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UNINTENDED CONSEQUENCES FOR EXCLUSIONS

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ADVOCATES' MIGRATION BRIEF SERIES

The Advocates' Migration Brief Series addresse recent judicial decisions relating to people on the move.

1. UNINTENDED CONSEQUENCES FOR EXCLUSIONS
(David Simonsz)

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1. INTRODUCTION

On 1 January 2020, the asylum seeker community in South Africa received an unwelcome new year's gift: Wide-ranging amendments to the Refugees Act 130 of 1998 (*"the Refugees Act"*)[1] and the regulations thereto[2] which made significant (and adverse) changes to the operation of the asylum system.

Among these changes were an expansion of the grounds on which asylum seekers and refugees may be excluded from refugee status, in terms of section 4 of the Refugees Act. The nature of each of these new grounds for exclusion will doubtless be the site of much academic discussion, and litigation, in the years to come.

For the time being, however, the practical effect of these amendments is – or will be, once the impact of the COVID-19 pandemic recedes – to increase greatly the numbers of asylum seekers who are being excluded from asylum.

It is appropriate, in these circumstances, to consider how exactly exclusion works in practice – and for this, one must look to the leading Constitutional Court case of *Gavrić v Refugee Status Determination Officer, Cape Town and Others* [2018] ZACC 38 (*"Gavrić"*).[3]

Gavrić starts with one important ruling:[4] that persons excluded from refugee status are nonetheless protected by the

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[1] On 1 January 2020, three different amendment acts (which I shall refer to as *"the 2020 amendments"*) came into effect. These are the Refugees Amendment Act 11 of 2017, the Refugees Amendment Act 33 of 2008 and Refugees Amendment Act 12 of 2011. The 2020 amendments were to come into effect together, and the date of operation was determined by the President of the Republic of South Africa to be 1 January 2020 in Proc 60, *Government Gazette* 42932, 23 December 2020.

[2] The Refugees Regulations, published in GNR 1707 in *Government Gazette* 42932 of 27 December 2019.

[3] Cited as 2019 (1) SA 21 (CC) and 2019 (1) BCLR 1 (CC). The author acted as junior counsel to Mr Dobrosav Gavrić in this matter.

[4] The Constitutional Court's findings on the merits of Mr Gavrić's review application, and its commentary on section 4(1)(b) of the Refugees Act and the question of what crimes are *"political"* for the purposes of exclusion, are important but are not the subject of this article.

right of *non-refoulement*, enshrined in the overarching provisions of section 2 of the Refugees Act. In other words, a person excluded from refugee status may still – depending on the persecution that the person fears – not be returnable to their country of origin, and thus still retains the most basic protection (of non-return) granted to asylum seekers.

But *Gavrić* then goes on to find that a person excluded from asylum, but who remains protected by the right of *non-refoulement*, can raise his or her right of *non-refoulement* as a defence in his or her extradition proceedings (which Mr Gavrić was still to face).[5]

How this is meant to operate when an excluded person is not facing extradition – which category will include the vast majority of asylum seekers – is left unsaid, and unclear.

At the time, exclusion decisions were sufficiently rare (and the judgment in Gavrić sufficiently recent) that this verged on being only an academic problem. The 2020 amendments, however, look to change that.

The unintended consequence of Gavrić read with the 2020 amendments is to create a category of persons who are neither part of the refugee and asylum system, nor of the South African immigration system, nor have any formal documentation or clear rights in South Africa, save for the right to remain in South Africa. And this is in no one's interests. Indeed, it may well be unsustainable, both legally and practically, for the Department of Home Affairs (*"the Department"*) and the South African migration system as a whole.

In expounding the above, this article begins with a brief explanation of the right of *non-refoulement*, and of the role of exclusions within the asylum system. Thereafter, Mr Gavrić's

[5] *Gavrić* at para 30.

personal and litigious history is described. This article then turns to the findings of the Constitutional Court in *Gavrić vis-à-vis* exclusion, and particularly the finding that excluded persons may remain protected by the right of *non-refoulement*, depending on the merits of their claim, which claim is to be adjudicated in extradition proceedings.

But an analysis of the Extradition Act 67 of 1962 (*"the Extradition Act"*) shows that the procedures thereunder are wholly unsuited to deal with foreign persons who are not subjects of extradition requests (unlike Mr Gavrić). Nor can the systems under the Immigration Act 13 of 2002 (*"the Immigration Act"*) be of assistance, as this statute is equally not designed to adjudicate claims about harm feared in foreign countries. The best approach may be to conduct refugee status determinations under the Refugees Act prior to assessing whether asylum seeker is excluded (known as the "*inclusion before exclusion*" approach). However, this did not occur in *Gavrić*, and the Constitutional Court held in *Gavrić* that such an approach need not be followed.

The article concludes that the practical consequences of the "*Gavrić* approach" to asylum and exclusions, applied in light of the 2020 amendments, will be uncertain, chaotic, and in all likelihood adverse to those most in need of protection: asylum seekers.

2. THE RIGHT OF *NON-REFOULEMENT*

The right of *non-refoulement* needs little introduction to any person familiar with refugees and asylum seekers. Domestically, it is contained in section 2 of the Refugees Act, which provides:

> *"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."*

This provision has attracted much judicial comment, the most authoritative of which are the dicta of the Constitutional Court, in Ruta[6] at paragraphs 24-26, as follows:

> *"This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also*

[6] R*uta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC) (*"Ruta"*).

expresses a principle: that of non refoulement, the concept that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.

It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees "the right to seek and to enjoy in other countries asylum from persecution".

. . .

