by the Applicant, and then further lied to the Applicant when she informed him (after making her decision) that the content of his interview was contained on her dictaphone.

136. And the Respondents have, in their submissions, accepted that even excluded persons – like the Applicant – are entitled to the protection of section 2 of the Act.[127]

137. In light of all of the above factors, this is one of those exceptional cases where the Court should bring finality to this matter and declare the Applicant to be a refugee.

V. DECLARATORY RELIEF

138. It is submitted that if this Court is not inclined, for whatever reason, to review and set aside the exclusion decision and/or grant a substitution order, this Court can and should declare that the Respondents may not extradite, deport, or otherwise return or compel the return of the Applicant to Serbia.

[126] R: 6: 598 *et seq*.
[127] Submissions bundle at page 44 para 26.

139. Such a declaratory order would uphold a different approach to refugee protection, and appears to be supported by the Respondents.[128]

140. It would mean, in effect, that the Applicant (and others like him) could lawfully be excluded from refugee status for their previous crimes, but they could still not be returned to countries where they would face persecution on the grounds specified in section 2 of the Act (or face torture, in terms of section 3.1 of CAT).

141. The basis for such an order is two-fold: Section 2 of the Act, and the Constitution.

142. Section 2 – which enshrines the international customary law rule of *non-refoulement* – protects all "persons", not just refugees.

143. This change in language between sections 2 and 3 of the Act – from "person" to "refugee" – must be given a meaning,[129] and the common use of the word "person" indicates that it must apply to every person (not just refugees).

144. Put differently, even persons who are found not to be refugees must, if they meet the requirements of section 2, be protected against return to their home countries. In the vast majority of cases, a person who meets the requirements of section 2 will always be formally recognised as a refugee, but if section 4 applies to that person, such recognition may not take place.

[128] Submissions bundle at page 44 para 26.
[129] A deliberate change of expression is *prima facie* taken to import a change of intention; see *R v Sisilane* 1959 (2) SA 448 (A) at 453F-G; *Administrateur, Transvaal v Carletonville Estates Ltd* 1959 (3) SA 150 (A) at 155H; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561G-I.

145. As set out above concerning, *inter alia*, *Mohamed* and *Tsebe*, the Constitution also supports such a ruling, as it would be inconsistent with the Constitution to allow any situation in which a person is compelled to return to a country to face a reasonable possibility of inhumane persecution. Accordingly, if this Court is not inclined to strike down section 4(1)(b) of the Act as unconstitutional, there must be another way to ensure that persons excluded from refugee status by that section are afforded meaningful protection.

VI. CONCLUSION

146. For all of the above reasons, the Applicant submits that this Court should grant leave to appeal and make the following orders:

146.1. The judgment of the High Court in this matter handed down on 6 April 2016 is set aside;

146.2. The decision of the First Respondent of 19 November 2012 to reject the Applicant's application for refugee status and exclude the Applicant in terms of 4(1)(b) of the Act is declared to be unlawful, inconsistent with the Constitution, and invalid;

146.3. The exclusion decision is reviewed and set aside;

146.4. The Applicant is declared to be a refugee who is entitled to asylum in South Africa as contemplated by sections 2 and 3 of the Act;

Alternatively to the first and second orders above:

146.5. It is declared that the Respondents may not extradite, deport, or otherwise return or compel the return of the Applicant to the Republic of Serbia; and

146.6. The Second to Fifth Respondents are to pay the costs of the Applicant, including the costs of two counsel; jointly and severally the one paying the other to be absolved.

147. In the event that the Applicant succeeds, he prays for an order of costs in his favour, such costs to include the costs of two counsel. In the event that this application is unsuccessful, it is submitted that the principles set out in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) apply and no costs order should be made.

ANTON KATZ S.C.

DAVID SIMONSZ

Applicant's counsel

Chambers, Cape Town

13 October 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(CONSTITUTIONAL HILL, BRAAMFONTEIN)

Case number: CCT217/16

In the matter between:

DOBROSAV GAVRIĆ	Applicant
and	
THE REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN	First Respondent
THE MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE	Sixth Respondent

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RESPONDENTS' SUBMISSIONS

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1. On 1 February 2017, the Chief Justice directed the parties to file written submissions on the issues set forth below.

THE CURRENT STATUS OF THE APPLICANT IN THIS MATTER

2. The Applicant is a Serbian national and a fugitive from justice in his home country. He came to South Africa in and during 2007, from which time he has been living here under the assumed name of *Sasa Kovacevic*.

3. On 21 March 2011, the Applicant was the driver of a 4X4 BMW. In the vehicle of the Applicant was a certain Cyril Beeka (Beeka) who was reputed to be an underworld crime boss. Whilst driving along Modderdam Road, Bellville South, Western Cape, Beeka was slain by a person riding pillion on a motorbike.

4. The Applicant, who suffered some injuries in the above incident, was then arrested on a charge of possession of drugs. He was also later charged with fraud, which related to his having obtained a driver's licence, passport and firearm licence, all under the false name of Sasa Kovacevic.

