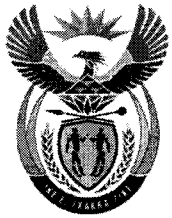

Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

"REPORTABLE"

In the matter between:

CASE NO : A138/2012

DOBROSAV GAVRIC Appellant

and

THE STATE Respondent

Coram	:	**Stelzner, AJ**
Judgment by	:	**Stelzner, AJ**
For the Appellant	:	**Adv. P.F. Mihalik** 021-424 5617 **Adv. J.Nortjé** 021-424 5783
Instructed by	:	JC Smuts Abrahams & Gross Inc 1st Floor 56 Shortmarket Street Cape Town 021-422 1323
For the Respondent	:	**Adv. D. Damerell**
Instructed by	:	The Director of Public Prosecutions

115 Buitenkant Street
Cape Town

Date(s) of Hearing	:	**16 + 17 May 2012**
Judgment delivered on	:	**23 May 2012**

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: A138 / 2012

In the matter between :

DOBROSAV GAVRIC **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Stelzner, AJ

Introduction

1. This is an appeal in terms of section 65 of the Criminal Procedure Act, No 51 of 1977 (the CPA) against the refusal of bail by the Magistrate's Court, Cape Town.

2. The appellant, a 38 year old Serbian national, was arrested on 27 December 2011 in terms of section 5(1)(b) of the Extradition Act, No 67 of 1962 read with section 43 of the CPA.

3. The arrest was preceded by a request for his provisional arrest in terms of section 4 of the Extradition Act and Article 16 of the European Convention on Extradition to which the Government of the Republic of South Africa and the Government of the Republic of Serbia are signatories and a warrant for his arrest on this charge, which was issued on 26 December 2011.

4. The appellant had been in the country under an assumed name since 2007 at the time of his arrest, having fled Serbia via Italy under this name on a false Bosnia – Herzegovinan passport, for Ecuador where he lived for a year before moving to Cape Town with his wife and two children. He was convicted in Serbia on three counts of aggravated murder but fled before sentence. He was sentenced in absentia to 35 years imprisonment.

5. The appellant's real identity was established by the authorities during or about 2011 after the appellant was shot, seriously injured and hospitalized in a drive by shooting. His fellow occupant of the vehicle in which they were travelling at the time, Cyril Beeka, was killed in the shooting. Some cocaine was found in the vehicle for which the appellant was subsequently

arrested and finger printed which resulted in his true identity being established and the extradition request.

6. The appellant was arrested on 27 December 2011 after his attorney was informed of the warrant and after he had handed himself over to the South African Police at Sea Point.

7. In the preceding nine months he had attended on the police on a number of occasions in order to :

a. give a witness statement in respect of the killing of Beeka at which time he was warned he could be arrested on a charge of possession of cocaine (during March 2011),

b. be arrested on the charge of cocaine (November 2011) and taken to the Magistrates' Court in Cape Town where bail (in respect of the arrest on the cocaine charge) was granted (and his Bosnian passport under the assumed name handed over to Captain Hendrikse, the investigating officer in the above matters),

c. provide Hendrikse with an affidavit setting out his true identity and explain why he had fled Serbia under the assumed identity - in essence because he feared he would be killed in prison once sentenced by supporters of one of his victims (23 December 2011).

8. The appellant applied for bail on 10 January 2012 after various appearances and postponements before a magistrate.

9. In the period between his arrest and the bail hearing he applied for asylum in terms of section 22 of the Refugees Act, No 130 of 1998. By the time judgment in the bail application was handed down he had obtained a temporary asylum seeker permit in terms of section 21 of the Refugees Act (on 30 January 2012).

