THE PRINCIPLE OF NON-REFOULEMENT IN SOUTH AFRICA AND THE EXCLUSION FROM REFUGEE STATUS OF ASYLUM SEEKERS WHO HAVE COMMITTED OFFENCES ABROAD: A COMMENT ON *GAVRIC v REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN AND OTHERS*

Jamil Ddamulira Mujuzi*

Abstract

South Africa is home to thousands of asylum seekers and refugees, especially from African countries. In order to protect the rights of refugees and asylum seekers, South Africa has ratified international and regional human rights treaties and enacted domestic legislation. The domestic legislation is the Refugees Act (the Act). Section 4(1) of the Act provides for three grounds on which a person may be excluded as a refugee. That a person 'does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she – has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment' is one of the grounds provided for in section 4(1)(b). Section 2 of the Act embodies the principle of non-refoulement. In 2018, the Supreme Court of Appeal and the Constitutional Court handed down judgments clarifying how section 4(1)(b) should be implemented in practice as well as the relationship between sections 2, 3 and 4(1)(b) of the Act. This was comprehensively dealt with by the Constitutional Court in Gavric v Refugee Status Determination Officer, Cape Town and Others*. The purpose of this article is to use this judgment as a springboard to highlight the issues that South African courts, especially the Constitutional Court, have to address when determining whether or not a person should be excluded as a refugee under section 4(1)(b) of the Act. The highlighted issues are the criteria to determine whether or not the applicant has had a fair trial; the relevance of the* Hollington *rule to foreign convictions; and the admissibility of hearsay evidence.*

Keywords: non-refoulement; Gavric; refugees; asylum seekers; foreign conviction; exclusion; deportation; *Hollington* rule

* LLB (Makerere); LLM (UP); LLM (UFS); LLD (UWC); Professor of Law, Faculty of Law, University of the Western Cape.

1 Introduction

South Africa hosts thousands of asylum seekers and refugees, especially from African countries. The High Court has observed that it is obvious that in recent years South Africa has seen an 'influx of large numbers of political and economic refugees'.[1] It is against this background that the Constitutional Court observed that 'South Africa is by international standards very heavily burdened by asylum seekers'.[2] In order to protect the rights of refugees and asylum seekers, South Africa has ratified international and regional treaties dealing with the rights of refugees and enacted domestic legislation. The treaties in question are the 1951 Refugees Convention and its Protocol and the African Union Convention Governing Specific Aspects of Refugee Problems in Africa.[3] The relevant domestic legislation is the Refugees Act 130 of 1998 (the Act).

The Refugees Act provides for, inter alia, the definition of a refugee, the conditions that have to be met before a person may be recognised as a refugee, the procedure for status determination and the rights of refugees. The Act domesticates the 1951 Refugees Convention and its Protocol and the African Union Convention Governing Specific Aspects of Refugee Problems in Africa.[4] Section 6 of the Act provides that the Act 'must be interpreted and applied with due regard to' the 1951 Convention and its Protocol, the African Union Refugees Convention and the Universal Declaration of Human Rights.[5]

It is inevitable that not all asylum seekers will be recognised as refugees. According to the Department of Home Affairs, it is only a minority of the many asylum seekers that qualify to be recognised as refugees.[6] In early 2018, Lawyers for Human Rights reportedly informed the South African Human Rights Commission that their research showed that the Department of Home Affairs had rejected 96% of refugee applications.[7] As some of the cases discussed in this article illustrate, some of the people whose applications have been rejected have approached courts to review and set aside those decisions. In addition,

1 *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (4) All SA 414 (WCC) para 1.

2 *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) para 10.

3 Adopted on 10 September 1969 by the Assembly of Heads of State and Government. CAB/LEG/24.3. It entered into force on 20 June 1974.

4 See Preamble to the Act.

5 See *Minister of Home Affairs and Others v Saidi and Others* 2017 (4) SA 435 (SCA); 2017 (2) All SA 755 (SCA) para 22.

6 *410 Voortrekker Road* case (n 1 above) para 2.

7 Zoë Postman '96% of refugee applications are refused, say lawyers' 8 February 2018 https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers (accessed 19 April 2019).

asylum seekers and those who have been recognised as refugees have, inter alia, to find employment, housing, education and other necessities of life. This is because South Africa does not house refugees in camps and does not support them financially. These developments, coupled with frustration with the way applications are handled by government officials,[8] explain why there are thousands of cases by asylum seekers or refugees against the Department of Home Affairs[9] and a few cases against other government departments. For example, on 5 September 2018, the Minister of Home Affairs informed Parliament that between 2008 and 2018, the '[g]rand total of litigation instituted by asylum seekers and refugees to date is 7,726'.[10]

Three grounds are provided for in section 4(1) of the Act on which a person may be excluded as a refugee. In particular, 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 ... has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment.

As the principle of non-refoulement, which is explained in detail below, is contained in section 2 of the Act,[11] a careless application of section 4(1)(b) could lead to the expulsion from South Africa of a person who may be persecuted in his or her country of origin. In 2018, the Supreme Court of Appeal and the Constitutional Court handed down judgments clarifying how section 4(1)(b) should be implemented in practice as well as the relationship between sections 2, 3 and 4(1)(b) of the Act. The most comprehensive of these judgments is that of the Constitutional Court in *Gavric v Refugee Status Determination Officer, Cape Town and Others*.[12] The purpose of this article is to use this judgment as the springboard to highlight the issues that South African courts, especially the Constitutional Court, have to address when determining whether or not a person should be excluded as a refugee under section 4(1)(b)

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8 *Hossain v Minister of Home Affairs and Another* 2011 ZAECPEHC 21 (17 May 2011) (577/2011) para 1.

9 *Tshiyombo v Members of the Refugee Appeal Board and Others* 2015 ZAWCHC 190 (17 December 2015) (13131/2015) para 11.

10 Parliamentary Monitoring Group 'Question NW2246 to the Minister of Home Affairs (question asked by Mr MH Hoosen)' 5 September 2018 https://pmg.org.za/committee-question/9858/ (accessed 19 April 2019).

11 The principle of non-refoulement is also applicable to people who are not recognised as refugees or asylum seekers. See generally A Duffy 'Expulsion to face torture? Non-refoulement in international law' 2008 20 *International Journal of Refugee Law* 373.

12 *Gavric v Refugee Status Determination Officer, Cape Town and Others* 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC).

of the Act. The discussion first highlights the South African courts' interpretation of the concept 'refugee', followed by the rights of refugees and the principle of non-refoulement. The *Gavric* case is analysed in the section dealing with non-refoulement.

2 Definition of a Refugee

Section 1 of the Act defines an asylum seeker as 'a person who is seeking recognition as a refugee in the Republic' and a refugee as 'any person who has been granted asylum in terms of this Act'. Section 3 of the Act provides for circumstances in which a person may be granted refugee status. It is to the effect that:

> Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—
> (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
> (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
> (c) is a dependant of a person contemplated in paragraph (a) or (b)

The above grounds are based on both the 1951 Refugees Convention and its Protocol and the African Refugees Convention. Similar grounds are provided for in legislation of other African countries such as Lesotho,[13] Malawi,[14] Uganda,[15] Zambia,[16] Zimbabwe[17] and Kenya.[18] In other words, a person qualifies to be recognised as a refugee if he or she falls under one of the three categories. As the High Court held in *Mayongo v Refugee Appeal Board and Others*,[19]

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13 Section 3 of the Refugees Act 18 of 1983.
14 Section 2(1) Refugee Act 1989.
15 Section 5 of the Refugees Act 2006 (the Ugandan definition includes more grounds than that of South Africa).
16 Section 2(1) of the Refugees Act 1 of 2017.
17 Section 2(1) of the Refugees Act ch 4:03, 2001.
18 Section 3 of the Refugees Act 13 of 2006.
19 *Mayongo v Refugee Appeal Board and Others* 2007 ZAGPHC 17 (4 April 2007) (16491/06).