"The principle of protecting refugees from persecution was elaborated three years after the Universal Declaration, in article 33 of the Convention Relating to the Status of Refugees of 1951 (1951 Convention). This gave substance to article 14 of the Universal Declaration. The 1951 Convention defined "refugees", while codifying non refoulement. South Africa as a constitutional democracy became a State Party to the 1951 Convention and its 1967 Protocol when it acceded to both of them on 12 January 1996 – which it did without reservation. In doing so, South Africa embraced the principle of non-refoulement as it has developed since 1951. The principle has been a cornerstone of the international law regime on refugees. It has also become a deeply-lodged part of customary international law and is considered part of international human rights law."

(Emphasis added.)

If an asylum seeker or refugee is a person fleeing harm as defined in section 3 of the Refugees Act in their country of origin, then non-return (*non-refoulement*) is the most fundamental protection that the person can receive. It serves as a prerequisite, logically and

practically, for all other rights that may be offered to a refugee or asylum seeker. As Khan and Schreier state: "*The most vital element of refugeehood is the safeguard against being returned to a country where a person has reason to fear persecution*".[7] And as Ruta states in no uncertain terms, "*[t]he 'shield of non-refoulement' may be lifted only after a proper determination [of the merits of an asylum seeker's claim] has been completed*".[8]

The significance of *non-refoulement* is stressed because Gavrić raises the question: What are the rights or status of a person who is neither a refugee nor an asylum seeker, but who remains protected by the "*shield*" of *non-refoulement*?

[7] Khan & Schreier (eds.) Refugee Law in South Africa (Juta) at 1.

[8] *Ruta* at para 54.

3.THE PLACE OF EXCLUSION WITHIN THE ASYLUM SYSTEM

First, an explanation of exclusion. Persons *"excluded"* from refugee status are refused recognition as refugees not because they do not fear persecution in their countries of origin (i.e. on the merits of their claim), but either because some other act of theirs has rendered them undeserving of refugee status or because they are have the effective protection of another country and hence do not need refugee status.

While the notion of exclusion derives from international law,[9] in South Africa the relevant provision of the Refugees Act is section 4, which needs quoting in full:

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[9] Specifically from the United Nations 1951 Convention Relating to Status of Refugees (*"the Convention"*) and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (*"the OAU Convention"*). 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."*

Article 5 of the OAU Convention provides:

> *"The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:*
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
> *(b) he 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 Organization of African Unity;*
> *(d) he has been guilty of acts contrary to the purposes and principles of the United Nations"*

The parallels to section 4 of the Refugees Act are obvious.

"(1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she-

(a) has committed a crime against peace, a crime involving torture, as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013), a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

(b) has committed a crime outside the Republic, which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment without the option of a fine; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations or the African Union; or

(d) enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen; or

(e) has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), or which is punishable by imprisonment without the option of a fine; or

(f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or

(g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or

(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or

(i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.

(2) For the purposes of subsection (1) (c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations or the African Union."

The United Nations High Commissioner for Refugees ("UNHCR") has stated:

"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."[10]

(Emphasis added.)

Exclusion was, prior to the 2020 amendments, something of a rarity. Besides *Gavrić*, only a handful of other cases deal with exclusion.

In *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T), the applicant was a political opponent sought by the Libyan government. He applied for but was refused recognition as a refugee in South Africa. He then approached the High Court to set that decision aside, and to be granted refugee status.[11] The Department opposed the grant of refugee status on the basis that Mr Tantoush should be excluded in terms of section 4(1)(b) of the Refugees Act, as he had committed theft.[12] The High Court, however, held that theft was not a sufficiently serious crime to warrant exclusion,[13] and that the charge of theft may well have been trumped up by Libyan authorities specifically to deprive Mr Tantoush of the protection of the Refugees Act.[14]

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[10] 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*") at para 2. See also 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."*

[11] In other words, a substitution order in terms of section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[12] At para 7.

[13] At paras 115-116.

[14] At paras 118-122

In *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa and Others* [2014] ZAGPPHC 753 (14 September 2014), the applicant, a non-governmental organisation ("*CORMSA*"), sought to set aside the granting of refugee status to a Mr Faustin Kayumba Nyamwasa. Mr Nyamwasa, a former Rwandan general, was alleged to be implicated in genocide, crimes against humanity, and war crimes. Accordingly, CORMSA argued, he was not deserving of refugee status. While the High Court dismissed the application due to lack of evidence against Mr Nyamwasa,[15] on appeal to the Supreme Court of Appeal ("SCA"), the High Court's order was set aside by agreement between the parties.[16]

In *Okoroafor v Minister of Home Affairs and Another* 2017 (3) SA 290 (ECP), the applicant, a Nigerian national, was found with a fraudulent visa in his passport, for which he was convicted and sentenced. Subsequent to serving his time, the applicant claimed that he wished to seek asylum, but the Department opposed this on the basis that the applicant was excluded by section 4(1)(b) of the Refugees Act because of the fraud he had committed. The High Court dismissed the Department's arguments by finding that section 4(1)(b) only applied to crimes committed outside South Africa.[17]

In *Mail & Guardian Media Ltd v Chipu* NO 2013 (6) SA 367 (CC) ("*Chipu*") the Constitutional Court discussed exclusion,[18] but the *obiter dicta in Chipu* were authoritatively critiqued in

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15 At paras 20-21.

16 *CORMSA v President of the Republic of South Africa and Others* (SCA 75/2016), order of 24 May 2017). As it was by agreement, there is no judgment. A copy of the order is on file with the author.

17 At para 20. In making this finding, the High Court (per Eksteen J) overruled a previous unreported decision of that Division (per Jones J) in the matter of *Ozoekwe v Minister of Home Affairs* (2674/2008, delivered on 26 February 2009).