10. On 3 February 2012 his bail application was refused and on 2 March 2012 an appeal to this court was noted. At issue in this appeal is whether the magistrate exercised his powers under section 9(2) of the Extradition Act correctly by refusing the appellant bail. [1]

11. Section 9(2) of the Extradition Act gives the magistrate the powers that he has at a preparatory examination including the power of admitting to bail

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[1] Although not relevant to the question whether the magistrate correctly refused bail (an issue to be decided on the facts before the magistrate at the time) since then the proceedings in terms of the Refugees Act have been ongoing and an outcome to the appellant's application for asylum is still awaited. The application has been processed up to the point where a Standing Committee of the Department of Home Affairs has reviewed the initial decision of the Department. The details and preliminary outcomes of these proceedings are not before this court.

any person detained in response to an extradition request. In terms of this section the magistrate may grant (or refuse) bail pending the enquiry. [2]

12. In terms of section 65(4) of the CPA the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given. [3]

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[2] Section 9(2) of the Extradition Act – "... *the magistrate holding the enquiry (under section 9(1) for the extradition) shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.*" See **Ex parte Graham: In re USA v Graham 1987 (1) SA 368 WLD at 371A** Cf **Veenendal v Minister of Justice 1993 (1) SACR 154 (T) (1993 (2) SA 137)**

[3] Cf **S v Pothers and Others 2004 (2) SACR 242 (C)** The appellant relied on the principles in **S v Thornhill (2) 1998 (1) SACR 177** in motivating his argument that the magistrate had erred. Although an application for bail directly to the High Court pending an appeal to the SCA against an order of the High Court confirming (on appeal to it in terms of section 13 of the Extradition Act) a committal order of a magistrate in terms of section 10(1) of the Extradition Act, the general principles pertaining to the granting of bail in the context of an extradition application as set out in this judgment are of equal application in the current appeal.

Grounds of appeal

13. At the appeal hearing, Mr Mihalik who appeared for the appellant with Mr Nortjé grouped the various grounds of appeal into four categories of misdirection by the magistrate – as to onus, as to relevant factors which were ignored, as to not considering the imposition of stringent conditions and as to the implications of the Refugees Act on the application for bail. [4] Mr Nortjé dealt in argument (in reply) with the last category. They will be considered separately and in the same order although the argument of Mr Nortjé relates to a further factor which the appellant submits should have been considered (with the others) and given more weight to by the magistrate.

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[4] It is to be noted In respect of the last category of misdirections that this is not an application for the setting aside of the warrant of arrest by virtue of section 24(1) of the Refugees Act. The argument before the magistrate (and on appeal) was that the appellant's status as the holder of an asylum seeker permit was a further factor which the magistrate should have considered favourably and which should have resulted in the appellant being admitted to bail.

Onus

14. The appellant's first ground of appeal is that the magistrate erred in finding that the appellant had accepted that the onus was on him to show exceptional circumstances in terms of section 60(11)(a) of the CPA ("the first misdirection").

15. The appellant's right to argue the incidence of the onus at the end of the hearing was reserved at the time of his tendering evidence in the form of an affidavit by him. He offered to tender his evidence first on the grounds that this was without prejudice to his right to argue the incidence of onus at the end of the hearing.

16. The magistrate accordingly erred in stating at the commencement of his judgment that the appellant had accepted that the onus was on him to show exceptional circumstances which entitled him to be released on bail.

17. Insofar as the magistrate may have further decided (at first) that such an onus was indeed on the appellant, irrespective of the perceived acceptance thereof, he also erred. Nothing turns on this in the current appeal.

18. It is clear from the remainder of the judgment that the magistrate did not decide the application on the basis that the onus was on the appellant nor

did he refuse bail on the ground that no exceptional circumstances had been established by the appellant. [5]

19. The magistrate ultimately decided the application in terms of section 60(1) of the CPA read with section 60(4)(b). He concluded on his evaluation of the facts before him that it was not in the interests of justice to grant the appellant bail since he was a flight risk and, in the magistrate's view, would seek to avoid being extradited to Serbia by fleeing South Africa for some other country. In doing so he was satisfied that the State had proven the above on a balance of probabilities.

20. In this appeal Mr Damerrel for the State did not seek to argue that this application of the onus by the magistrate was wrong. In the circumstances whether the magistrate was correct in not applying section 60(11)(a) of the CPA in the proceedings before him need not be decided.