> a person is a refugee as soon as he/she fulfils the criteria contained in the definition. That takes place before he/she applies for refugee status. Recognition of refugee status does not make the person a refugee but only declares that he/she is one.[20]

Although the grounds under section 3 appear to be broad, case law from South African courts shows that not every asylum seeker qualifies for refugee status. The High Court held that '[e]conomic considerations *per se* does [*sic*] not qualify a person as a refugee'.[21] For a person's application for recognition as a refugee to be successful, he or she must explain why they think that their life is in danger and who is likely to hurt them should they return to their county.[22] In other words, the person must provide 'compelling reasons' to justify his or her recognition as a refugee.[23] He or she must 'persuade' the Refugee Appeals Board why they 'felt the need to flee' instead of relocating to safer parts of the country.[24] The burden to prove that a person qualifies to be recognised as a refugee is exclusively borne by him or her and does not change. It is not shared with the Refugee Appeals Board.[25] However, both the asylum seeker and the Refugee Appeals Board share the responsibility of conducting research about the relevant political, social and economic environment in the applicant's country of origin to establish whether or not the applicant should be recognised as a refugee.[26] The evidence on which his or her application is based 'must be coherent and plausible' and '[i]t must not run counter to generally known facts'.[27] The High Court has also clarified the meaning of 'social group' for the purpose of section

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20 Id para 8. See also *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 (5) SA 550 (WCC) para 11.

21 *Fang v Refugee Appeal Board and Others* 2007 (2) SA 447 (T) (the applicant's argument that his return to China with his wife and four children would subject him to economic hardships, because of the one-child policy in that country, was rejected by the court).

22 *Lumumba v Refugee Appeal Board and Others* 2007 ZAGPHC 218 (21 September 2007) (17170/2006).

23 *Mayongo* case (n 19 above) para 11(2). In *Mateku v Minister of Home Affairs and Others* 2012 ZAGPJHC 241 (28 November 2012) (2012/34977) the applicant did not provide any reason why he sought refuge in South Africa. See also *Singh v Minister of Home Affairs and Another* 2012 ZAECGHC 48 (14 June 2012) (1467/2012) para 20.

24 *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* 2019 ZAGPPHC 78 (30 January 2019) (99766/15) para 34.

25 Id para 49.

26 Id para 50. However, courts in some countries have held that the burden of proof is shared between the applicant and the official who examines the application for refugee status. See, for example, *O (A) v Refugee Appeals Tribunal & Anor* 2004 IEHC 107 (26 May 2004) (High Court of Ireland).

27 *Gorhan v Minister of Home Affairs and Others* 2016 ZAECPEHC 70 (20 October 2016) (3899/2015) para 30.

3 of the Act[28] and a person who falls outside that ground does not qualify to be recognised as a refugee under section 3(1)(a). The High Court held in *Muberarugo v Refugee Appeal Board and Others*[29] that:

> The phrase "well-founded fear" contains both a subjective and objective requirement. There must be a state of mind, fear of being persecuted, and a basis which was well-founded for this particular fear … Protection is restricted to persons who can demonstrate a present or prospective risk of persecution. Therefore, what is required is an assessment of the risk going forward.[30]

The High Court found that some refugee status determination officers 'seemed largely ignorant' of the fact that the definition under section 3 of the Act 'incorporates a provision from the Organisation of African Unity (OAU) Refugee Convention which is broader than the 1951 Refugees Convention and in rejecting some asylum seekers' applications for recognition as refugees 'they often cited British case law stating exactly the opposite proposition, that fleeing the instability of civil war does not qualify an individual for asylum'.[31] However, case law shows that some refugee status determination officers have considered factors in both section 3(a) and (b) in deciding whether or not to recognise an asylum seeker as a refugee.[32] If the Refugee Appeals Board concludes that there is no evidence to believe that on return to his or her country the asylum seeker will be at risk of being persecuted on any of the grounds under section 3(a), it is 'important and necessary' to determine 'whether the asylum seekers were compelled to flee … [their country] due to external aggression or external occupation'.[33] In other words, in each appeal, section 3 has to be approached 'holistically' and if an asylum seeker does not qualify for refugee status under the first leg of section 3, the Refugee Appeals Board has to decide whether or not he or she qualifies under the second leg (s 3(b)). This is important to ensure that the principle of non-refoulement is upheld.[34] In other words, 'both section 3(a) and (b) requirements must be considered when determining an asylum seeker's appeal'.[35]

Although the Act is very clear on the definition of a refugee, some

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28 *Fang* case (n 21 above).
29 *Muberarugo v Refugee Appeal Board and Others* 2015 ZAWCHC 139 (17 August 2015) (13427/2012).
30 Id 10–11.
31 *Harerimana* case (n 20 above) para 41.
32 *Ngoyingoho v Minister of Home Affairs and Others* 2008 ZAGPHC 90 (27 March 2008) (3829/08).
33 *Somali* case (n 24 above) para 36.
34 Ibid.
35 Id para 41.

judges also appear to confuse refugees with undocumented migrants.[36] The High Court has held that '[a] person's status changes from that of an asylum seeker to that of a refugee once asylum has been granted'.[37] The moment a person is recognised as a refugee, he is 'legally entitled to reside in South Africa' and should not be detained by the police without a valid cause'.[38] Once a person has been recognised as a refugee in South Africa, he has all the rights in the Bill of Rights, excluding those reserved for citizens only.[39] Our attention now shifts to highlighting these rights and, most importantly, to highlighting case law in which these rights have been dealt with by South African courts.

3 Rights of Refugees and Asylum Seekers

Section 27 of the Act provides for the rights of refugees. This entails that a refugee: is entitled to a formal written recognition of refugee status; be given full legal protection, which includes the rights provided for in the Bill of Rights; may apply for and be granted the relevant documents (status and travel documents); may seek employment; and is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive.

Case law from South African courts shows that courts have held that refugees have a right to work, including in the private security sector,[40]

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36 For example, in *Mogul and Others v Minister of Home Affairs and Another In re: Mustafa and Others v Minister of Home Affairs and Another* 2008 ZAGPHC 227 (29 July 2008) (27497/08, 27498/08), the applicants were in South Africa illegally when they were arrested by the Department of Home Affairs. In justifying their continued detention, the court observed that '[t]he applicants remain illegal refugees so long as they have not been accorded asylum refugees status, consequently bound to be deported to their country of origin … To merely have illegal refugees released simply because it is alleged that their further detention is unlawful, will result in a situation where the numbers of refugees roaming the streets of the Republic [will be] ever increasing to unacceptable and uncontrollable proportions' (para 39).