5. Following his arrest as aforesaid, the South African authorities discovered that the Applicant was a fugitive from justice in Serbia, where he had been found guilty on 9 October 2006, of having committed three counts of aggravated murder and in respect of which he was sentenced to a term of 30 years' imprisonment. This was later altered on appeal by the Serbian Supreme

Court to 35 years after the Applicant had challenged both his conviction and sentence.

6. On 27 December 2011, the Applicant was further arrested in terms of Section 5(1)(b) of the Extradition Act (no. 67 of 1962) (the Extradition Act), in pursuance of a request for his provisional arrest, pending a request from the government of Serbia for his extradition.

7. The Applicant appeared in the Cape Town Magistrate's Court on 28 December 2011, as a consequence of his arrest in terms of Section 5(1)(b) of the Extradition Act.

8. The Applicant initiated bail proceedings on 10 January 2012 in the Cape Town Magistrate's Court, but his release, after a full hearing, was refused on 3 February 2012 on account of him being a flight risk. Subsequent appeals by the Applicant to the Western Cape High Court and the Supreme Court of Appeal, were dismissed.

9. The Applicant subsequently launched a further bail application on the basis of allegedly *new facts*, but this application was, however, similarly dismissed by the Cape Town Magistrate's Court on 7 November 2014.

10. On 26 January 2012, and whilst his application for release on bail was still pending, the Applicant applied for asylum in terms of Section 21 of the Refugees Act (no.30 of 1998) (the Refugees Act).

11. The application for asylum by the Applicant has created a legal bar to continuation of the extradition proceedings, until such time as the asylum application has been finalised.[1]

12. In the circumstances, the proceedings in respect of the request for the Applicant's extradition to Serbia, which was received in February 2012, has been suspended pending the outcome of the Applicant's asylum application. The extradition enquiry has accordingly been postponed from time to time in the Cape Town Magistrate's Court.

13. The next date for the extradition hearing is 26 May 2017, but it will once again be postponed should the asylum application by the Applicant not be disposed of by then.

14. In the meantime and pending the outcome of all legal processes, the Applicant is presently being detained at the Helderstroom prison.

15. Currently, the Applicant has no legal status in South Africa inasmuch as he is not in possession of any valid visa or permit to be in South Africa in terms of the Immigration Act (no.13 of 2002) (Immigration Act). This is also so,

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[1] Section 21(4) of the Refugees Act provides :

> **"Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-**
>
> **(a) such person has applied for asylum in terms of subsection (1) until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or**
>
> **(b) such person has been granted asylum."**

because his application for asylum, was rejected by the First Respondent on 10 October 2012, on the basis that he did not qualify for refugee status inasmuch as there was a reason to believe that he had committed a non-political crime in Serbia, namely, murder (three counts), which is punishable in South Africa by imprisonment.

16. As will appear from the papers filed herein, the Applicant's review of the above decision by the First Respondent, was dismissed by the Western Cape Division of the High Court and his application for leave to appeal against the latter Court's decision was dismissed by the Supreme Court of Appeal, hence his application to this Court for leave to appeal, the outcome of which, is now awaited.

DO THE MECHANISMS AND PROCESSES CONTAINED IN THE EXTRADITION ACT, 67 OF 1962 AFFORD APPROPRIATE SAFEGUARDS IN PREVENTING POTENTIAL VIOLATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS?

17. Whilst the question posed, does not refer to any particular constitutional right, it is accepted for present purposes, that the constitutional rights implicated in this matter, are those referred to in Sections 10, 11 and 12 of the Constitution, which relate to human dignity, life and freedom and security of the person. In the instant matter, the Applicant complains that were he to be returned to Serbia there is a real risk that he might be killed.

18. Although the question is confined to the Extradition Act, it is important to note that Section 2 of the Refugees Act, which contains a general prohibition against the return of any person to any other country where his or her life,

physical safety or freedom would be threatened, also governs *extradition* and accordingly, the Refugees Act and the Extradition Act must be read together, whenever there is a risk that a person may be upon extradition, be subjected to persecution or his or her life, physical safety or freedom, threatened.

19. It is accordingly appropriate, for present purposes, to reproduce the whole of Section 2 of the Refugees Act, which provides as follows:

"General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

2. *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." (emphasis applied)

20. Thus, to the extent that that Section 2 embraces within its remit *extradition*, the Minister of Justice, acting in terms of Section 11 of the Extradition Act, may not extradite any person to another country where such person may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group.

21. Furthermore, the words *in the interests of Justice* ... contained in Section 11(b)(iii) of the Extradition Act, are, in our respectful view, wide enough to afford the Minister of Justice the power to refuse to extradite any person where there is a real risk that his or her life, physical safety or freedom would be threatened.

22. Moreover, and in any event, the Minister's decision to extradite is also constrained by the findings of this Court in **Mohamed & Another v President of the Republic of South Africa & Others**[2] (Mohamed) and **Minister of Home Affairs & Others v Tsebe & Others**[3] (Tsebe).