Factors

21. In exercising his powers under section 9(2) of the Extradition Act the magistrate was permitted to have regard to the factors listed in section 60

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[5] A section which were it to have found application in the present matter would have placed an onus on the appellant. See **S v Dhlamini, S v Dladla & Others, S v Joubert and S v Schietekat 1999 (2) SACR 51 (CC)** as to the purpose and constitutionality of the section.

of the CPA (for example in section 60(4) of the CPA) insofar as these factors were relevant to bail in the context of an arrest on an extradition request. [6] Many of the factors listed in section 60 do not apply to an arrest in response to an extradition request. [7] Some do. The magistrate was correctly guided by the relevant parts of the section.

22. In refusing bail the magistrate relied mainly on the ground in subsection 60(4)(b) of the CPA, that of the appellant being a flight risk in the sense that there was a likelihood that the appellant, if he were released on bail, would attempt to evade his extradition hearing, and if the extradition were to be ordered, his subsequent extradition - that he would flee from South Africa in order to avoid being extradited to Serbia .

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[6] Clearly not all the considerations listed in sub-sections 60(4) and (5) for example would apply to bail following on an extradition arrest and the extradition hearing thereafter. Certain of them need some adaptation to find application and others (for example the risk of interference with witnesses) are wholly inappropriate.

[7] See also section 58 of the CPA to a "charge" and "offence" and to the factors to be considered when extending bail "until sentence is imposed" which do not apply to the present matter. Section 60(1)(a) of the CPA refers to "an accused" who is in custody in respect of "an offence" being entitled to be released on bail at any stage preceding his or her "conviction" in respect of such offence, if the court is satisfied that the interests of justice so permit. Once again, this does not apply to an extradition arrest. It is clear that section 60 of the CPA was not drafted with extraditions in mind. "Extradition" is also not specifically mentioned in the schedule of offences to the CPA. Extradition is in any event not an offence.

23. In terms of section 60(6), in considering whether this ground had been established, the court was permitted to take into account the factors listed in the sub-section (with the necessary adaptation required by the fact that the admission to bail is in the context of an extradition arrest), namely -

(a) the emotional, family, community or occupational ties of the appellant to South Africa ;

(b) the assets held by the appellant and where such assets are situated;

(c) the means, and travel documents held by the appellant, which may enable him to leave the country;

(d) the extent, if any, to which the appellant can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he flee across the borders of the Republic in an attempt to evade his expedition hearing;

(f) the nature and the gravity of the charge on which the appellant's extradition has been requested;

(g) the strength of the case against the appellant and the incentive that he may in consequence have to attempt to evade his or her extradition;

(h) the nature and gravity of the punishment which is likely to be imposed should the appellant be extradited;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;

(j) any other factor which in the opinion of the court should be taken into account. [8]

24. In **S v Dhlamini, S v Dladla & Others, S v Joubert and S v Schietekat 1999 (2) SACR 51 (CC),** in the context of bail hearings in general, the Constitutional Court described these as "categories of factual findings" which could ground a conclusion that bail should be refused. Whether and to what extent any one or more of such pros and cons were found to exist and what weight each should be afforded, was left to the good judgment of the presiding judicial officer.

25. In making this judgment the principles in **S v Thornhill (2) 1998 (1) SACR 177 (C) at 180 – 182** needed to be kept in mind. '*In dealing with an application of this nature, it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. . . . The*

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[8] See also **S v Acheson 1991 (2) SA 805 (Nm)** at 822B - 823C,

presumption of innocence operates in favour of the applicant even where it is said that there is a strong prima facie case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the Court would be fully justified in refusing to allow him bail.'

26. See also **S v Essack 1965 (2) SA 161 (D) at 162C – E:** "*the ultimate enquiry in a bail application is whether it is in the interests of justice that bail be granted. In conducting this enquiry, the Court must have regard to all the relevant facts. Once the facts have been established, it is for the Court to decide where the interests of justice lie after having regard to all the relevant considerations.*"

27. As was further held in **S v Thornhill (2) 1998 (1) SACR 177 (C)** – "*The determination of the question whether the applicant for bail will abscond and forfeit bail essentially involves an enquiry into the probable future conduct of the applicant. This future conduct has to be determined on the basis of information relating, inter alia, to the applicant's past conduct. What has to be determined, therefore, is not a fact or a set of facts but merely a future prospect which is speculative in nature even though it is based on proven facts.* **Ellish en Andere v Prokureur-generaal, WPA 1994 (2) SACR 579 (W).** *While it is true that the applicant's statement on oath that he/she will not abscond must carry weight, it is not decisive. The*

reliability of such a statement must be assessed in the light of other established facts.