37 *Jamole v Director-General Home Affairs and Another* [2018] ZAGPPHC 805 (12 February 2018) (40010/2017) para 32.

38 *Ngona v Minister of Police* 2012 ZAWCHC 325 (8 October 2012) (9198/2010) para 4.

39 Some rights are only applicable to citizens. For example, s 19 of the Constitution (political rights – the rights to vote and form political parties) and s 21 (freedom of movement and residence). Apart from refugees, undocumented migrants are also protected by the Constitution. In *Minister of Home Affairs v Rahim and Others* 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) para 23, the Constitutional Court held that undocumented immigrants 'nonetheless enjoy the protection of the Constitution, at least so far as the principle of legality, and their right to respect for their dignity, is concerned'.

40 *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC); *Rutimba and Others v Director Private Security Industry Regulatory Authority and Others* [2006] ZAGPHC 55 (26 May 2006) (35986/03).

health sector,[41] as drivers,[42] and to apply for licences to operate retail shops.[43] The challenge, though, is that some banks are not willing to allow refugees to open bank accounts.[44] For example, Capitec Bank states on its website that it does not 'open accounts for refugees and asylum seekers'.[45] This makes it a challenge for some of these refugees to operate businesses.

Asylum seekers also have a right to work and study in South Africa.[46] The courts have held that a regulation which prohibits asylum seekers from applying for permanent residence is invalid;[47] that an applicant whose application for recognition as a refugee has been rejected must be furnished with the reasons for the decision;[48] and that an asylum seeker has a right to have the correct interpreter present at the hearing to determine their application status if they do not understand English.[49] Courts also found that refugees and asylum seekers (who are in the country legally) are entitled to emergency housing;[50] asylum seekers have a right to be heard before their applications may be rejected;[51] refugees

41 *Ndikumdavyi v Valkenberg Hospital and Others* 2012 (8) BLLR 795 (LC); 2012 33 *ILJ* 2648 (LC). However, asylum seekers cannot apply for work permits or other types of visa while in South Africa, see *Minister of Home Affairs and Another v Ahmed and Others* 2017 (6) SA 554 (SCA).

42 *Kanku and Others v Grindrod Fuelogic* 2017 ZALCCT 26 (21 June 2017) (C602/2014) para 2.

43 *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* 2015 (1) SA 151 (SCA).

44 *National Director of Public Prosecutions v Starplex 47 CC and Others; National Director of Public Prosecutions v Mamadou and Another* 2009 (1) SACR 68 (C); 2008 (4) All SA 275 (C) para 29.

45 Capitec Bank 'Bank accounts for foreign nationals' https://www.capitecbank.co.za/bankbetterlivebetter/articles/bank-accounts-for-foreign-nationals (accessed 19 April 2019). This is the case although since 2010 the Department of Home Affairs stated that refugees and asylum seekers should be permitted to open bank accounts. See Lawyers for Human Rights 'Refugees and asylum seekers again able to access bank accounts' http://www.lhr.org.za/news/2010/refugees-and-asylum-seekers-again-able-access-bank-accounts (accessed 19 April 2019).

46 *Watchenuka and Another v Minister of Home Affairs and Others* 2002 ZAWCHC 64 (15 November 2002) (1486/02); *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (1) All SA 21 (SCA) (28 November 2003).

47 *Ahmed and Others v Minister of Home Affairs and Another* 2018 (12) BCLR 1451 (CC).

48 *M v Minister of Home Affairs and Others* 2014 ZAGPPHC 649 (22 August 2014) (6871/2013); *Kumah and Others v Minister of Home Affairs and Others* 2016 (4) All SA 96 (GJ); 2018 (2) SA 510 (GJ) para 46.

49 *Chen and Another v Director-General Home Affairs and Others* 2014 ZAWCHC 181 (2 December 2014) (18985/2014) para 36.

50 *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another* 2017 (2) SA 328 (ECG).

51 *Ncube v The Minister of Home Affairs and Others* 2018 ZAGPPHC 402 (16 May 2018) (26477/2017).

have a right not to have their permits cancelled illegally[52] and not to be deported illegally;[53] and an asylum seeker who meets the requirements under the Act must be issued with a permit.[54] Because it is an offence for a person to be in South Africa without the necessary documents,[55] there have been many instances in which the Department of Home Affairs has arrested and detained asylum seekers whose permits have expired – in many of these cases the period of detention was extended beyond the lawfully permitted period. As a result, the Department of Home Affairs has been ordered to release asylum seekers who had been detained illegally because of the fact that their permits had expired; in some cases it has been ordered to issue new permits to asylum seekers who had been detained.[56] Because of the fact that refugees need the

52 *Director-General: The Department of Home Affairs and Others v Dekoba* 2014 (5) SA 206 (SCA).

53 *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) All SA 117 (SCA).

54 *Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others* 2011 ZAGPPHC 29 (17 February 2011) (27294/2008); *Kyabu v Minister of Home Affairs* [2019] ZAGPJHC 204 (25 June 2019) (18338/2019; 18339/2019).

55 Section 49(1) of the Immigration Act 13 of 2002 provides that: '(a) [a]nyone who enters or remains in or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years. (b) Any illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years.' In *S v Mochochonono* 2013 ZAFSHC 100 (25 April 2013) (71/2013) para 6, the court held that '[c]ontravention of s 49(1)(a) is by its very nature a very serious offence'. There are cases in which people have been convicted and sentenced for contravening section 49(1). See eg *S v Banda* 2015 ZAFSHC 114 (4 June 2015) (90/2015) (Zimbabwean citizen sentenced to 30 days imprisonment or payment of a fine of R1 500); *S v Rabbi* 2014 ZAFSHC 243 (18 December 2014) (148/2014) (sentenced to pay a fine or R1 000 or 20 days imprisonment); *S v Ntshonyane and Another* 2014 ZAFSHC 124(99/2014); 2015 (2) SACR 70 (FB) (21 August 2014); *S v Phemadu* 2012 ZAFSHC 192 (18 October 2012) (185/2012); *S v Ramakewana* 2012 ZAFSHC 191 (18 October 2012) (189/2012); *S v Rakhongoana and Others* 2011 ZAFSHC 159 (22 September 2011) (350/2011); *S v Madocha* 2016 ZAGPPHC 387 (24 May 2016) (A335/16). In *Dhor v Direkteur van Openbare Vervolging* 2016 ZANCHC 79 (20 December 2016) (CA&R136/2016), the court held that when a person's visa expires and he does not renew it, he automatically becomes an illegal immigrant. However, that does not mean that he cannot be released on bail.