23. Although **Mohamed** and **Tsebe** dealt with the risk to life following the expulsion of a person to a retenionist 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. Thus in **Tsebe** this Court said the following:

"[43] The question that arises is: What is the principle that Mohamed established? The principle is that the Government has no power to

[2] 2001 (3) SA 893 (CC)
[3] 2012 (5) SA 467 (CC)

extradite or deport or in any way remove from South Africa to a retentionist State[4] any person 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.[5] This Court's decision in Mohamed means that if any official in the employ of the State, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in section 7(2) of the Constitution." (emphasis added)

24. The Constitutional Court in **Tsebe** also stated that it had made it clear in **Mohamed**, 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.[6]

25. In the circumstances, it is respectfully submitted, that the Extradition Act affords appropriate safeguards in preventing potential violations of constitutionally protected rights.

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[4] A retentionist State is a State that has retained the death penalty.

[5] The proposition that the test is a real risk is supported by the fact that, after quoting from *Soering v United Kingdom* (1989) 11 EHRR 439 (*Soering*); *Hilal v United Kingdom* (2001) 33 EHRR 31 (*Hilal*); and *Chahal v United Kingdom* (1996) 23 EHRR 413 (*Chahal*), all of which referred to "a real risk", this Court in *Mohamed* went on to say at para 58:

> "These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the State to 'protect, promote and fulfil the rights in the Bill of Rights'." (Footnotes omitted.)

See *Mohamed* above n 9 at paras 55-9.

[6] Tsebe at par 50.

WHAT IS THE SCOPE OF APPLICATION OF THE PRINCIPLE OF *NON-REFOULEMENT* ENSHRINED IN SECTION 2 OF THE REFUGEES ACT, 130 OF 1998? IS SUCH PROTECTION AVAILABLE TO: PERSONS WHO HAVE BEEN EXCLUDED IN TERMS OF SECTION 4(1)b) OF THE REFUGEES ACT.

26. For the reasons, already advanced earlier herein, we submit that the provisions of Section 2 of the Refugees Act certainly apply to persons who have been excluded in terms of Section 4(1)(b) of the Refugees Act. However, it is not for the refugee status determination officer (RSDO) (the First Respondent in this matter), to make the judgment call required by Section 2 of the Refugees Act. That is the prerogative of the Minister of Justice.

27. The RSDO's role in terms of Section 4 of the Refugees Act, is a very limited one. He or she is obliged to enquire into whether or not the facts of any particular case satisfy the requirements of the said section and as such, to make a finding that the person does or does not qualify for refugee status for the purposes of the Refugees Act.

28. In the circumstances, the entire argument about whether or not the Applicant is at risk of losing his life if he were to be returned to Serbia, is premature and accordingly does not call for any consideration by this Court.

29. The key international and regional Conventions governing refugee law are those referred to in the preamble to the Act, to which South Africa has acceded. In very similar terms, these instruments define, on the one hand,

persons who qualify as refugees,[7] their rights and the responsibilities of States when considering the grant of asylum, and, on the other hand, persons who do not qualify as refugees.

30. Both the 1951 Refugee Convention and the 1969 OAU Convention, recognise classes of persons who are not eligible for refugee status, even if they satisfy the inclusionary criteria. To this end, both Conventions recognise that individuals who have committed serious non-political crimes outside the country of refuge, are to be excluded. Thus Article 1F(b) of the 1951 Refugees Convention (materially mirrored in the OAU Convention) provide :

> **"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that :**
>
> **(a)** ...
>
> **(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."**

31. Section 3 and Section 4(1) of the Refugees Act, are the principal provisions reflecting respectively, the inclusionary and exclusionary requirements, mandated by international law. Section 3 defines persons eligible for refugee

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[7] Article 1(2) of the 1951 Refugee Convention, provides that a person is to be considered a refugee if- **"owing to 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."**

status. South Africa's exclusion clause is contained in Section 4(1) of the Act. Section 4(1)(b) provides as follows :

"Exclusion from refugee status

4(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) ...

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment;"

32. Exclusion assessments are mandatory under international law and under the Refugees Act.[8] 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.

33. The rationale behind the exclusion clause is two-fold:

33.1. It protects refugee status from being abused by those who are undeserving; and

33.2. It ensures that those who have committed serious crimes do not

[8] In terms of Section 4(1) a person **"does not qualify"** as a refugee if the exclusionary circumstances are present.

escape prosecution.

34. 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 inclusionary provisions serve to protect the vulnerable. The exclusionary provisions serve to ensure that the grant of refugee status is not afforded to individuals who are not deserving thereof.

35. In the premises, the purpose of Section 4(1)(b) of the Refugees Act, is not only clearly rational and reasonable in the circumstances, it clearly also conforms with the relevant laws, norms and standards of international law.

36. Section 4(1)(b) of the Refugees Act also does not challenge in any way the right to life[9], nor the right to freedom and security of the person.[10]

37. 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 as regards the return of such person to his or her home country. The State concerned, can choose to grant the excluded individual a stay on other grounds.