28. The appellant argued that in making his finding, the magistrate did not properly consider all the relevant facts and was selective in his analysis thereof - the magistrate, for example, attached insufficient weight to the fact that the appellant co-operated with the police over the period of 9 months between March and December 2012 referred to above, attending on them whenever requested to do so and ultimately handing himself over for arrest ("the second misdirection"). If he was a flight risk, he could have fled at any time during this period already, the argument proceeded.

29. The appellant was not co-operative throughout. When first asked as to his identity by the police he gave his assumed name. It was only after being legally represented that the appellant co-operated in the manner in which he did. Much of that which was done, including his application for asylum and the concomitant disclosures of his past, were described in argument by the State as having been opportunistic and raising more questions than providing answers. I agree. The State has had no opportunity of cross examining the appellant on his statements / affidavits and the extradition inquiry the State wished to hold has now been suspended by the appellant's application for interim refugee status. In the circumstances the appellant's co-operation and application for refugee status cannot be an overriding consideration.

30. The fact that the appellant did not flee during the past nine months (during which time he was at first suffering from his injuries in the shooting and then arrested on a charge of being in possession of a small quantity of cocaine, in respect of which arrest bail was granted and his false passport seized) does not obviate the risk of his fleeing in the future to avoid serving a lengthy prison sentence in Serbia on some other false passport (something which he did once before when he fled Serbia).

31. That the appellant is capable of travelling the world cannot be gainsaid. His original flight to Ecuador from Serbia via Italy on a false passport is but one example thereof. While living in South Africa he travelled on a number of occasions to Ecuador and to other South American countries, namely Peru and Cuba. His ability to do so once again, on some other false passport, should he be released on bail is apparent. That he has the financial means to do so is equally apparent given his local standard of living, his tender of being placed under house arrest with no need to make provision for hours of work and the non disclosure of his financial position. There is no evidence of any immovable property or fixed employment. His wife and children may be here (and the children may attend a local school), but this does not mean that they cannot be uprooted or follow him in due course should he leave.

32. The appellant is described in the application for his warrant of arrest as being a fugitive from justice. That is the basis on which his extradition was

requested and the grounds on which he was provisionally arrested. There is at least a factual presumption that a fugitive might flee and that he therefore must be kept in custody pending his surrender, should this be the outcome of the extradition proceedings. [9]

33. This is not to prejudge the outcome of the extradition proceedings. It is simply taking into account and attaching the necessary weight to the circumstances of the arrest.

34. In the circumstances the magistrate was not wrong in reaching his conclusion that the appellant posed a flight risk and refusing him bail on this ground.

Conditions

35. The magistrate, according to the appellant, further failed to properly consider imposing stringent bail conditions which would have addressed and eliminated any perceived flight risk ("the third misdirection"). [10]

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[9] See **Ex parte Graham supra** at 371E – F. In **R v Spilsbury [1898] 2 QB 615** and **R v Blumenthal 1924 TPD 358** (referred to with approval in **Ex parte Graham supra** at 371B - C) the courts held that the power to grant bail should in extradition matters be exercised sparingly.

[10] In terms of section 60(12) the court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

36. Given the range of possible conditions which could have been imposed which would in combination have obviated or ameliorated any flight risk (ranging from technological innovations such as computer chips / tracking devices and stringent reporting / house arrest conditions), the magistrate erred, according to the appellant, by rejecting them all out of hand without proper consideration.

37. If the magistrate was uncertain as to the efficacy, practicability and enforceability of any condition, for example house arrest, the argument proceeded, it was open to the magistrate (and it is now open to this court) to obtain a report from a correctional supervision officer in this regard. [11]

38. Appellant relied on the unreported judgment of this court per Dolamo AJ in **S v Russol WCHC Case No A187 / 2012** to motivate house arrest and reporting three times a day to a local police station as being some of the conditions which could and should be imposed in the present matter.