56 *Fikre v Minister of Home Affairs and Others* 2012 (4) SA 348 (GSJ); *Shabangu v Minister of Home Affairs and Others* 2010 ZAGPJHC 146 (10 December 2010) (49231/10); *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA); *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA); *Aruforse v Minister of Home Affairs and Others* 2010 ZAGPJHC 160 (25 January 2010) (2010/1189); *Rahim v The Minister of Home Affairs* 2015 (4) SA 433 (SCA); *SA v Minister of Home Affairs and Others* 2019 ZAGPJHC 303 (4 September 2019)(26921/2019) (court orders the release of illegally detained asylum seekers); *AI and Others v Director of Asylum Seeker Management: Department of Home Affairs and Others* [2019] ZAWCHC 114 (2 September 2019) (22059/18) (court orders the Department of Home Affairs to issue asylum permits to asylum seekers).

relevant documents to live in South Africa legally, courts have ordered the Department of Home Affairs to open up refugee centres to issue and renew asylum applications.[57] But as much as asylum seekers have the right to liberty, suspected human traffickers or victims of human trafficking who are in police custody will not be issued with asylum seekers' permits because 'state interest in such a serious matter outweighs their right to be treated as asylum seekers'.[58]

However, the mere fact that a person is in police custody for allegedly committing an offence in South Africa or pending extradition from South Africa does not mean that he or she cannot be issued with an asylum seeker's permit.[59] Being in possession of an asylum seeker's permit does not mean that a person will be released on bail. A court must consider other factors in determining whether or not such a person should be released on bail.[60]

There have been cases where the rights of the children of asylum seekers had to be dealt with. In instances where the asylum seeker had a child with a South African citizen, it was held that the child must be registered as a South African citizen irrespective of the fact that the asylum seeker's permit had expired.[61] Where children are separated from their biological parents and are in the care of asylum seekers or refugees (who are not their biological parents), for the purpose of section 3(c) of the Act, they are to be considered dependants of the asylum seekers or refugees.[62] The legal implication of this is that such children are automatically entitled to the same legal status as their guardians irrespective of the fact that they are not their biological parents.

Case law also shows the challenges faced by asylum seekers in the process of attempting to legalise their stay in South Africa. These problems have included the following: long queues at refugee reception centres and delays in the issuing of permits;[63] improperly constituted

57 *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA); *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* 2015 (3) SA 545 (SCA).

58 *Cheba and Others v Minister of Police and Others* 2018 ZALMPPHC 6 (13 February 2018) (520/2018) para 28.

59 *S v Gavric* 2012 ZAWCHC 161 (23 May 2012) (A138/2012) para 9.

60 Ibid. For the factors that a court will have to consider in determining whether or not an arrested person should be released on bail, see Du Toit *Commentary on the Criminal Procedure Act* (loose-leaf, 2018) ch 9.

61 *Xiuguo and Another v The Director-General of the Department of Home Affairs and Another* 2018 ZAGPPHC 508 (5 July 2018) (60392/16).

62 *Mubake and Others v Minister of Home Affairs and Others* 2016 (2) SA 220 (GP).

63 *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC); *Ersumo v Minister of Home Affairs and Others* 2012 (4) SA 581 (SCA) para 4.

Refugee Appeals Boards to hear asylum appeals;[64] Refugee Committee members disobeying court orders to submit a record of the proceedings for the court to review their decision;[65] refusal by Department of Home Affairs officials to renew or issue asylum permits, contrary to the relevant regulations;[66] asylum seekers being exploited by their lawyers;[67] and lawyers abusing the court process in seeking redress for their clients.[68]

Another right not discussed thus far, is the right not to be returned or extradited to a country where the person will be persecuted. This right is embodied in the international law principle of non-refoulement, which forms the subject of the next section.

4 The Principle of Non-refoulement in South Africa

Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which South Africa is a party, provides that:

1. 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.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 3 of the Convention against Torture prohibits the expulsion, return or extradition of a person to a state 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The South African High Court has held that for article 3 to be applicable, the person in question does not have to be an asylum seeker

64 *Bolanga v Refugee Status Determination Officer and Others* 2015 ZAKZDHC 13 (24 February 2015) (5027/2012) (the Appeal Board consisted of one member only when it heard the applicant's application although the law requires a composition of three members). See also *Dorcasse v Minister of Home Affairs and Others* 2012 (4) All SA 659 (GSJ).

65 *Katsshingu v Chairperson of the Standing Committee for Refugees Affairs and Others* 2011 ZAWCHC 533 (25 November 2011) (19726/2010).

66 *Ssemakula and Others v Minister of Home Affairs and Others* 2012 ZAWCHC 398 (5 March 2012) (4139/11); *Saidi and Others v Minister of Home Affairs and Others* 2015 ZAWCHC 201 (26 November 2015) (17770/15).

67 *Tekalign v Minister of Home Affairs and Others* 2018 (3) All SA 291 (ECP).

68 *Bhuiyan and Others v Minister of Home Affairs and Another* 2011 ZAECPEHC 40 (15 September 2011) (2585/2011, 2599/2011).

or a refugee.[69] He or she could also be a citizen of South Africa whose extradition has been sought by another country.[70] However, for purposes of this contribution, the discussion will be limited to the applicability of the principle of non-refoulement to asylum seekers and refugees. In the context of refugee law, article 33(1) of the United Nations (UN) Refugees Convention provides that:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

At the African Union (AU) level, the principle of non-refoulement is embodied in article II(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa:

> No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

In order to give effect to its obligations in the UN Refugees Convention and the African Refugees Convention, the Refugees Act 130 of 1998 was enacted. It provides for the principles of non-refoulement in 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—
> (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.

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69 In *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* 2012 (1) BCLR 77 (GSJ); 2012 (1) All SA 83 (GSJ), the High Court held that art 3 of the Convention against Torture prohibited South Africa from extraditing or deporting to Botswana citizens of Botswana who had fled that country after committing murder, if the government of Botswana did not guarantee that they would not be sentenced to death or that if sentenced to death they would not be executed.

70 South African law does not bar the extradition of nationals.

In *Makumba v Minister of Home Affairs and Others*[71] the High Court held that section 2 'entrenches the international law obligation of non-refoulement'[72] and that '[t]he principle of non-refoulement is binding on' South Africa.[73] Put differently, section 2 'encapsulates the international law principle of non-refoulement'.[74] Section 2 is based on the international and regional refugee treaties[75] and is applicable to any person. He or she does not have to be an asylum seeker or refugee.[76] It applies to a person even before they enter South Africa; all that is required is that the person has arrived at a South African port of entry. This section also applies to a person who is in South Africa illegally. The High Court held that section 2 also applies to a person who has fled his or her country on the ground that they are being persecuted because of their sexual orientation.[77] This is the case although sexual orientation is not one of the grounds mentioned in any of the international refugee instruments mentioned above or in section 3 of the Act. In *Ruta v Minister of Home Affairs*[78] the Constitutional Court referred to section 2 and held that:

> 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 expresses a principle: that of non-refoulement, the concept

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71 *Makumba v Minister of Home Affairs and Others* 2014 ZAWCHC 183 (3 December 2014) (6183/14).

72 Id para 16. See also *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) para 63; *A v Chairperson of the Refugee Appeal Board and Others* 2017 ZAWCHC 19 (28 February 2017) (19483/2015) para 4; *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* 2015 (1) All SA 100 (WCC) para 4; *Mohamed v Minister of Home Affairs and Others* 2016 ZAWCHC 13 (12 February 2016) (A287/2015) para 42; *Somali* case (n 24 above) para 3.

73 *Makumba* case (n 71 above) para 20. See also *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa and Others* 2014 ZAGPPHC 753 (26 September 2014) (30123/2011) para 6.

74 *FNM v The Refugee Appeal Board and Others* 2018 (4) All SA 228 (GP) para 84.

75 *Tshiyombo v Members of the Refugee Appeal Board and Others* 2016 (4) SA 469 (WCC) para 28.