38. An excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an

[9] Section 11 of the Constitution.
[10] Section 12 of the Constitution.

individual to a country where there is a risk that he or she will be subjected to torture.[11]

39. Moreover, as illustrated earlier herein, South Africa's jurisprudence is clearly to the effect that no individual will be returned to his or her country of origin or nationality even in circumstances where there is an application for his or 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 tortured.[12]

WHAT IS THE SCOPE OF APPLICATION OF THE PRINCIPLE OF *NON-REFOULEMENT* ENSHRINED IN SECTION 2 OF THE REFUGEES ACT, 130 OF 1998? IS SUCH PROTECTION AVAILABLE TO: PERSONS WHO DO NOT OTHERWISE QUALIFY FOR REFUGEE STATUS?

40. It is respectfully submitted, that the same argument submitted under the immediately previous section, applies equally to the question posed above.

ARE THERE ADDITIONAL MECHANISMS IN THE SOUTH AFRICAN LAW THAT PROTECT AN UNSUCCESSFUL APPLICANT FOR REFUGEE STATUS FROM REFOULEMENT?

41. An unsuccessful applicant for refugee status would be an illegal foreigner and subject to deportation in terms of the Immigration Act or liable to be extradited

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[11] UNHCR's Guidelines on International Protection: pp. 4, para 9.
[12] Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC); Minister of Home Affairs v Tsebe 2012 (5) SA 467 (CC).

under the Extradition Act. As we have tried to demonstrate above, the Applicant falls within the category of those persons who are liable to be extradited under the Extradition Act. We have dealt with the safeguards and mechanisms available in our law (Section 2 of the Refugees Act, Section 11(3)(b) of the Extradition Act and our jurisprudence) to protect individuals such as the Applicant, hereinabove.

42. An unsuccessful applicant may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments. For example, the **1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture.[13]

43. This Court decided in both **Mohamed** and **Tsebe** that the State may not extradite or deport a person if this will expose him to a real risk of the imposition and execution of the death penalty. If the foreign state furnishes an assurance that it will not impose the death penalty or if it is imposed, that it will not execute it, then there is no such risk and the State may deport or extradite him.

44. The Applicant faces a 35-year prison sentence should he be returned to Serbia. The Serbian government, however, has assured the South African government that the death penalty is not part of their legal and penal system and hence there is no possibility that the Applicant will be executed.

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[13] UNHCR Guidelines on International Protection, p. 4, para 9.

45. In any event, as submitted earlier herein, the question as to whether there is a real risk that the Applicant might be killed if he were to be returned to Serbia, is a fact-sensitive factor which must be dealt with by the Executive when it considers the question as to whether or not to extradite (or deport) the Applicant to Serbia.

IS THE APPLICABILITY OF SECTION 4(1)(b) OF THE REFUGEES ACT, 130 OF 1998 CONTINGENT ON A PREVIOUS FINDING BY THE REFUGEE STATUS DETERMINATION OFFICER THAT THE PERSON QUALIFIES FOR REFUGEE STATUS IN TERMS OF SECTION 3 OF THE REFUGEES ACT, 130 OF 1998?

46. The answer to the above question is in the negative, since the inquiry in terms of Section 4(1)(b) of the Refugees Act, is a necessary antecedent inquiry to that contained in Section 24, read with Section 3 of the Refugees Act. Thus, in the event that the person does not qualify for refugee status, it becomes unnecessary to determine whether the person qualifies for refugee status in terms of Section 3 of the Refugees Act, since such a person is excluded from being granted refugee status.

IN THE EVENT THAT AN APPLICATION FOR REFUGEE STATUS IS REJECTED, ARE THERE MINIMUM REQUIREMENTS WHICH MUST BE SATISFIED IN THE REASONING IN ORDER FOR THE DECISION TO BE DEEMED ADEQUATE?

47. There can be no doubt that the rejection of an application for refugee status must be accompanied by reasons which must at the least, satisfy the

requirement of rationality. This must be so, since the decision of the RSDO constitutes administrative action and as such, must be lawful, reasonable and procedurally fair.

48. It is clear from the RSDO's reasons for the rejection of the Applicant's application, that she was satisfied that all the requirements of Section 4(1)(b) of the Refugees Act had been met, in that the Applicant had committed a crime which was not of a political nature and which, if committed in the Republic, would be punishable by imprisonment. Whilst her reasons could be said not to constitute a model when measured against judicial pronouncements, they quite adequately demonstrate the basis for her conclusion and leaves one with no doubt that she was satisfied that the requirements of Section 4(1)(b) had been met. In fact, the RSDO went so far as to find (although it was not necessary for her to do so), that the evidence presented by the Applicant did not convince her that there was a well-founded fear of future persecution based on race, religion, nationality, membership of a particular social group or political opinion, as required by Section 3 of the Refugees Act.

49. In light of the above, it is clear that the First Respondent's decision met the minimum requirements in reasoning, to justify the rejection of the Applicant's application for refugee status, whether in terms of Section 3 or Section 4 of the Refugees Act.