39. The State argues that any condition imposed will be difficult to enforce, readily circumvented and will not eliminate the risk of the appellant fleeing.

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[11] In terms of section 60(3) if the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

Given his history of fleeing Serbia once before, having been released on bail pending sentence, [12] and the severity of the charges he has been convicted on and sentenced for, the magistrate was correct in refusing bail outright and not imposing conditions without further investigation.

40. Bail conditions should be in the interests of justice and practically feasible. [13] The **Russol** judgment is distinguishable from the present matter on the facts. The charges in **Russol** were those of extortion and similar charges committed locally, the accused in that matter still has to stand trial on the charges, he is a South African resident with a fixed address. His circumstances are entirely different to those of the appellant. In that matter the bail conditions imposed were considered to be in the interests of justice and practically feasible. The imposition of similar conditions in the present matter would not be in the interests of justice given the appellant's prima facie status as a fugitive from justice and the real risk of

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[12] The exact manner and circumstances in which this was done remain unclear. The terms of his release pending sentence, the extent of the bail and the conditions which were set at the time, have not been disclosed by the appellant. Had they been or had the Serbian Government been joined as a party to the bail proceedings before the magistrate, the court would have had a better idea of the sum of bail, if any, the appellant was prepared to forfeit once before, and the conditions, if any, the appellant had previously been able to circumvent. In the absence of this information the fact remains – the appellant was able to flee from Serbia in the period between his conviction and sentence.

[13] **R v Fourie 1947 (2) SA 574 (O) at 577**

the appellant fleeing the Republic to evade possible extradition in the future to Serbia. History has proven that the appellant was after being released on bail, able to flee, has done so in the past and has every reason and ability to do so in the future. This would appear to be possible irrespective of the conditions imposed on him.

41. The present matter is not a case where the court does not have reliable or sufficient information or evidence at its disposal or lacks certain important information to reach a decision on the bail application and therefore requires the input of a correctional supervision report.

42. This is a case where history has shown the risk of flight to be so real that the magistrate was correct in deciding that the appellant was not to be admitted on bail, on any condition.

Refugees Act

43. The "fourth misdirection" relied on by the appellant was that the magistrate did not appreciate both the legal effect and factual implications of the appellant's application for refugee status under section 21(1) of the Refugees Act, both on the extradition proceedings and on the application for bail.

44. His application for refugee status, it was submitted, was an important factor which the magistrate overlooked. Given in particular the provisions

of section 21(4) of the Refugees Act the application for asylum should have resulted in the appellant being permitted to bail (at least pending the final determination of proceedings under the Refugees Act).[14]

45. Should the appellant be granted refugee status the extradition proceedings would be terminated. Should the appellant be unsuccessful in his application, an internal appeal and thereafter a review to the High Court and further appeals may follow, before the process in terms of the Refugees Act is exhausted. Pending all of this, the appellant argues further, he has every incentive to remain in the country and should therefore have been granted bail.[15]

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[14] In terms Section 21(4) of the Refugees Act "*Notwithstanding any law to the contrary, no proceedings may be .... continued against any person in respect of his or her unlawful entry into or presence within the Republic if - (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4.*"

[15] It is noted, once again, that there is no application for the appellant's release from arrest on this ground nor is this an application for the setting aside of the warrant of arrest on this ground. It is presented as a factor to which more weight should have been given in the bail application.

46. The appellant's arrest was in response to and as a result of an extradition request. It was a provisional arrest pending the filing of an extradition application from Serbia. [16]

47. The appellant was not arrested in terms of the Refugees Act nor had he applied for this status at the time of his arrest although he had indicated he was in the process of doing so (hence the affidavit referred to above in paragraph 7(c) of this judgment).

48. It is clear that it was the prospect of arrest (on the extradition request) which precipitated the application for asylum. Since 2007 no such application has been made. Counsel for the appellant, Adv Mihalik, described the belated application as being pro-active.