76 In *Gavric v Refugee Status Determination Officer, Cape Town and Others* 2016 (2) All SA 777 (WCC) para 96, the High Court held that '[s]ection 2 of the [Refugees] Act enshrines the international customary rule of non-refoulement which protects all "persons" not just refugees'.

77 *Makumba* case (n 71 above). See also *AM v Chairperson of the Refugee Appeal Board and Others* 2019 ZAWCHC 113 (28 August 2019)(1102/2019); the applicant, a Ugandan national, applied for refugee status on the ground that he had been persecuted in Uganda because of his sexual orientation.

78 *Ruta* case (n 2 above).

> 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.[79]

The court referred to the principle of non-refoulement as 'a noble principle', which South Africa, because of its history of oppression, 'has emphatically embraced'.[80] The court held that this principle is rooted in international human rights and international refugee law instruments which South Africa has ratified.[81] In ratifying these instruments,

> 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. As refugees put agonising pressure on national authorities and on national ideologies in Europe, North America, and elsewhere, the response to these principles of African countries, including our own, is of profound importance.[82]

There are other cases in which the Constitutional Court has emphasised the principle of non-refoulement. For example, in *Saidi and Others v Minister of Home Affairs and Others*,[83] the court referred to section 2 of the Refugees Act and held that:

> At the heart of international refugee law is the principle of nonrefoulement (non-return). This is not about non-return for the sake of it; it is about not returning asylum seekers to the very ills – recognised as bases for seeking asylum – that were the reason for their escape from their countries of origin.[84]

The Supreme Court of Appeal referred to article 33 of the UN Refugees Convention and section 2 of the Refugees Act to conclude that '[a]n international principle of cardinal importance when dealing with refugees is that of non-refoulement'.[85] The High Court has made a similar observation[86] when it held that the principle of non-refoulement is

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79 Id para 24.
80 Id para 25.
81 Id paras 25–26.
82 Id para 26.
83 *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC).
84 Id para 27.
85 *Minister of Home Affairs and Others v Saidi and Others* (n 5 above) para 23.
86 In *Ahmed and Others v Minister of Home Affairs and Another* 2017 (2) SA 417 (WCC) para 3, the court held that '[t]his principle of "non refoulement" as enshrined in the Refugee Convention is central to refugee and asylum seeker law'.

meant to protect *bona fide* asylum seekers and not economic migrants.[87] It held that '[p]roperly considered, section 2 is person focussed' and the question to be asked is whether 'the particular person (refugee or asylum seeker) face any threat to his or her life if he or she was to be denied refugee status resulting in them having to be returned to their country'.[88]

It has been held that the principle of non-refoulement is meant to protect a person who 'faces a genuine risk of serious harm' should he be returned to the country from which he fled.[89] The principle of non-refoulement 'effectively means that no person may be refused asylum in another country where that person faces real threats to his or her life especially life threatening persecution in such person's country of origin should he be refused asylum'.[90] It is argued that that is not the threshold provided for under section 2 of the Act. To be recognised as a refugee, a person must be persecuted. It was held in *N v Chairperson of the Standing Committee for Refugee Affairs and Others*[91] that '[t]he standard of proof in refugee matters is one of a "reasonable possibility of persecution", and not the normal civil standard, which has been held by our courts to impose too onerous a burden of proof'.[92]

The Department of Home Affairs has to 'give proper weight to the principle of non-refoulement' when deciding whether or not to allow a person's application for refugee status.[93] Courts have held that erroneously rejecting an asylum seeker's application for refugee status violates the principle of non-refoulement,[94] and that relying on insufficient information in assessing an asylum seeker's application to be recognised

87 *Chihomba v Chairperson: Refugee Appeal Board and Others* 2015 ZAGPPHC 444 (16 June 2015) (16418/2012) para 31.4; the court held that '[t]he principle of non-refoulement addresses bona fide Applicants for asylum and is incapable to cover economic migrants who enter South Africa to benefit financially'.

88 *Somali* case (n 24 above) para 34.

89 *Katabana v Chairperson of Standing Committee for Refugee Affairs and Others* 2012 ZAGPPHC 362 (14 December 2012) (25061/2011) 6. See also *Mubala v Chairperson of the Standing Committee for Refugee Affairs and Others* 2013 ZAWCHC 208 (8 November 2013) (10971/2013) and *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) para 135 (however, in this case the court does not refer to serious harm).

90 *Somali* case (n 24 above) para 2.

91 *N v Chairperson of the Standing Committee for Refugee Affairs and Others* 2017ZAWCHC 57 (16 May 2017) (15376/16).

92 Id para 41.

93 *Kalisa v Chairperson of the Refugee Appeal Board and Others* 2018 ZAWCHC 156 (19 November 2018) (17413/2017) para 38.

94 *Tafira and Others v Ngozwane and Others* 2006 ZAGPHC 136 (12 December 2006) (12960/06).

as a refugee 'unlawfully denies the applicant the protection to which he is entitled'.[95]

The following section discusses the principle of non-refoulement and its application to a person who has been excluded from refugee status on the basis of section 4(1)(b) of the Act.

4.1 The Principle of Non-refoulement and the Exclusion of an Asylum Seeker who has Allegedly Committed a Crime of a Non-political Nature

Courts have grappled with the question whether an asylum seeker who has committed a crime before coming to South Africa should be excluded from being recognised as a refugee and be returned or extradited to the country in question for prosecution or to serve his or her sentence. Section 4 of the Refugees Act 130 of 1998 provides that:

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

Thus, section 4 provides the grounds on which a person may be excluded from being recognised as a refugee. Until recently (December 2018), there were conflicting High Court decisions on whether or not section 4(1)(b) is applicable to offences committed in South Africa or only to offences committed outside South Africa. In some cases, it was held that it is applicable to offences committed in South Africa[96] and in others the

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95 *Akanakimana v Chairperson of the Standing Committee for Refugee Affairs and Others* 2015 ZAWCHC 17 (18 February 2015) (10970/13) para 20.

96 *Power v Minister of Home Affairs and Others* 2013 ZAGPJHC 146 (13 June 2013) (2013/14516) (asylum seeker convicted of robbery committed in South Africa); *Ekene v Minister of Home Affairs and Another* 2013 ZAGPJHC 141 (13 June 2013) (2013/13550) (fraud committed in South Africa).

opposite conclusion was drawn.[97] The High Court also held that once a foreign national has been found guilty of an offence and sentenced to imprisonment before he or she applies for an asylum permit, they lose the right to apply for asylum and must be deported after serving their sentence.[98] In *Ruta v Minister of Home Affairs,*[99] the applicant, an asylum seeker, committed traffic offences in South Africa and the Department of Home Affairs invoked section 4(1)(b) to reject his application to recognise him as a refugee. The Constitutional Court brought this debate to an end when it held that section 4(1)(b) is only applicable to offences committed outside South Africa. The court held that the exclusion in section 4(1)(b) is only applicable to offences committed abroad because:

> [T]he preamble to the Refugees Act states that the purpose of the statute is to implement South Africa's commitment to the 1951 Convention and the Organisation of African Unity Convention. Both these conventions explicitly provide that exclusionary crimes must be committed outside the country of refuge. Quite beyond the explicit language of section 4(1)(b) …, this is a further indication that only crimes outside South Africa operate exclusionarily.[100]

The relationship between sections 2 and 4(1)(b) is important. As mentioned earlier, section 2 embodies the principle of non-refoulement and section 4(1)(b) provides that a person does not qualify to be recognised as a refugee in South Africa 'if there is reason to believe that he or she has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment'. In other words, can South Africa extradite a person who committed the offence in question even if there are reasons to believe that he or she will be persecuted on one or more grounds provided for under section 3 of the Refugees Act? The following section addresses this aspect in more detail.