DOES THE *AUDI ALTERAM PARTEM* PRINCIPLE APPLY WHERE A REFUGEE STATUS DETERMINATION OFFICER CONSIDERS INFORMATION OBTAINED FROM A SOURCE BEYOND THE INFORMATION IN THE PAPERS?

50. Yes, the *audi alteram partem* principle does apply in such a situation, in that a decision of an RSDO is an administrative decision in terms of Section 33 of the Constitution and as such, should be procedurally fair.[14]

51. It is respectfully submitted, that the First Respondent's research into the legal system of Serbia, of which she did not inform the Applicant before making her decision, does not undermine her decision in any way since it was not material thereto. The First Respondent's said research did not change the jurisdictional facts, namely, that the Applicant was convicted by a Serbian court of law (on his own account), of a crime which is not of a political nature and which if committed in the Republic, would be punishable by imprisonment.

52. Whilst, the fact that the First Respondent had also established by research that Serbia has an internationally recognised legal system, this aspect, however, was also not material to her decision, and hence does not detract from her finding that he had been properly convicted by a Court of Law in Serbia

53. It is accordingly, respectfully submitted, that the Applicant's submissions at paragraph 65 of his written submissions, that he could have been able to

[14] Hoexter, C, Administrative Law in South Africa, 2nd ed., 2011, at p. 363: "Procedural fairness in the form of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them."

demonstrate that the judgments of the Belgrade District Court and Supreme Court of Serbia, have been superseded by later confessions and judicial findings (against criminals associated with Arkan), amount to no more than mere speculation and are in any event not supported by the evidence in the review proceedings before the High Court.

54. Moreover, the Applicant's submissions contained in paragraph 65 of his written submissions herein, would be more appropriate for the consideration of the Minister of Justice, should the Applicant be declared to be liable for extradition by the Cape Town Magistrate's Court, as to whether or not the Applicant should be extradited to Serbia.

DOES THE DOCTRINE OF IMPUTED POLITICAL OPINION FIND APPLICATION IN THE SOUTH AFRICAN LAW FOR THE PURPOSES OF THE APPLICATION OF SECTION 3 OF THE REFUGEE ACT, 130 OF 1998?

55. Whilst the doctrine of imputed political opinion has not been firmly entrenched as such in South African law, South African courts have admittedly decided a number of refugee claims based on perceived political opinions.[15] However, as the Applicant points out, it appears that a number of foreign jurisdictions have indeed recognized claims based on imputed political opinion.[16]

56. Thus, even if it could be said that the doctrine of perceived political opinion, applies in South African Law, the question remains whether it can find

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[15] See, for example, Tambwe v The Chairperson of the Refugee Appeal Board and Others (WCD 2401/201 (referred to in footnoe 45 of Applicant's written submissions)

[16] See, for example, *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *Mario Ernesto Navas v Immigration and Naturalization Services* 98-70363, United States Court of Appeals of the 9th Circuit.

application under Section 3 of the Refugees Act in circumstances where the requirements of Section 4 of the said Act have been found to have been satisfied, as in the instant case? We have already contended that Section 4 enjoys primacy over Section 3, and hence the issue concerning perceived political opinion, and the concomitant risk to life or limb which accompanies it, is not a justiciable issue at this juncture but rather a matter for the consideration and decision at a later stage of the Minister of Justice.

57. Moreover, and in any event, on the facts of the instant case, the First Respondent, as already stated herein, found that the evidence presented by the Applicant, did not convince her that there was a well-founded fear of persecution based on, *inter alia*, membership of a particular social group or political opinion (perceived or otherwise) as required by Section 3 of the Refugees Act.

M.A. ALBERTUS SC

G.R. PAPIER

Counsel for the Respondents

1 March 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT number: 217/16

In the matter between:

DOBROSAV GAVRIĆ	Applicant
and	
THE REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN	First Respondent
THE MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
THE DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE	Sixth Respondent
and	
THE PEOPLE AGAINST SUFFERING OPPRESSION AND POVERTY	Amicus Curiae

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WRITTEN SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

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INTRODUCTION

1 People Against Suffering and Oppression and Poverty ("PASSOP") is a community-based non-profit organisation and grassroots movement that works to protect and promote the rights of all refugees, asylum seekers and immigrants in South Africa. PASSOP believes in and advocates for equality and justice for people across all societies, irrespective of nationality, age, gender, race, creed, disability or sexual orientation.[1]

2 In doing so, PASSOP creates and strengthens networks of communication, dialogue and interchange for the advancement of peace, understanding and justice in local communities. PASSOP's mission is to empower communities to stand up and express their beliefs, needs and fears freely, and access the constitutional rights that they are entitled to.[2]

3 PASSOP was founded in 2007. It has since become a leading advocate for refugees and immigrants in their demands for human rights in South Africa. PASSOP is unique amongst other South African non-profit organisations in that it is an advocacy and activist

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1 FA: Admission as Amicus Curiae p 4 para 7.