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[16] Although the point was argued before the magistrate that no extradition application had been filed at the time of the bail hearing on 10 and 11 January 2012 (as opposed to an extradition request) and in terms of article 16(4) of the European Convention on Extradition Paris 13.XIL.1957 provisional arrest may be terminated if within a period of 18 days after arrest the "requested Party" had not received the request for extradition and certain prescribed documents, no application was brought for the setting aside of the warrant and the arrest on this basis. Instead the point which was argued on appeal, and not too vigorously, was that this delay was only a factor which should have been taken into account in granting the appellant bail. The quoted part of the article is directory not mandatory, the same article permits a maximum of 40 days from the date of the arrest for the bringing of the application and the appellant's main argument was that his temporary asylum seeker permit had suspended the extradition proceedings.

49. The appellant placed much reliance on **Bula and others v Minister of Home Affairs and others (589/11) [2011] ZASCA 209** (29 November 2011), not in order to argue that the section is a bar to his being held in custody pending the outcome of the asylum and extradition applications, but in order to show the importance of his status as the holder of an interim permit.

50. Given these rights and the importance for the appellant to obtain the status he has applied for, it is argued, the appellant has every incentive to remain in the Republic in order to participate in this process and see it through to completion.

51. It is only when the application is refused and the extradition proceedings recommence that the appellant would have an incentive to flee the country. In the intervening period the appellant claims he should have been released on bail.

52. His status as asylum seeker permit holder, it is claimed, is furthermore a factor meriting special consideration and treatment of the appellant

53. In **Bula,** the SCA per Navsa JA held that the purpose of Regulation 2(2) under the Refugees Act (which was clearly also to give effect to the purpose of the Refugees Act itself), was to ensure that where a foreign national indicates an intention to apply for asylum, the regulatory

framework of the Refugees Act kicks in ultimately to ensure that genuine asylum seekers are not turned away.

54. In terms of section 21(2) of the Refugees Act the Refugee Reception Officer concerned must accept the application form from an applicant for asylum. Similarly in terms of section 22 the Refugee Reception Officer must, pending the outcome of an application in terms of section 21 (1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

55. The granting of this permit is therefore not an indication that the application is genuine nor does it reflect on the appellant's prospects of succeeding with the application. It is a peremptory provision which the Refugee Reception Officer must comply with.

56. The Department may in terms of section 22(6) at any time withdraw an asylum seeker permit if - ... *(b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or (c) the application for asylum has been rejected; or (d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5 of the Refugees Act.*

57. An '*abusive application for asylum'* is defined in section 1 of the Refugees Act to include an application for asylum made with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof.

58. A '*manifestly unfounded application*' is defined to mean an application for asylum made on grounds other than those on which such an application may be made under this Act.

59. In terms of section 4 of the Extradition Act a person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment.[17]

60. All of these possibilities present themselves in which event the appellant would have every reason to flee the country in order to escape being extradited.

61. Section 23 provides for the detention of an asylum seeker - *if the Department has withdrawn an asylum seeker permit in terms of section 22 (6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalization of the application for asylum.*

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[17] See **Abdi and Another v Minister Of Home Affairs And Others 2011 (3) SA 37 (SCA)** for similar provisions in international instruments

62. Without prejudging the application, these sections of the Refugees Act reveal that applicants for refugee status do not have unqualified protection against arrest and face the prospect of their applications not succeeding and their being arrested, in which event, were it not for a pre-existing extradition application, they could be deported in terms of the Refugees Act.

63. Given this general possibility (and apart from the fact of the co-existing extradition request) there would accordingly still be an incentive for the appellant to flee the Republic rather than await the outcome of his application for asylum.

64. There is therefore, notionally at least, as great a possibility of the application being rejected as its succeeding. The appellant has not shown that he has good prospects of succeeding therewith. On the contrary the appellant argues that the court should not engage in this enquiry and pre-judge the application.

65. The result is that the mere bringing of the application for asylum status cannot be an overriding factor in determining whether bail should be granted. Nor should the appellant be given special treatment simply as a result thereof.