4.2 The Judgment in Gavric v Refugee Status Determination Officer, Cape Town and Others

In *Gavric v Refugee Status Determination Officer, Cape Town and Others*[101] the applicant, a Serbian national who was in detention in South

97 See eg *Okoroafor v Minister of Home Affairs and Another* 2017 (3) SA 290 (ECP).
98 *Mateku* case (n 23 above).
99 *Ruta* case (n 2 above).
100 Id para 57. Section 4(1)(b) of the South African Refugees Act should be distinguished from refugee legislation in some countries such as Kenya where s 4 of the Kenyan Refugees Act provides that '[a] person shall not be a refugee for the purposes of this Act if such person … has committed a serious non-political crime inside Kenya after the person's arrival and admission into Kenya as a refugee'.
101 *Gavric* case (n 12 above).

Africa pending his extradition to Serbia, was, in his absence, convicted by a Serbian court and sentenced to 30 years' imprisonment for the murder of a prominent political figure. On appeal, the Serbian Supreme Court increased his sentence to 35 years' imprisonment.[102] His appeal to the European Court of Human Rights against the Serbian judgment was dismissed.[103] The applicant fled Serbia and arrived in South Africa under a false name. South African authorities only discovered his true identity when he was arrested for allegedly committing an offence in South Africa. When the applicant applied for refugee status, his application was rejected on the basis of section 4(1)(b) because there was evidence, in the form of judgments from Serbian courts, that he 'had committed serious non-political crimes'.[104]

The applicant argued that the respondent should not have relied on the Serbian judgments to reject his application on the basis of section 4(1)(b). In support of this argument, he submitted that he had been 'falsely implicated in the murders' in question and that the judge who presided over his murder trial and sentenced him to 30 years' imprisonment had borrowed money from one of the clan members of the deceased and that if he returned to Serbia, he would be killed by the former associates of the deceased.[105] By this submission, the applicant implied, inter alia, that his trial had not been fair.

In rejecting this submission, the court first clarified the meaning of the concept 'reasonable belief' under section 4(1) of the Act. It held that '[t]hough a conviction may inform such a belief, it is important to note that a conviction is not necessary to meet this threshold. Conversely, the fact of a conviction, where such conviction was politically motivated, may militate against a "reasonable belief" that an offence was actually committed'.[106] The court added that:

> It appears that the applicant received due process throughout these legal proceedings. By his own admission, he was initially detained but released after three years as required by Serbian law. The applicant has not presented any evidence which can disturb the prima facie evidence that the rule of law was upheld during his trials and appeals. The standard employed is not beyond a reasonable doubt but merely whether there is a reasonable belief that a crime was committed. Counsel for the applicant conceded, in light of the Serbian judgments and the information received from the ECHR [European Convention on Human Rights], that the

102 Id para 8.
103 Ibid.
104 Id para 11.
105 Id para 108.
106 Id para 107.

> threshold of the reasonable belief test had been met. I am satisfied that there is a reasonable likelihood that the applicant committed the crimes he was convicted of.[107]

The court held that the applicant had not led any evidence to convince it that the murders had been 'politically motivated' and that 'for what it is worth, the evidence as it appears from the Serbian judgments points in the opposite direction' and that the Serbian courts held that the murders were 'for monetary gain'.[108] Against that background, the court held that the offence of which the applicant had been convicted was of a non-political nature.[109] However, the court added that this conclusion 'does not close the door to the applicant's contention that he may face persecution on the basis of imputed political opinion' and that this issue 'may arise in extradition proceedings aimed at returning the applicant to Serbia'.[110] The court held further that a refugee status determination officer does not have to make a finding in terms of section 3 of the Act before deciding whether or not a person should be excluded under section 4(1)(b). Whether a person should not be extradited because he or she faces the risk of being persecuted is only determined 'at the stage when the asylum seeker is facing extradition'.[111] The court added that:

> 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 [refugee status determination officer] 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.[112]

The court discussed the relationship between sections 3 and 4(1)(b) of the Act and called for a flexible approach when applying both sections.[113] The court held that:

> 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

107 Id para 110.
108 Id para 113.
109 Id paras 92–115.
110 Id para 116.
111 Id para 38.
112 Id para 39.
113 Id paras 40–43.

> detract from an applicant's right to have due consideration given to their application. An application process should not be truncated solely on the basis that the applicant falls to be excluded under section 4(1). It was not necessary for the RSDO to have taken a decision under section 3 either before or when excluding the application under section 4(1)(b).[114]

On the issue of whether the Serbian judgments were admissible in evidence and their evidential value, the court held that they should not have been relied on by the refugee status determination officer because they 'do not relate to information about country conditions'.[115] This is because, in making its decision, the refugee status determination officer is only allowed to take 'into account conditions in the country of feared persecution or harm'.[116] The court referred to its case law on the evidential value of foreign judgments[117] and held that '[t]hough there has been a reluctance to rely on the factual findings of decisions of a foreign court, it is open to a Court to take judicial notice of the human rights situation evidenced by these decisions'.[118] The court referred to a Practice Note from the United Kingdom and to the Practical Guide on Exclusions from the European Asylum Support[119] to hold that in deciding whether or not to admit evidence of a foreign conviction, 'consideration must be given to whether the prosecution was legitimate and whether the applicant was prosecuted or convicted for political reasons'.[120] The court concluded that although the Act is silent on how an asylum seeker who has been excluded on the basis of section 4(1)(b) may challenge that decision,[121] a purposive interpretation of the Act leads to the conclusion that such an applicant can appeal to the Refugee Appeal Board.[122]

4.3 Analysis of the Constitutional Court's judgment in Gavric v Refugee Status Determination Officer, Cape Town and Others

It has been illustrated that South African courts have handed down judgments which are relevant to the principle of non-refoulement. With its ruling in *Gavric v Refugee Status Determination Officer, Cape Town and Others*[123] the Constitutional Court has raised important issues in

[114] Id para 44.
[115] Id para 78.
[116] Id para 74.
[117] Id para 87.
[118] Id para 88.
[119] Id paras 89–90.
[120] Id para 91.
[121] Id paras 45–52.
[122] Id para 53.
[123] *Gavric* case (n 12 above).

relation to the application of the principle of non-refoulement in South Africa, which will now be analysed.

The first issue relates to the criteria the court used to determine that the applicant's trial had not been politically motivated and that he had received 'due process throughout these legal proceedings' and that the appellant did not adduce any evidence to convince the court that the 'rule of law was [not] upheld during his trials and appeals'.[124] Apart from recognising that the applicant was released on bail while awaiting his trial and that the European Court of Human Rights had dismissed the applicant's application, the court did not explain in detail how the appellant's right to a fair trial had been guaranteed. In particular, the court did not stipulate which rights had been respected during the appellant's trial, which had taken place in his absence, before it arrived at its conclusion.