18 See para 30.

Gavrić.[19]

In *Refugee Appeal Board v Mukungubila* 2019 (3) SA 141 (SCA), the SCA heard the appeal of a Congolese religious leader who had been excluded in terms of sections 4(1)(a) and (b) of the Refugees Act. In the High Court, Mr Mukungubila succeeded in having the exclusion decision set aside, and was also granted a range of declaratory and other orders. In the SCA, the setting aside was confirmed due to factual defects in the exclusion decision,[20] but the rest of the substantive orders were overturned (partly due to *Gavrić*, which was decided shortly prior to this judgment).[21]

One of the reasons why exclusion decisions were rare is that, prior to the 2020 amendments, section 4(1) contained only the first four subsections listed in the above quotation. The circumstances and/or criteria listed in these subsections are inherently unusual – few persons can be accused of war crimes or crimes against peace, for example. It is subsections 4(1)(e) to (i) which are recent arrivals, and which deserve special attention. They effectively exclude persons who enter South Africa other than through a port of entry, or who fail to access a Refugee Reception Office ("*RRO*") within five days of entry into South Africa, unless compelling reasons are provided for the irregular entry/failure to report.

These are relatively common offences. Many asylum seekers enter South Africa irregularly, or fail – despite their best efforts – to access an RRO within five days. Accordingly, these two subsections will, as time passes, apply to hundreds and eventually thousands of asylum seekers.

Indeed, from the perspective of the Department, that may

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19 *Gavrić* at paras 34-39.

20 At paras 25-27.

21 See para 28.

‘IF AN ASYLUM SEEKER OR REFUGEE IS A PERSON FLEEING HARM AS DEFINED IN SECTION 3 OF THE REFUGEES ACT IN THEIR COUNTRY OF ORIGIN, THEN NON-RETURN (NON-REFOULEMENT) IS THE MOST FUNDAMENTAL PROTECTION THAT THE PERSON CAN RECEIVE.’

be the point. The asylum decision-makers within the Department – the Refugee Status Determination Officers ("*RSDOs*"), Refugee Appeal Authority ("*RAA*"), and Standing Committee for Refugee Affairs ("*SCRA*") – are notoriously under-resourced and overwhelmed with the demands already placed upon them by asylum seekers within South Africa. Might it not be desirable, as the Department may see it, to reduce these numbers by excluding thousands from asylum system at the stroke of a pen? Particularly when these individuals have failed to comply with the requirements of the Refugees Act?

The answer, as shall be seen in more detail, is no. This is because while these thousands may be excluded from the formal asylum system, they are not – under *Gavrić* – deprived of the shield of *non-refoulement*, and thus may lawfully remain in South Africa. They are still South Africa's, and thus the Department's, problem.

4. DOBROSAV GAVRIĆ[22]

Mr Gavrić is a Serbian national. In 2000, he was present (and was wounded) at the assassination of the Serbian nationalist warlord and gangster, Zeljko Ražnatović, better known as *"Arkan"*. He was charged, along with various accomplices, with the assassination of Arkan, and pleaded not guilty. He was detained in Serbia for the first three years of his criminal trial, during which time the entire wing of the prison was kept empty save for him, as the Serbian government believed he would otherwise be killed by Arkan's former comrades.

Mr Gavrić consistently claimed to be innocent, and that the true force behind Arkan's death was Serbian President Slobodan Milosevic, who feared Arkan's evidence concerning the atrocities committed in the Yugoslav ethnic conflicts might be used against him at, *inter alia*, the International Criminal Court.

Mr Gavrić was, however, ultimately convicted of Arkan's murder (and of the murder of two of Arkan's bodyguards, who died with him). The conviction was handed down *in absentia*, because Mr Gavrić had by then fled the country. An appeal to the European Court of Human Rights was later dismissed on the grounds of prematurity, as Mr Gavrić would have the right to a re-trial if he ever returned to Serbia.

He came to South Africa, where he obtained residence under a false name and passport. His presence here was only uncovered when he became a witness (and was wounded again) at another assassination. It was at this stage that Serbia sought Mr Gavrić's extradition.

Mr Gavrić, concerned that if he were returned to Serbia, the compatriots of Arkan would have him killed to avenge Arkan,

[22] The facts stated in this chapter derive from affidavits and court records in the possession of the author.

applied for asylum. On 19 November 2012, Mr Gavrić was held to be excluded in terms of section 4(1)(b) of the Refugees Act, because he had committed a serious non-political crime.

Mr Gavrić was instructed to approach the SCRA as an internal remedy, which he duly did, but the SCRA held that it had no jurisdiction over persons excluded in terms of section 4 of the Refugees Act. It was never suggested to Mr Gavrić (prior to the hearing in the Constitutional Court) that he should approach the Refugee Appeal Board).

Mr Gavrić approached the Western Cape High Court, seeking three primary forms of relief:

- The review and/or setting aside of the exclusion decision;
- A substitution order declaring him to be a refugee, in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"); and
- A declaration that section 4(1)(b) of the Refugees Act was inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid.

The premise of the constitutional challenge to section 4(1)(b) was that the rationale behind exclusion as a concept – that certain persons could be *"undeserving"* of protection against gross violations of their human rights – was not consistent with the modern conception of human rights as enshrined in the Constitution.[23] South Africa (and the world) had, Mr Gavrić

[23] *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) ("Tsebe") at paras 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

contended, already begun to recognise that there are some forms of persecution to which a person cannot be sent, regardless of their crimes.[24]

On 6 April 2016, the Western Cape High Court (per Mantame J) dismissed Mr Gavrić's application, but he was given leave to appeal to the Constitutional Court. On 1 February 2017, the Constitutional Court issued directions requesting written submissions by the parties, including on the questions:

- 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?
- Do the mechanisms and processes contained in the Extradition Act afford appropriate safeguards in preventing potential violations of constitutionally protected rights? And
- Is the applicability of section 4(1)(b) of the Refugees Act

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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.)