66. The timing of the application, on the eve of his arrest on the extradition request, having been in the country for some 5 years prior to that without making such an application, suggests it was indeed an opportunistic ploy aimed at strengthening his position in the application for bail.

67. The explanation provided for the application not having brought earlier, namely that the appellant feared for his safety (in South Africa) should his true identity have become known, is unconvincing. In terms of the Refugees Act these applications are firstly required to be kept confidential. According to the appellant his enemies are in Serbia. If he wished to be safe from them he would have had every incentive to avoid being deported and applying for refugee status at the first possible opportunity in South Africa on a confidential basis.

68. If the appellant feared for his safety in South Africa should his identity have been disclosed, this would be a further incentive for fleeing the Republic, now that his true identity has been revealed.

69. It was decided in **Bula,** at para [73], that a decision on the bona fides of an application in terms of s 21 of the Refugees Act is not made upfront. This relates to the role of the Refugee Reception Officer in processing such applications and the Court's role in that process.

70. This does not mean that a court in a matter such as the present, in considering whether bail should be awarded, is precluded from taking into consideration the timing and nature of the application for asylum when deciding whether an applicant for refugee status should be granted bail on an arrest following on an extradition request.

71. The appellant placed further reliance on **Bula** at paras [74] – [78] to argue that he should have been admitted to bail since "*in terms of s 22 of the Refugees Act an asylum seeker has the protection of the law pending the determination of his application for asylum. To that end he or she is entitled to an asylum seeker permit entitling a sojourn in South Africa. ... it is for the RSDO (Refugee Status Determination Officer) and the RSDO alone to grant or reject an application for asylum ....*".

72. That may be so, but it was for the magistrate to decide whether the appellant should be permitted to bail having been arrested on an extradition request. It was not argued that section 22 of the Refugees Act removed the magistrate's powers in terms of section 9(2) of the Extradition Act. On the contrary his powers under this section were conceded.

73. The conclusion reached in **Bula** at para [80] that "*once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum seeker is entitled as of right to be set free subject to the provisions of the Act*" refers to

proceedings under that Act, the Refugees Act, not to proceedings under section 9(2) of the Extradition Act or section 60 of the CPA.

74. An argument to the effect that bail should be awarded to the appellant on this ground alone, ignoring other compelling grounds for refusing bail, cannot be sustained. All relevant factors need to be considered.

75. If the appellant were to be granted refugee status the State would be precluded from proceeding with the extradition enquiry, but at present, while the application for asylum is still pending, the State is entitled to keep the appellant in custody until such time as he is admitted to bail. The appellant does not argue for a different conclusion.

76. Section 21(4) in any event provides for the suspension of proceedings. It does provide for the setting aside of proceedings [18] which have already started but have not been completed - the extradition proceedings may therefore merely not be "*continued*" "*until a decision has been made*".

77. Accordingly, should a decision be made refusing the appellant refugee status, the extradition proceedings would continue.

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[18] And any arrests relating thereto, which may not even constitute "proceedings" within the meaning of the Refugees Act.

78. In order to ensure the appellant's presence at these proceedings, should and once they continue, the State wishes to continue detaining the appellant. The appellant does not argue that it has no right to do so.

79. Had it done so it may have been necessary to consider section 2 of the Refugees Act, which as with section 24(1), commences with "*Notwithstanding any provisions of this Act or any other law to the contrary*" and provides inter alia that "*no person may be ... extradited or returned to any other country or be subject to any similar measure ...*".

80. That would have called for an analysis of whether the appellant's arrest is "*a similar measure*" within the meaning of that section or a preliminary process in the extradition proceedings, which process has been suspended, and an interpretation of "*proceedings*" and the Afrikaans "*geregtelike stappe*" in section 21(4) of the Refugees Act.[19] It would also have required consideration of the question whether section 21(4) of the Refugees Act conflicts with section 9(2) of the Extradition Act to the extent of their being repugnant to each other or whether they complement each