Before section 4(1)(b) can be invoked, it has to be determined whether the person in question will get a fair trial should he or she be extradited for prosecution or whether their trial had been fair should they be extradited to serve their sentence. South Africa has ratified international and regional human rights instruments that guarantee the accused the right to a fair trial. These include the African Charter on Human and Peoples' Rights[125] and the International Covenant on Civil and Political Rights.[126] One of the rights guaranteed under these international instruments is the accused's right to defend himself or herself at his or her trial and the right to be tried in his or her presence. In order to give effect to its international human rights obligations, South Africa adopted a Constitution with a comprehensive Bill of Rights. One of the rights guaranteed in the Bill of Rights is the right to a fair trial. Section 35(3) provides for a list of rights that make up the right to a fair trial. One of these rights is for the accused 'to be present when being tried'.[127] However, this right is not absolute and South African law provides for

124 Id para 110.

125 Article 7 of the African Charter on Human and Peoples' Rights provides that '(1). Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court or tribunal. (2). No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

126 Article 14.

127 Section 35(3)(e).

circumstances in which the accused's trial may take place in his or her absence.[128]

One would have expected the court to explain how the applicant's trial had met the minimum international standards although it was held in his absence. The judgment suggests that in the future a conviction resulting from a trial that was not in accordance with the rule of law may not be considered as a factor in concluding that there is reasonable belief that the applicant had committed an offence outside South Africa. Although the court makes it very clear that a conviction is not a prerequisite for such a reasonable belief to exist, it added that 'the fact of a conviction, where such conviction was politically motivated, may militate against a "reasonable belief" that an offence was actually committed'.[129]

The challenge, though, is that the court does not elaborate on what it means for a trial to be in accordance with the rule of law or to be in accordance with due process or to be politically motivated. It is also not clear whether these are independent elements, or whether they are cumulative for the conviction to be disregarded for purposes of exclusion under section 4(1)(b). It is submitted that for clarity's sake, the court needs to establish criteria that have to be used to assess whether or not a foreign conviction should be relied on for the purpose of exclusion under section 4(1)(b). In the light of the fact that section 39(1)(c) of the Constitution empowers the court to refer to foreign law in interpreting the Bill of Rights, it may find the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union (EU) useful in this regard. It should be noted that the Constitutional Court has in the past referred to the jurisprudence of the European Court of Human Rights.[130] The jurisprudence of the European Court of Human Rights and the Court of Justice of the EU provides authority that member states of the EU may refuse to recognise a foreign conviction if it was the result of a trial that amounted to a flagrant denial of justice. The Court of Justice of the EU, relying on the jurisprudence of the European Court of Human Rights, has developed the following criteria to determine whether the trial in question amounted to a flagrant denial of justice:

> [A] conviction in absentia without the possibility of obtaining a re-examination of the merits of the charge; a trial that is summary in nature and conducted in total disregard of the rights of the defence; detention

[128] See s 159 of the Criminal Procedure Act 51 of 1977.

[129] *Gavric* case (n 12 above) para 107.

[130] See eg *S v Makwanyane and Another* 1995 (3) SA 391; 1995 (2) SACR 1 paras 35, 68 and 81; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) para 70; *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) para 264.

> whose lawfulness is not open to examination by an independent and impartial tribunal; and a deliberate and systematic refusal to allow an individual, in particular an individual detained in a foreign country, to communicate with a lawyer. The European Court of Human Rights also attaches importance to the fact that a civilian has to appear before a court composed, even if only in part, of members of the armed forces who take orders from the executive.[131]

The High Court in the United Kingdom held that the above threshold is 'a high one'.[132] If the South African Constitutional Court were to adopt the above criteria, it will not be the first court outside of Europe to do so. The High Court of New Zealand has already done so.[133] These criteria will guide the Refugee Appeals Board in deciding whether the refugee status determination officer had reached the correct decision in terms of section 4(1)(b). In the absence of such rules, the Refugee Appeals Board may end up adopting the unclear standards set by the court – the rule of law, due process and political motivation – in making its decisions. This will lead to more litigation.

Related to the above issue is the question of the admissibility of foreign convictions in South African courts to determine whether the person in question should be excluded on the basis of section 4(1)(b). Although legislation such as the Criminal Procedure Act provides for circumstances in which South African courts may admit foreign convictions in evidence,[134] the Refugees Act is silent on this issue. Notwithstanding this silence, the court held that the Serbian judgments were admitted in evidence because they were 'part of the Rule 53 in the High Court and before the High Court'.[135] This means that the Serbian judgments were not admitted as independent pieces of evidence, that is, as foreign convictions, but that they were admitted as part of the record under rule 53 of the Uniform Rules of Court. This record included other pieces of evidence. In the light of the fact that South African law is generally silent on the admissibility of evidence of foreign convictions, one would have expected the court to call upon the parties to make submissions on the admissibility or otherwise of the Serbian judgments and their evidential value. This is because the Constitutional Court has

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131 *Minister for Justice and Equality (Defaillances du système judiciaire) (European arrest warrant – Grounds for refusal to execute – Opinion)* 2018 EUECJ C-216/18PPU_O (28 June 2018) para 82.

132 *National Crime Agency v Hajiyeva* (Rev 1) 2018 EWHC 2534 (Admin) (03 October 2018) para 77.

133 See *Kim v Minister of Justice* 2016 NZHC 1490; 2016 3 NZLR 425 (1 July 2016) para 106.

134 See eg ss 89 and 211.

135 *Gavric* case (n 12 above) para 85.

held that inadmissible evidence should not form part of the rule 53 record.[136] In deciding whether or not information should be included in the record, '[t]he question is: is there some legally cognisable basis for excluding the relevant information from the record?'[137]

The court's reliance on rule 53 to admit foreign convictions raises the issue of whether the admission of foreign convictions in civil proceedings does not contradict the 'problematic'[138] and 'widely criticised'[139] rule in *Hollington v F Hewthorn & Company Ltd*.[140] According to this rule, which has been confirmed as part of South African law by the Constitutional Court,[141] 'a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he was convicted'.[142] The court may have to clarify whether the *Hollington* rule extends to foreign convictions. The Privy Council has held that the *Hollington* rule applies to foreign judgments.[143] The same conclusion has been reached by the Hong Kong High Court.[144] In *Capital Century Textile Co Ltd v LI Dianxiao and Another*[145] the Hong Kong High Court held that the 'application' of the *Hollington* Rule 'to reliance on a domestic criminal conviction in subsequent civil proceedings has been abolished by s 62 of the Evidence Ordinance … This section has no application to a foreign conviction …'.[146] The United Kingdom High Court observed that although the *Hollington* rule was abolished in the United Kingdom, there is 'some support' for the argument 'that the rule in *Hollington v Hewthorn* must still apply to convictions outside the United Kingdom, so that the equivalent of a certificate of conviction from a foreign court would not be admissible'.[147] In *Daley v Bakiyev*[148] the High Court of England and Wales invoked the *Hollington* rule to hold that a conviction by a court in the Kyrgyz Republic was inadmissible as