See also *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.

[24] 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. 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.

contingent on a previous finding by the RSDO that the person qualifies for refugee status in terms of section 3 of the Act?

Both Mr Gavrić and the Department filed written submissions which, inter alia, concurred that persons excluded in terms of section 4(1)(b) of the Refugees Act remain protected by the right of *non-refoulement*.

However, Mr Gavrić submitted that the Extradition Act did not afford appropriate safeguards to ensure that persons were not returned to countries in which they would face persecution, in violation of their rights to *non-refoulement*. The Department disagreed. Similarly, Mr Gavrić submitted that asylum seekers should undergo a refugee status determination before they are assessed under section 4(1)(b) of the Refugees Act (inclusion before exclusion), and the Department disagreed.

On 28 September 2018 (two years after he first applied to the Court, and almost six years after the exclusion decision was made) the final judgment was handed down. Throughout this time, the extradition proceedings against Mr Gavrić were stayed.

5. THE FINDINGS OF THE CONSTITUTIONAL COURT IN *GAVRIĆ*

The first issue of substance dealt with in *Gavrić* was the constitutional challenge to section 4(1)(b).

The Constitutional Court begins, at paragraph 20 et seq, with a summary of Mr Gavrić's argument, and then appears to state with approval that *"the rationale behind the exclusion clause is two-fold: it protects refugee status from being abused by those who are undeserving; and it ensures that those who have committed serious crimes do not escape prosecution"*. [25]

But the Court goes on to hold at paragraphs 26-27 that:

> *"It is trite that under the Constitution, human rights cannot be denied to any person, regardless of the crimes they have committed. This principle was affirmed by this Court in Mohamed. Section 4(1)(b) does not in any way challenge or negatively impact on the right to life, or the right to freedom and security of the person. This is so because of the principle of non-refoulement which is embodied in section 2 of the Act. The principle of non-refoulement has been endorsed and given effect to by this Court. No person will be returned to her country of origin or nationality even in circumstances where there is an application for her extradition, where there is a real risk that such person will be exposed to the imposition of the death penalty or be treated or punished in a cruel, inhuman or degrading way or in any way be tortured."*
>
> (Emphasis added.)

And at paragraph 36, the Court summarises its findings in

[25] *Gavrić* at para 24.

paragraphs 26-31 of its judgment as follows:

> *"Section 2 creates a stop-gap measure that ensures that no person will be returned to any country where their life, physical safety or freedom will be threatened, irrespective of whether they have been excluded under section 4".*
>
> (Emphasis added.)

It is these dicta that confirm that excluded persons remain shielded by the right of *non-refoulement*. Undoubtedly this finding is correct. It is consistent with the wording of section 2 of the Refugees Act, as well as with the underlying purpose of refugee law as a whole: to protect persons from inhumane persecution.

But these dicta also allow for the creation of a relatively novel class of foreigner in South Africa: Excluded asylum seekers who may not be removed from South Africa until their claims of persecution in their countries of origin have been adjudicated and (potentially) dismissed.

And the failure of the Constitutional Court is in giving sadly little guidance on how such excluded asylum seekers are to be processed and treated. At paragraphs 30 to 31 of *Gavrić*, the Court states:

> "In the event that the exclusion decision of the RSDO is confirmed, the question whether there is a real risk of the applicant being killed or persecuted if he were to be returned to Serbia, is one which the Executive will be compelled to determine when it considers Serbia's application for his extradition. At that stage, the applicant may avail himself of the right to oppose his extradition to Serbia on account of there being a real risk that he might be killed should he be returned to Serbia.

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

The above is the sum of the Constitutional Court's analysis of the Extradition Act. The logic of the Constitutional Court appears to be that:

- Mr Gavrić may be excluded under section 4(1)(b) of the Act, but he is still protected by the right of *non-refoulement*.
- His challenge to section 4(1)(b) must therefore fail, because that section read with section 2 of the Act does not allow him to be sent to face inhumane persecution in Serbia.
- The question of whether Mr Gavrić will, in fact, face inhumane persecution – whether he would, aside from his exclusion, have a meritorious asylum claim – falls to be determined in his extradition proceedings.

Were this case to be considered *in vacuo*, the above reasoning may have been satisfactory. It may be that in the context of Mr Gavrić's facts, with a long-delayed extradition enquiry looming in the background, the above approach appeared to be an elegant solution. No court is swift to come to the assistance of those seen as fugitives from justice. But *Gavrić* sets a precedent for all persons seeking asylum. And the Constitutional Court appears to have forgotten that the vast majority of asylum seekers are not also facing extradition proceedings.

Consider the following hypothetical: A political dissident fleeing extra-judicial execution at the hands of her government

flees to South Africa and crosses the border irregularly (despite being in possession of a passport and other resources needed to enter South Africa legally). When appearing before an RSDO, the RSDO finds that she is excluded in terms of section 4(1)(h). This finding is then upheld by the RAB.

What happens then? The dissident cannot continue under the Act to seek asylum, and cannot be sent out of South Africa to face her death. Where and how is the dissident to have the merits of her claim to *non-refoulement* determined? And what are her rights and status in South Africa pending this determination? Indeed, what are her rights and status if she succeeds in proving that she faces persecution at home?

6. SOLUTIONS IN OTHER LEGISLATION?

6.1 THE EXTRADITION ACT 67 OF 1962

The *prima facie* answer, in light of Gavrić, may be to look to the Extradition Act.

But there are a range of insurmountable difficulties with such an approach. The Extradition Act only applies to persons *"accused or convicted of an extraditable offence"*[26] within the foreign State concerned. Magistrates holding extradition enquiries are required to consider only whether the persons before them are *"liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned"*.[27] In practice, evidence of such an accusation or conviction almost always comes via a formal extradition request made by the foreign State in question.[28]

But most asylum seekers, like the dissident hypothesised above, are not accused or convicted of crimes, nor the subjects of extradition requests. In fact, it is unlikely that even 1% of asylum seekers are also the subject of extradition requests. Mr Gavrić is the exception, not the rule.