2 FA: Admission as Amicus Curiae p 4 para 8.

organisation that draws the majority of its members and volunteers from the refugee and immigrant community.[3]

4 In order to achieve the realisation of its principles and values, PASSOP has engaged on its own litigation[4] and intervened as an amicus curiae in matters before this Court.[5] PASSOP has specialised expertise in the area of the impact of immigration law on foreign nationals and the treatment of detained foreign nationals by the State.[6]

5 PASSOP was granted leave to file written submissions and to make oral submissions in this matter as an amicus curiae. PASSOP's submissions seek to address primarily the following issues:

5.1 First, whether an exclusion decision is subject to an internal review or appeal under the Refugees Act 130 of 1998 ("the Act");

5.2 Second, the scope of the principle of non-refoulement enshrined in section 2 of the Act;

5.3 Third, the duties of a Refugee Status Determination Officer in making a decision; and

[3] FA: Admission as Amicus Curiae p 4 para 9.

[4] *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* 2014 (11) BCLR 1352 (GJ)

[5] *Minister of Home Affairs v Rahim and Others* 2016 (3) SA 218 (CC) and *Lawyers for Human Rights v Minister of Home Affairs and Another* 2016 (6) BCLR 780 (CC)

[6] FA: Admission as Amicus Curiae p 5 para 11.

5.4 Fourth, whether the doctrine of imputed political opinion finds application in South African law.

6 We now deal with each of the issues in turn.

INTERNAL REMEDIES FOR AN EXCLUSION DECISION

The importance of the issue

7 None of the parties to this matter appear to have dealt with the issue of whether an "exclusion" decision is subject to an internal review or appeal under the Refugees Act.

8 However, this is an issue that must be considered in order to resolve this case.

8.1 Section 7(2) of PAJA[7] is emphatic. It provides that "*no court … shall review an administrative decision … unless any internal remedy … has first been exhausted*"[8] and instead the court "*must … direct that the person concerned must first exhaust such remedy before instituting proceedings … for judicial review*".[9]

[7] Promotion of Administrative Justice Act 3 of 2000

[8] Section 7(2)(a) of PAJA

[9] Section 7(2)(b) of PAJA

8.2 This is subject only to the Court's power to exempt the applicant from the duty to exhaust internal remedies, in terms of section 7(2)(c) of PAJA.

8.3 Thus, if indeed the decision to "*exclude*" the applicant from asylum is subject to an internal remedy (as is indeed the case as we explain below), then the appropriate remedy may well be to direct that the applicant is entitled to exercise that remedy before any judicial review application is determined.

9 More critically from the point of view of PASSOP, this is a matter that has profound implications from the point of view of ordinary asylum-seekers and refugees.

9.1 Where no internal remedy is available, an asylum-seeker facing potential exclusion is left in the hands of a single official – the Refugee Status Determination Officer (RSDO).

9.2 That RSDO will determine whether the asylum-seeker's claim is excluded. If she decides that the claim is excluded then on the approach of the Respondents, the asylum-seeker has no ability to approach either the Standing Committee or the Refugee Appeal Board. The RSDO's decision on this critical issue will be final, subject only to expensive and cumbersome review by a High Court.

9.3 The problems inherent in this approach are particularly significant given the acute vulnerability of asylum-seekers and refugees.[10] 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 judgment by a single official, with no right of internal review or internal appeal by the Standing Committee or Refugee Appeal Board.

9.4 The concern of PASSOP is especially acute given the practical realities of RSDO decisions. As was explained by a leading academic, Dr Roni Amit, in the International Journal of Refugee Law:

> *"... In response to the tremendous demand on the system, government efforts have focused on efficiency. Because of these efforts, individuals are being routinely denied refugee status, in accordance with refugee and administrative law, without proper consideration of their asylum claims.*
>
> *This article describes the findings of a review of 324 negative status determination decisions from South Africa's refugee reception offices. The review uncovered serious flaws in the status determination process. Decisions were characterized by errors of law, an absence of reasons, a lack of individualized decision making, and a general failure to 'apply the mind' or to use sound reasoning. Unthinking and non-contextualized cutting and pasting, both from other decisions and from internet sources, was also rampant, and many claimants received identical decisions regardless of the details of their claims. The review demonstrates that South Africa's refugee system is failing to fulfill its core function – identifying those in need of protection as refugees. The current system, influenced by larger immigration policy, is giving rise to grave human rights violations as the status*

[10] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at paras 28-30

determination process fails to uphold the non-refoulement principle."[11]

9.5 Indeed, Dr Amit goes on to explain that it is often only during the internal remedies process that a proper hearing is given for the first time:

> *"While asylum seekers who understand and take advantage of the appeals process may ultimately receive a procedurally fair decision from the RAB, many asylum seekers do not have a sufficient grasp of the system to pursue appeals and are being denied needed protection."*[12]

9.6 In these circumstances, the notion that an exclusion decision is a once-off exercise, undertaken by an overburdened single official, raises considerable concerns.