136 *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) paras 17 to 51.
137 Id para 52.
138 *Chua Boon Chye v Public Prosecutor* 2015 SGCA 31 (29 June 2015) para 28.
139 *Lincoln National Life Insurance Company v Sun Life Assurance Company of Canada & Ors* 2004 EWHC 343 (Comm) (26 February 2004) para 52.
140 1943 KB 587 (CA) 1943 ALL ER 35.
141 *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 42.
142 *Nel v Law Society of the Cape of Good Hope* 2010 (6) SA 263 (ECG) para 16.
143 *Calyon v Michailaidis & Ors (Gibraltar)* 2009 UKPC 34 (15 July 2009) para 23.
144 *Pacific Electric Wire & Cable Co Ltd v Harmutty Ltd and Others* 2010 HKCFI 2268; HCCL 18/2009 (9 November 2010) para 14 (conviction from Taiwan); *Hong Dau Construction Co Ltd v The Incorporated Owners Of Garden Vista* 2017 HKCFI 1620; HCA 2290/2016 (8 September 2017) (conviction from mainland China).
145 *Capital Century Textile Co Ltd v Li Dianxiao and Another* 2018 HKCFI 729; HCA 263/2012 (3 April 2018).
146 Id para 23.
147 *R v Kordansinki* 2006 EWCA Crim 2984 (7 November 2006) para 60.
148 *Daley v Bakiyev* 2016 EWHC 1972 (QB) (29 July 2016).

evidence in civil proceedings in the United Kingdom. The High Court of Justice in Northern Ireland arrived at a similar conclusion with regard to a conviction from the Republic of Ireland.[149] Likewise, in *Chua Boon Chye v Public Prosecutor*,[150] the Supreme Court of Singapore endorsed the view that although Parliament had abolished the *Hollington* rule with regard to domestic convictions, the rule was still applicable to foreign convictions or acquittals.[151] In the same vein, the Court of Appeal in Bermuda invoked the *Hollington* rule to conclude that evidence of the appellant's convictions in the UK was inadmissible in Bermuda.[152]

Related to the above is the issue of proof of foreign convictions. Unlike in some countries such as the UK where legislation specifically provides for the procedure that has to be followed in proving foreign convictions,[153] and this explains why some judges are of the view that foreign convictions from member states of the EU are admissible in the United Kingdom,[154] South African legislation is silent on this issue. The refusal by South African courts to recognise foreign convictions could conflict with the international law principle of comity. This is an issue that the court would have to address should the opportunity present itself.[155]

The above discussion shows that the reasonable belief referred to in section 4(1) should be based on admissible evidence. However, as the Constitutional Court held, a conviction is not a prerequisite. In *Refugee Appeal Board of South Africa and Others v Mukungubila*[156] the Supreme Court of Appeal described the type of evidence that should be relied on:

> Section 4 requires the person considering the question of an asylum applicant's qualification for refugee status to be satisfied that there is

149 *Breslin & Ors v McKenna & Ors (Omagh Bombing case)* 2009 NIQB 50 (8 June 2009) para 130.

150 *Chua Boon Chye v Public Prosecutor* 2015 SGCA 31.

151 Id para 46.

152 *Goodwin Davano Spencer v The Queen* 2010 BMCA 9; 2010 CA (Bda) 12 Crim (16 November 2010).

153 See s 73 of Police and Criminal Evidence Act 1984.

154 In *The Assets Recovery Agency v Virtosu & Anor* 2008 EWHC 149 (QB) (5 February 2008) para 42, the court held that 'it is to be noted that at the time *Hollington v Hewthorn* was decided the law of evidence was very different from what it is today … The rules of evidence are less strict in civil cases than in criminal cases, and it would be surprising if evidence admissible in a criminal trial were to be inadmissible in a civil claim arising out of the same facts. Moreover, the credit which this court gives to the judgments of foreign courts has changed greatly over the years, in particular in relation to the courts of countries which are members of the Council of Europe, and who are thus subject to the European Convention on Human Rights, as is the case with France.'

155 See *Hellenic Republic v Tzatzimakis* 2003 FCAFC 4 (31 January 2003).

156 *Refugee Appeal Board of South Africa and Others v Mukungubila* 2019 (3) SA 141 (SCA).

> reason to believe that the applicant has committed the crimes envisaged in the provision. The 'reason to believe' must be constituted by an objective factual basis giving rise thereto and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice.[157]

Put differently, a belief based on information or hearsay evidence as a reasonable man or woman could give credence to, will suffice. What amounts to a 'reasonable' man or woman is well known in South Africa law.[158] The Supreme Court of Appeal's ruling also opens the door for the relevant authorities to rely on hearsay evidence in determining whether to exclude an applicant under section 4(1)(b) or not. However, only the Refugee Appeals Board or the High Court reviewing the decision of the Refugee Appeals Board, are empowered to rely on hearsay evidence. In terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 the admission of hearsay evidence is allowed in 'criminal or civil proceedings'.[159] A decision by a refugee status determination officer cannot be referred to as 'proceedings'.[160] On the basis of the Law of Evidence Amendment Act, the Refugee Appeals Board will be able to admit hearsay evidence through one of the three routes provided for under section 3(1): if both parties to the proceedings agree to the admission of the evidence; if the evidence is admitted temporarily on condition that the person who made the statement will come and testify at a later state; or if it is in the interest of justice for hearsay evidence to be admitted. Case law from South Africa shows that in the majority of the cases courts have admitted hearsay evidence on the ground that it is in the interest of justice to admit such evidence.[161]

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157 Id para 22.

158 See generally *Roberts v Additional Magistrate for the District of Johannesburg, Mr Van Den Berg and Another* 1999 (4) All SA 285 (A); *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC); *Harrington NO and Another v Transnet Limited t/a Metrorail and Others* 2010 (2) SA 479 (SCA).

159 Section 3(4) of the Act defines hearsay evidence to mean 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

160 In *Okoroafor* (n 97 above) para 26, the court held that '[w]hat does not sit comfortably with the provisions of the Refugees Act or the OAU Convention of 1969 is the notion that an individual immigration officer, appointed under the Immigration Act, or any other law enforcement officer, is entitled to decide, … that "there is reason to believe" that a foreigner is disqualified in terms of section 4(1)(b) of the Refugee Act, no matter what the strength of the evidence before him. The decision does not lie with him.'

161 A Paizes & DT Zeffertt *The South African Law of Evidence* 3 ed (2017) 399–474.

5 Conclusion

South Africa is home to thousands of asylum seekers and refugees. Their rights are governed by national legislation, which was enacted to give effect to South Africa's international human rights law obligations. Many South African courts have handed down judgments on, inter alia, the definition of a refugee, the rights of refugees and asylum seekers and the principle of non-refoulement. This contribution discussed the three grounds listed in section 4(1) of the Refugees Act on which a person may be excluded as a refugee. The link between section 4(1)(b) and section 2 of the Refugees Act embodying the principle of non-refoulement was also discussed.

The 2018 judgments of the Supreme Court of Appeal and the Constitutional Court in *Gavric v Refugee Status Determination Officer, Cape Town and Others* that clarified the practical implementation of section 4(1)(b) and its relationship with sections 2 and 3, formed the bulk of the discussion. In particular, the Constitutional Court's judgment was analysed and it was recommended that the Constitutional Court should clarify the issue of the admissibility of foreign convictions in South Africa. Suggestions were made as to how this matter could be approached, with reference to the jurisprudence of foreign jurisdictions.