In the absence of such prerequisites, extradition under the Extradition Act may not lawfully proceed, nor even makes any conceptual sense. Extradition law itself *"concerns how any person – which includes South African nationals – may be forcibly surrendered from South Africa to another country to face criminal charges or serve sentences"*.[29] It is not intended to serve as a means

[26] Section 3 of the Extradition Act.

[27] Section 10(1) of the Extradition Act. See also section 12(1) of the Extradition Act.

[28] Section 4 of the Extradition Act.

[29] Khan (ed.) Immigration Law in South Africa (Juta) at 234. The chapter on extradition, from which this quote is taken, was written by Adv. Anton Katz S.C. and the author of this article.

‘ON 1 JANUARY 2020, THE ASYLUM SEEKER COMMUNITY IN SOUTH AFRICA RECEIVED AN UNWELCOME NEW YEAR’S GIFT: WIDE-RANGING AMENDMENTS TO THE REFUGEES ACT 130 OF 1998 (“THE REFUGEES ACT”) AND THE REGULATIONS THERETO WHICH MADE SIGNIFICANT (AND ADVERSE) CHANGES TO THE OPERATION OF THE ASYLUM SYSTEM. THE PRACTICAL EFFECT OF THESE AMENDMENTS IS – OR WILL BE, ONCE THE IMPACT OF THE COVID-19 PANDEMIC RECEDES – TO INCREASE GREATLY THE NUMBERS OF ASYLUM SEEKERS WHO ARE BEING EXCLUDED FROM ASYLUM.’

‘SOUTH AFRICA EMBRACED THE PRINCIPLE OF NON-REFOULEMENT AS IT HAS DEVELOPED SINCE 1951. THE PRINCIPLE HAS BEEN A CORNERSTONE OF THE INTERNATIONAL LAW REGIME ON REFUGEES. IT HAS ALSO BECOME A DEEPLY-LODGED PART OF CUSTOMARY INTERNATIONAL LAW AND IS CONSIDERED PART OF INTERNATIONAL HUMAN RIGHTS LAW’
(RUTA CASE 2019, PARA 26)

‘EXPECT THAT THOUSANDS OF FOREIGNERS WILL, OVER THE COMING YEARS, BE EXCLUDED FROM ASYLUM UNDER SECTION 4 OF THE REFUGEES ACT.’

‘THE EXCEPTIONAL NATURE OF ARTICLE 1F SUGGESTS THAT INCLUSION SHOULD GENERALLY BE CONSIDERED BEFORE EXCLUSION’

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”) at para 2

to ascertain what hardships a person may face in their country of origin, nor to grant any person a valid basis to remain in South Africa.

The Extradition Act does provide that the Minister of Justice and Correctional Services (*"the Justice Minister"*) may elect not to extradite a person—

> *"(iii) 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; or*
>
> *(iv) 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".*[30]

But the protections these sections offer are not comparable to the equivalent protections in the Refugees Act. 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 Justice Minister or magistrate[31] does not (textually) have to consider the criteria set out in section 3 of the Refugees Act. And the focus

[30] Substantively-similar provisions appear at section 12(2)(c)(i) and (ii) 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.

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

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.

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 apparently 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.

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.[32]

Lastly, there are serious but unanswered practical questions. Who is to ensure that the excluded asylum seeker appears before the magistrate, or the Justice Minister? Most asylum seekers lack the knowledge or resources to do so. [33]Even the Justice Minister

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[32] 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.

[33] *Gavrić* at para 70:

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

See also *Ruta* at para 48; *Union of Refugee Women and Others v Director: Private*

and the magistrates in question may not know what to do, given that this is such a novel problem. What tools or procedures are to be used to ensure that the excluded person appears at the appropriate time and place? The Extradition Act envisages that this is to occur via arrest[34] – is that to be the norm for excluded persons?

And what rights or documentation do excluded persons have, either during the determination process or if successful in their claim? The Constitutional Court has recognised that a person left undocumented faces unacceptable threats to their right to *non-refoulement*, as they would be perceived as being ordinary illegal foreigners and would be vulnerable to deportation in terms of section 32(2) of the Immigration Act, which provides that "*illegal foreigners shall be deported*".

In *Saidi*,[35] the Constitutional Court held that an asylum seeker who had been finally rejected in terms of the Refugees Act, but who took the decisions against him or her on judicial review, had to be granted extensions of his or her asylum seeker visa pending the resolution of the litigation. As held by the Constitutional Court in *Saidi* at paragraph 13, "*[t]emporary permits issued in terms of [section 22 of the Refugees Act] are critical for asylum seekers. They do not only afford asylum seekers the right to sojourn in the Republic lawfully and protect them from deportation but also entitle them to seek employment and access educational and health care facilities lawfully*".

The Constitutional Court went on to state:

"*The respondents' interpretation exposes asylum seekers to the*

Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC) ("Union of Refugee Women") at paras 28-29.

34 Section 5 of the Extradition Act.

35 *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) ("*Saidi*").

real risk of refoulement in the interim whilst the outcome of judicial review is pending. Without a temporary permit, there is no protection. This runs counter the very principle of non refoulement and the provisions of section 2 of the Refugees Act. It is cold comfort to say – between the exhaustion of internal remedies and the outcome of judicial review – an asylum seeker may seek and obtain interim protection by means of an urgent application to court. Litigation being what it is, there is no guarantee that the approach to court will succeed; the urgent application may be dismissed on a technicality or any other legally cognisable basis. That would then expose the asylum seeker to the risk of return. What then of the notion of non-refoulement against one's will "in any manner whatsoever"? South Africa may be saying it is not opposed to its administrative refusal of an asylum seeker's application being challenged by way of judicial review. But it will be making it possible for refoulement to take place in the interim. That is a breach of the principle of non-refoulement."[36]

The Extradition Act does not deal with any of these issues, because it is not designed to provide a basis on which foreign persons can remain in South Africa. 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.