The proper interpretation of the Act

10 We submit that it is not correct that no internal appeal or internal review is available for an exclusion decision,

11 When faced with an application for asylum, an RSDO has only three options available in respect of the final decision that can be taken:

11.1 She can grant asylum;[13]

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[11] R. Amit, "*No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection*" Int J Refugee Law (2011) 23 (3): 458-488 (emphasis added)

[12] Amit at p 460

[13] Section 24(3)(a)

11.2 She can reject the application as manifestly unfounded, abusive or fraudulent;[14] or

11.3 She can reject the application as unfounded.[15]

12 In this regard, the Act sets out two different internal remedies where the application is rejected:

12.1 If the RSDO rejects the application as manifestly unfounded, abusive or fraudulent, then the matter must automatically serve before the Standing Committee on Refugee Affairs on automatic review.[16]

12.2 Similarly, if the RSDO rejects the application as unfounded, the asylum-seeker has a right of appeal to the Refugee Appeal Board.[17]

13 The approach of providing such 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 cases; and the drastic and catastrophic consequences that may result if an applicant is wrongly refused asylum.

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[14] Section 24(3)(*b*)

[15] Section 24(3)(*c*)

[16] Section 24(4) and section 25(1).

[17] Section 26(1).

14 Moreover, this approach is consistent with the value ascribed to internal remedies by this Court in *Koyabe.*[18]

15 However, on the approach adopted by the Respondents in the present matter, the position appears to be that a person whose asylum application is rejected because he is held to have been "excluded" under section 4 appears to receive no internal remedy at all.

15.1 Thus, when the RSDO made the exclusion decision in the present case, she referred the matter to the Standing Committee.

15.2 However, when the Standing Committee then dealt with the matter, it declined to reach the merits of the review because it considered that it had no jurisdiction.

16 We submit that this does not represent a correct interpretation of the Act.

16.1 It would be extraordinarily surprising 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.

[18] *Koyabe and Others v Minister for Home Affairs* 2010 (4) SA 327 (CC) at para 37

16.2 Moreover, there appears to be no textual reason for this conclusion. As we have explained, section 24(3) of the Act sets out the three options available to the RSDO in adjudicating an application. The application must be:

16.2.1 granted;

16.2.2 rejected as manifestly unfounded, abusive or fraudulent; or

16.2.3 rejected as unfounded.

16.3 There is no separate statutory power given to the RSDO to "exclude" an application.

16.4 Thus, when the RSDO rejects an application on the basis that the exclusion provision applies, she is either rejecting it as "unfounded" or "manifestly unfounded".

16.5 It follows from this that the decision to exclude an asylum application is subject to the internal remedies contained in the Act.

17 We submit that this Court should make clear that this is the case, so that future exclusion decisions are subject to the internal remedies in the Act.

THE EFFECT OF SECTION 2 OF THE ACT

18 Questions 1.3 and 1.4 of this Court's initial directions deal with the effect of section 2 of the Refugees Act.

19 The Respondents concede that section 2 of the Refugees Act "*certainly*" applies to persons who are excluded in terms of section 4(1)(b).[19] That is plainly correct.

20 However, the Respondents then contend that it is "*the prerogative of the Minister of Justice*" to "*make the judgment call*" required by section 2.[20]

21 It is not entirely clear what this means. If the Respondents are suggesting that section 2 vests some discretion in the Minister of Justice, that is plainly incorrect. The section creates a strict legal bar as a matter of law against any person who falls within the section to be returned to the country concerned. Whether a person falls within the section is an objective enquiry – not a discretionary matter or a "judgment call" left to a state official.

22 Moreover, even if there were a "judgment call" to be made, it is not at all clear why it would be the Minister of Justice that would need to

[19] Respondents' first submissions, para 26

[20] Respondents' first submissions, para 26

make the decision concerned. The question of which state official would be responsible for making the determination would have to depend in part on whether the person was proposed to be returned to another country by refusal of entry, expulsion, extradition or so on.

THE DUTIES OF AN RSDO

23 Questions 1.6 and 1.7 of this Court's initial directions deal with the duties of an RSDO.

24 The applicant has dealt in detail with the flaws of the RSDO decision in the present matter. Mindful of the limited role of an amicus curiae, we do not seek to interrogate the grounds of review or the facts in detail in this regard.

25 However, what is critical is that in determining those grounds of review, this Court makes clear the high standards required of RSDOs when it comes to procedural fairness and the provision of adequate reasons.

26 In this regard, it must be noted 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 the RSDOs and ensure that they adhere to their duties.[21] It is therefore imperative that RSDOs fulfil their functions properly.

[21] FA: Admission as Amicus Curiae p 11 para 29.3.

27 This is especially the case given the catastrophic consequences that can result if an applicant for asylum is wrongly rejected. A failure by an RSDO to properly exercise his or her powers can literally have life or death consequences for the applicant concerned.

28 Having regard to this context and the potential life or death consequences, one would have hoped that RSDOs would show the most scrupulous adherence to the principles of administrative justice. Indeed, this Court has repeatedly held that by committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that "*this must be demonstrated by the State in everything that it does*".[22] This certainly applies to the manner in which RSDOs ought to carry out their duties.