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[19] In which regard would inter alia have had to be had to **S v Swanepoel 1979 (1) SA 478 A at 488 – 489**, the difference between "procedures" and "proceedings", Du Toit et al's use of the word "procedure" to refer to provisional extradition arrests in Commentary on the Criminal Procedure Act App B17 – B18, and **R v Shoolman 1937 CPD 183 at 186 – 7** in the event of there being an absurdity.

other, forming one system and reinforcing one another, in which event they would need to be harmonized where possible. [20]

81. It is only where there is a direct contradiction, incapable of harmonization, that the issue whether priority should be given to the Refugees Act above the Extradition Act (because of the qualification "*notwithstanding any other law*" in sections 2 and 24(1) of the Refugees Act) would need to be determined.[21]

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[20] **Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd 1990 (4) SA 196 (C) at 204H - I; R v Maseti and Others 1958 (4) SA 52 (E) at 53H; Nkabinde v Nkabinde and Nkabinde 1944 WLD 112 at 122; Johannesburg City Council v Makaya 1945 AD 252 at 257 and 259; Chotabhai v Union Government and Another 1911 AD 13; Mankayi v AngloGold Ashanti Ltd 2010 (5) SA 137 (SCA) ([2010] 3 All SA 606)** reversed on appeal in **Mankayi v AngloGold Ashanti Ltd 2011 (3) SA 237 (CC) (2011 (5) BCLR 453,** in respect of the application of the principle to the legislation in question. See also section 6(1)(e) of the Refugees Act.

[21] In which event regard could be had to **Baron & Jester v Eastern Metropolitan Local Council 2002 (2) SA 248 (W), Transnamib Ltd v Poolman & others (2000) 5 LLD 334 (NmS)**

82. It was however not argued before me that the bail provision in section 9(2) of the Extradition Act stands in direct conflict with the Refugees Act and these issues need therefore not be decided.

83. It was accepted that the magistrate could consider whether the appellant, an applicant for refugee status, should be admitted to bail by applying the ordinary principles applicable to such a bail application.

84. Such an enquiry is different to whether the applicant is indeed to be granted asylum / refugee status and can be conducted in harmony with the provisions of the Refugees Act without the magistrate encroaching on the relevant officials' areas of responsibility and decision making and without the magistrate pre-judging the merits or demerits of the application for refugee status. This would include considering additional factors such as the strength of the extradition case against the appellant (notwithstanding its having been suspended pending the application for refugee status), how severe the punishment is likely to be if he is extradited (should the application for refugee status / asylum be dismissed) and how much inducement there would therefore be for him to avoid being extradited. It was in this context that the magistrate concluded that there was a real risk that the appellant would flee to escape extradition. There was in my view nothing wrong in that.

85. The final consideration which the appellant argues should be taken into account is the prejudice to him should he be kept in custody pending the outcome of the various applications under the Refugees Act which could take many years at the end of which he may be granted refugee status which would terminate any extradition proceedings.

86. This would involve an examination of a number of issues which were either not placed before the magistrate or are at this stage not capable of determination - such as the duration of these proceedings, whether the period of past incarceration has been excessively long, the cause of any delay in the completion of these proceedings, whether or not the appellant is partially or wholly to be blamed for any delay, the extent to which he might be prejudiced in engaging legal assistance in effectively preparing for these applications if he remains in custody.

87. A court can weigh these considerations up against the flight risk in due course should they ever present themselves. At present they cannot be evaluated.

Conclusion

88. In the present matter the risk of the appellant fleeing and evading his extradition hearing was the primary issue.

89. In the final analysis the magistrate carefully assessed and weighed the relevant factors and reached the correct conclusion. The magistrate was therefore not wrong in not admitting the appellant to bail.

90. The appeal against the refusal of bail is accordingly dismissed.

91. This conclusion makes it unnecessary to decide a point of non-joinder which would otherwise have been important. In **Ex parte Graham** supra at 374C the court, per Harms J (as he then was), held that it cannot consider (granting) bail in the absence of notice to the country which requested the extradition given its direct interest in the outcome of such proceedings. Had the preliminary conclusion in this appeal been different, the appeal proceedings may have had to be adjourned in order for the Government of the Republic of Serbia to be joined.

Stelzner AJ

Acting Judge of the High Court

23 May 2012