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[36] *Saidi* at para 30. Emphasis added. And at para 18 of Saidi, the Constitutional Court held:

> *"This interpretation [of ensuring asylum seekers in review applications have visas] better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of: enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference."*

Aside from the Refugees Act, only one other statute provides a basis on which foreign persons may live, work, study and exist securely in South Africa: The Immigration Act.

6.2 THE IMMIGRATION ACT

But the Immigration Act suffers from similar problems. It, too, is not designed to adjudicate the potential persecution a claimant may be facing in a foreign country.

The *raison d'etre* of the Immigration Act is to meet the needs of South Africa; this is very different to granting residence to a foreigner based on the needs of the foreigner, as the Refugees Act does.

When being deported under section 34 of the Immigration Act, a foreigner must be allowed to come before a court in which he or she may challenge the deportation.[37] This is hardly an ideal forum for a detained and vulnerable asylum seeker to demonstrate why he or she fled from his or her country of origin.

But even if the court in question upholds the foreigner's right to *non-refoulement*, and overturns the deportation order, the court has no power to grant that foreigner any form of documentation. The foreigner will therefore be left undocumented, and thus still be liable to being arrested and detained for the purposes of deportation the next time he or she crosses paths with an immigration officer or other public official. The concerns set out in *Saidi* (above) remain unaddressed.

The structure of the Immigration Act assumes that if deportation is not to be granted, it is because the foreigner in question already has a right to some or other form of documentation which regularises his or her stay in South Africa. The Immigration Act allows foreigners to sojourn in South Africa

[37] *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (5) SA 480 (CC).

primarily by granting them either a temporary residence visa (*"TRV"*) or a permanent residence permit (*"PRP"*).

TRVs come in a variety of specific forms, as listed in sections 11-23 of the Immigration Act. They include study visas, work visas, relative's visas, and so on. Applicants for such visas must demonstrate that they meet the criteria for each visa (such as confirmation by an employer that a job offer has been made to the applicant), and the rights granted to each foreigner depends on the nature of their TRV (relative's visa holders, for example, may not work).[38]

Section 23 of the Immigration Act does provide for an asylum transit visa, but such visa may be *"valid for a period of five days only"*, and exists solely to allow persons seeking to apply for asylum to travel to RROs within South Africa. They are not a basis on which any person may remain in South Africa for a lengthy period of time.

PRPs, although they provide permanent rights (and in fact are only one step below citizenship), are likewise only available to persons who meet the prerequisites for permanent residency – none of which turn on proof of persecution. Recognised refugees may, under section 27(d) of the Immigration Act, apply for PRPs, but persons excluded under section 4 of the Act are not, of course, refugees. So this door remains closed to them.

Khan makes the following suggestion:

> *"What is the status of a foreign national with no visa or permit under the Immigration Act, but who cannot be deported (in light of Mohamed) or extradited (in light of Tsebe) and who remains in South Africa? To be left undocumented is an unsatisfactory*

[38] And visa applications require production of a valid passport, which most asylum seekers lack: see *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC) ("Ahmed") at para 63.

answer, as it would expose the foreign national to endless cycles of the prejudices commonly suffered by undocumented foreigners, such as being arrested for deportation. The circumstances of such a foreigner appear to be so exceptional, and are not otherwise catered for in the Immigration Act or the Extradition Act, that the best answer appears to be that they could and ought to be granted an exemption in terms of section 31(2)(b) of the Immigration Act until such a time as a more permanent solution can be found (for example, that they depart from South Africa voluntarily)."[39]

Section 31(2) of the Immigration Act provides:

> "Upon application, the Minister may under terms and conditions determined by him or her-
>
> . . . .
>
> (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may-
>
> (i) exclude one or more identified foreigners from such categories; and
>
> (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners".

Section 31(2) thus grants the Minister of Home Affairs ("*the Home Affairs Minister*") a broad power, exercisable in "*special circumstances*", to allow persons to sojourn in South Africa. As a means of regularising the presence of excluded asylum seekers in South Africa, section 31(2)(b) has some advantages. It is an established legal process, made to the Home Affairs Minister,

[39] Khan at 243.

which would allow the Minister to determine the merits of a claimant's fears of persecution, and provides a recognisable status and form of documentation to a successful applicant. It has been utilised, for example, to provide a legal status to categories of persons such as Zimbabwean or Basotho migrants in South Africa.

But it equally has disadvantages. There is no requirement that the Home Affairs Minister should consider persecution as a basis on which he or she should exercise this power. Pending a determination by the Minister, the rights or status of claimants would be unclear, and claimants would be left undocumented. And if successful, claimants would be granted *"the rights of permanent residence"* – which are superior to those of recognised refugees. This is an incongruous outcome.

Khan and Schreier also wrote prior to the judgment of the Constitutional Court in *Gavrić*, and prior to the 2020 amendments. They hence saw excluded asylum seekers to be *"exceptional"* – as they were at that time. This situation has changed. It is reasonable now to expect that thousands of foreigners will, over the coming years, be excluded from asylum under section 4 of the Refugees Act. Exemptions intended for *"special circumstances"* may not be a sufficient solution.

At most, an approach centred on exemptions under the Immigration Act may be said to be better than the alternatives (for the reasons dealt with above). But *"better"* is not the same as *"good"*. Neither the Immigration Act nor the Extradition Act contain the wide range of procedural protections afforded to persons seeking asylum under the Refugees Act.