29 Regrettably, the opposite has proved true.

30 Dr Amit has explained that part of the problem is the demands placed on RSDOs:

> *"RSDOs are expected to issue approximately ten asylum decisions a day. Each decision involves a process that includes interviewing the asylum seeker, doing the necessary background research, and writing a decision with adequate reasons. Under the most optimistic of assessments, this leaves no more than 20-30 minutes to conduct a status*

[22] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 144; *Mohamed v President of the RSA (Soc for the Abolition of the Death Penalty in SA Intervening)* 2001 (3) SA 893 (CC) at para 48

determination interview. Yet, because many asylum seekers may be traumatized, fearful of government authorities, and unsure of precisely what information is required of them, significantly more time may be required to get to the core of their asylum claims. A fair hearing 'is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions'. A cursory interview with an asylum seeker affords the individual no real chance to participate in or influence the outcome."[23]

31 Moreover, the reasons provided are often hopelessly inadequate, as Dr Amit again explains:

> *"[M]any rejection letters either contained no reasons at all, or were filled with generalities - often comprised of cut and pasted paragraphs - that did not engage with the individual claim. Decisions in the latter category constituted generic letters that could be given to anyone, in the absence of a status determination interview or any individualized consideration. As such, they did not contain concrete reasons in accordance with the standards of procedural fairness, nor did they engage with the evidence before the administrator..."*[24]

32 In the present case, of course, the applicant was fortunate to be represented by counsel, well-versed in refugee law. The case was a relatively unusual and notable one, compared to the average cases that RSDOs would deal with on a daily basis. If the reasoning of the RSDO was as terse and inadequate as it was in a case of this kind, it requires little imagination to conclude that in ordinary cases, the position would be even worse.

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[23] Amit at p 459-460

[24] Amit at p 475

33 We therefore submit that, whatever the outcome of the appeal, this Court ought to make clear the considerable responsibilities on RSDOs to ensure that their decisions are procedurally fair, provide proper reasons and are lawful.

IMPUTED POLITICAL OPINION

34 Question 1.9 raises the question of whether the doctrine of imputed political opinion forms part of our law. The applicant contends that it does form part of our law,[25] while the respondents appear to avoid the question.[26]

35 We endorse the submissions of the applicant, but do not repeat them. Instead, we wish to add that the doctrine of imputed political opinion must form part of our law when the effect of the Constitution is considered.

36 In *Tsebe*, this Court explained:

> *"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*

[25] Applicant's first set of written submissions, paras 66 to 70

[26] Respondents' first set of written submissions, paras 55 to 57

upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.

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's decision in Mohamed said that what the South African authorities did in that case was not consistent with the kind of society that we have committed ourselves to creating. It said in effect that we 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."[27]

37 The judgment thus makes quite clear that when it comes to the prospect of sending someone to face death or persecution, our Constitution does not distinguish between different kinds of people or what they have done. It insists that our government will not be party to people being killed or persecuted, under any circumstances.

38 If that is so in respect of someone accused of a serious crime, like Mr Mohamed or Mr Tsebe, it must apply with even greater force to someone who is being persecuted because it is (wrongly) thought that

[27] *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC) at paras 67 to 68 (emphasis added)

he is member of a particular political group. Our government cannot be party to allowing the persecution of people who fall under its control. This is so irrespective of whether the person is in fact a member of a persecuted political group or is merely thought to be so.

39 It would be simply unthinkable for our constitutional scheme to permit a person to be returned to face persecution because people think (albeit wrongly) that he holds a particular political affiliation or persuasion. The Refugees Act must be understood in this light.

CONCLUSION

40 We therefore submit that:

40.1 On a proper interpretation of the Refugees Act, a decision rejecting an asylum application on exclusion grounds is subject to the internal remedies set out in the Act;

40.2 Section 2 of the Refugees Act does not require a judgment call. The section creates a strict bar as a matter of law against any person who falls within the section to be returned to the country concerned and this applies also to those who fall within the exclusion grounds;

40.3 RSDOs must be held to the highest standards regarding both procedural fairness and adequate reasons in their decision-making; and

40.4 The Constitution requires that the doctrine of imputed political opinion form part of our law.

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19 January 2018

TABLE OF AUTHORITIES

Koyabe and Others v Minister for Home Affairs 2010 (4) SA 327 (CC)

Lawyers for Human Rights v Minister of Home Affairs and Another 2016 (6) BCLR 780 (CC)

Minister of Home Affairs and Others v Tsebe and Others 2012 (5) SA 467 (CC)

Minister of Home Affairs v Rahim and Others 2016 (3) SA 218 (CC)

Mohamed v President of the RSA (Soc for the Abolition of the Death Penalty in SA Intervening) 2001 (3) SA 893 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others 2014 (11) BCLR 1352 (GJ)

Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC)

R. Amit, "*No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection*" Int J Refugee Law (2011) 23 (3): 458-488