Under the Refugees Act, the duty to ascertain the facts behind an applicant's story rests equally on the applicant and on the adjudicative person/body, who is required to take an inquisitorial

‘THESE [FOUND TO BE EXCLUDED] PERSONS WILL BE PROCESSED AS ILLEGAL FOREIGNERS, AND MANY WILL BE ILLEGALLY DEPORTED TO THEIR COUNTRIES OF ORIGIN, POTENTIALLY TO FACE DEATH, TORTURE, SEXUAL VIOLENCE OR OTHER HORRIFIC CONSEQUENCES. THE CONSTITUTIONALITY OF THESE PROVISIONS MAY BE CHALLENGED, BUT SUCH CHALLENGES TAKE YEARS EVEN IF SUCCESSFUL.’

role.[40] Asylum seekers are, unless there are good reasons to the contrary, to be given the benefit of the doubt in assessing their stories.[41]

To be granted asylum, an applicant must show only a reasonable possibility of persecution.[42] This is a lower and more forgiving standard of proof than that of the usual civil standard of a balance of probabilities.[43] Confidentiality of evidence is protected, subject to limited exceptions.[44]

These features have hitherto been unique to refugee status determination procedures under the Refugees Act. A foreigner seeking to present his or her story and defend his or her claim to *non-refoulement* in the absence of these protections will be seriously disadvantaged.

Perhaps these protections will be held by the courts to apply to the excluded asylum seeker in whichever forum or process will determine their merits of their claim to *non-refoulement*. But it is a disturbingly large assumption that the courts will import the whole panoply of refugee and asylum seeker rights into a different statutory context.

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40 *FNM v The Refugee Appeal Board* 2019 (1) SA 468 (GPD) ("FNM") at paras 45-51.

41 *Mwamba v Chairperson of the Refugee Appeal Board and Others* [2017] ZAWCHC 16 (28 February 2017) ("Mwamba") at paras 15 and 44.

42 See *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) ("Tantoush") at para 97.

43 See also the UNHCR Handbook at para 203:

> *"After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt."*

44 Section 21(5) of the Refugees Act.

7. INCLUSION BEFORE EXCLUSION UNDER THE REFUGEES ACT

It follows from the above considerations – and is perhaps trite – that determinations of whether an asylum seeker qualifies as a refugee under section 3 of the Refugees Act should best be done in terms of the Refugees Act. Only under the Refugees Act are there dedicated and experienced Refugee Status Determination Officers, acting (in theory) independently, protectively, and inquisitorially. Only under the Refugees Act are principles such as the lower standard of proof, or the confidentiality of evidence, well-established. Only under the Refugees Act are persons awaiting a status determination given effective interim protection, in the form of section 22 visas.

Gavrić makes it plain that after a person is held to be excluded, such an approach is not permissible. As the Constitutional Court held, the risks to Mr Gavrić's life are ones *"which the Executive will be compelled to determine when it considers Serbia's application for his extradition"*.[45] The door to further assessments under the Refugees Act was closed.

But perhaps refugee status determinations may occur before exclusion decisions are made. This is known as the *"inclusion before exclusion"* approach, and is viewed by Khan and Schreier as the *"preferable"* approach.[46] In sum, an RSDO will first consider whether an asylum seeker meets the requirements for refugee status listed in section 3 of the Refugees Act, and only thereafter (if necessary) make a determination concerning exclusion under section 4.

The UNHCR also favours such an approach, though not

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45 *Gavrić* at para 30.

46 Khan and Schreier at 108.

inflexibly, stating in UNHCR Guideline 5*:*

> *"Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made. The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula."*[47]

This precise issue was raised by the Constitutional Court in its request for written submissions, and Mr Gavrić, relying on Chipu, pushed for an inclusion-before-exclusion approach. The Court, however, took a somewhat contradictory stance. First, it distinguished the South African domestic approach from that of the UNHCR, holding:

> *"The Handbook, as was noted in Chipu, suggests that it is preferable for an RSDO to consider the risk of persecution before making an exclusion decision. The answer lies in the Act.*
>
> . . . .
>
> *The proportionality inquiry discussed in the Handbook is, at its heart, an attempt to ensure that asylum seekers are not excluded and left to face grave persecution due to minor offences; an attempt to ensure that the harms suffered by an applicant are not disproportionate to the crime they have committed. This*

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[47] UNHCR Guideline 5 at para 31. Emphasis from the original. The Guideline continues in relevant part:

> *"Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue".*

is necessary because there is no proportionality inquiry built into the wording of the Convention.

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

Section 2 creates a stop-gap measure that ensures that no person will be returned to any country where their life, physical safety or freedom will be threatened, irrespective of whether they have been excluded under section 4. Thus, to require that an RSDO make a determination under section 3 prior to making an exclusion decision in order to factor the risk of persecution into the exclusion decision is tantamount to rendering an inquiry under section 2 superfluous. For these reasons, the applicant's view of Chipu must be rejected".[48]

It is difficult to read the underlined dicta above as anything other than a rejection of the inclusion-before-exclusion approach. But the Constitutional Court went on to hold:

> *"Courts, and decision-makers, should favour a flexible approach that allows for an exclusion decision, irrespective of whether there has been a section 3 decision. Conversely, the fact that there has been a section 3 decision granting an applicant asylum status, should not bar an applicant from being excluded at a later stage. This flexibility should not detract from an applicant's right to have due consideration*

[48] *Gavrić* at paras 34-38.

given to their application. An application process should not be truncated solely on the basis that the applicant falls to be excluded under section 4(1)."[49]

It thus appears that it may still be permissible (albeit not mandatory) for RSDOs to carry out refugee status determinations prior to making exclusion findings. If so, such an approach would go a significant way towards resolving the problems outlined above. It would mean that excluded persons who have been found not to have meritorious claims under section 3 of the Refugees Act could be safely deported, without violating the right of *non-refoulement*.

But problems remain. RSDOs are already generally overburdened with duties. If it is not mandatory to carry out status determinations, and/or if the Department does seek via the 2020 amendments to reduce demands on its capacity, why would RSDOs do so? If they do not, what is the remedy or procedure available to the excluded person who wishes to have their fears of persecution assessed? As set out above, there are no easy answers to this question.

Even if RSDOs do carry out prior refugee assessments, what of those persons who do have meritorious claims? What is their legal status in South Africa? What rights do they have? Can they study, or work, as refugees can? What documentation can or should they be provided with to demonstrate this status? Such persons cannot humanely or constitutionally be left undocumented or without a means to provide for themselves.[50] They must therefore be given effective protection – a desirable outcome, but one which does rather beg the question: What then was the point of the exclusion of the asylum seeker at all?

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[49] *Gavrić* at para 44

[50] *Saidi* at para 30; *Home Affairs & Others v Watchenuka & Another* 2004 (4) SA 326 (SCA) at para 32.

‘AS RUTA STATES IN NO UNCERTAIN TERMS, “[T]HE ‘SHIELD OF NON-REFOULEMENT’ MAY BE LIFTED ONLY AFTER A PROPER DETERMINATION [OF THE MERITS OF AN ASYLUM SEEKER’S CLAIM] HAS BEEN COMPLETED”

RUTA CASE 2019, PARA 54

8. CONCLUSION

A conclusion should provide a satisfactory answer to the question posed based on existing law. Unfortunately, that appears not to be possible here. There does not seem to be any clear, pragmatic, or legally tenable way to deal with large numbers of excluded asylum seekers, who may not be returned from South Africa to their countries of origin.

Instead, this article provides a summary and a prognostication. The summary:

- The Constitutional Court, in *Gavrić*, was correct to recognise that all persons (excluded or not) possess the right of *non-refoulement*. Those fearing gross human rights violations should not under any circumstances be compelled to return to their countries of origin.
- But the Court erroneously viewed exclusion through the lens of Mr Gavrić's facts, and in so doing set a precedent with potentially vast unforeseen consequences.
- It held, without much in the way of analysis or explanation, that excluded persons could defend their right to *non-refoulement* in extradition processes.
- But almost no asylum seekers are also the subject of extradition proceedings.
- In the absence of an extradition request (indeed, even with an extradition request), the provisions of the Extradition Act are ill-suited to adjudicate whether or not a person fears persecution as contemplated in section 2 of the Refugees Act.
- The Extradition Act is simply not intended to serve this purpose.
- Nor do the provisions of the Immigration Act assist, save for the broad powers of the Home Affairs Minister to

provide permanent residence exemptions under section 31(2) of that Act.

- RSDOs may still carry out prior status determinations, which is of some assistance, but such assessments are neither mandatory nor do they provide solutions for persons who do have valid fears of persecution in their country of origin and fall under the exclusion provisions.
- This problem was somewhat academic – until the 2020 amendments greatly broadened the ambit of section 4. This will almost certainly increase the numbers of asylum seekers found to be excluded by orders of magnitude, and make the resolution of this problem a pressing one.

And now the prognostication:

- Subject only to the passing of the COVID-19 pandemic, the Department will begin implementing the expanded grounds for exclusion that were created by the 2020 amendments.
- First dozens, then hundreds, and then more asylum seekers will be found to be excluded by RSDOs and the RAA.
- Many of these excluded persons will not be aware that they remain protected by the right of *non-refoulement*. RSDOs, already stretched beyond capacity, will resist having to carry out prior status assessments.
- Nor – at least in the beginning – will the Department advise asylum seekers of what their rights are if they are found to be excluded. Instead, these persons will be processed as illegal foreigners, and many will be illegally deported to their countries of origin, potentially to face death, torture, sexual violence or other horrific consequences.

- The constitutionality of these provisions may be challenged, but such challenges take years even if successful.
- In the meantime, an asylum seeker will approach the courts to prevent his or her deportation. Initially, such court challenges may seek to review the finding that the asylum seeker in question was excluded.
- But eventually an asylum seeker who was correctly excluded will seek a way to vindicate his or her right to *non-refoulement*.
- As explained above, there is no easy process, statute or forum within which this can occur. At best, years of litigation will ensue.
- And during these years, the numbers of undocumented and unprotected asylum seekers will continue to grow. They are the true victims of the problem created by the 2020 amendments and by *Gavrić*.

SIHMA

The Scalabrini Institute for Human Mobility in Africa (SIHMA) was established in Cape Town, South Africa, in 2014.

Our Vision is an Africa where the human rights of people on the move are ensured and their dignity is promoted.

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Journal: International Migration Review (IMR)
and Journal on Migration and Human Security (JMHS)
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SMC (Scalabrini Migration Center,) established in 1987 in Manila (Philippines)
Journal: Asian and Pacific Migration Journal (APMJ)
www.smc.org.ph

CEM (Centro de Estudios Migratorios), established in 1985 in São Paulo (Brazil)
Journal: Travessia
www.missaonspaz.org

CEMLA (Buenos Centro de Estudios Migratorios Latinoamericanos), established in 1985 in Buenos Aires (Argentina)
Journal: Estudios Migratorios Latinoamericanos (EML)
www.cemla.com

Among our partners: **CSEM** (Centro Scalabriniano de Estudos Migratórios) in Brasilia (Brazil); Journal: Revista Interdisciplinar da Mobilidade Humana (REMHU); *www.csem.org.br*

PEOPLE BEHIND THE FIGURES