Republic of South Africa
In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

CASE NO: **3474/13**

In the matter between:

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

JUDGMENT DELIVERED ON 6 APRIL 2016

MANTAME, J

A INTRODUCTION

[1] Applicant brought an application to review and set aside the decision of the first respondent of 19 November 2012, to reject the applicant's application for refugee status. Applicant contends that his exclusion in terms of Section 4(1)(b) of the Refugees Act 130 of 1998 ("*the Act*") should be declared to be unlawful, inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996, ("*the Constitution*") and invalid; that applicant is declared to be a refugee who is entitled to asylum in South Africa as contemplated by Sections 2 and 3 of the Act; and that Section 4(1)(b) of the Act is declared to be inconsistent with the Constitution and invalid; and that this Court declares that the respondents may not extradite, deport, or otherwise return, or compel the return of the applicant to the Republic of Serbia with ancillary relief.

[2] After the respondents furnished the Rule 53 record, applicant's grounds for review were amplified to include further, that first respondent failed to take into account the extensive documentation, and more pertinently, the material facts contained therein that applicant provided to first respondent at his interview on 25 September 2012. The decision of the first respondent to exclude applicant from refugee status in terms of Section 4(1) (b) of the Act is made in ignorance of the true facts of applicant's case, and that such actions are unlawful; and furthermore, in making this exclusion decision, first respondent, did not act in terms of Section 24(3) of the Act, as this Section limits and constrains the powers of first respondent when adjudicating applications for refugee status. In so doing, first respondent acted *ultra vires*, unlawfully, and unconstitutionally, and therefore, falls to be reviewed and set aside.

[3] Applicant was represented by Adv Anton Katz SC, and Adv David Simonsz. The respondents were represented by Adv Anwar Albertus SC, and Adv Gregory Papier.

B BACKGROUND FACTS

[4] Applicant, Mr Dobrosa Gavrić was born in Loznica in the Republic of Serbia on 17 March 1976. He is a Serbian national who is seeking refugee status, or similar protection in South Africa. Applicant contended that on 19 November 2012, the first respondent excluded him from refugee status in terms of Section 4(1) (b) of the Act, and according to the applicant, he falls within the definition of "*refugee*" in Section 3 of the Act and should be granted such a permit in terms of Section 24 of the Act.

[5] Applicant is a married man with two (2) minor children aged, seven and five. His family home is in Tokai, Cape Town, but currently he is detained at Goodwood Prison since 27 December 2011.

[6] Prior to proceeding to the Republic of South Africa, he studied in Serbia and qualified as a police officer. He later on joined the Serbian Police Force, and worked with the Serbian Special Forces where he was assigned to the Serbian Crime Prevention Unit, which performed duties like crowd control as well as providing special protection to VIP's. Applicant was not a member of any political party, nor was he convicted of any violent criminal acts at the time.

[7] During 1990's, the Republic of Yugoslavia was embroiled in a series of terrible internal revolts, ethnic conflicts and wars. The instigator of the wars was Serbian President Slobodan Milošević ("*Milošević*") who rose to power in the 1980's on the basis of populism and extreme Serb nationalism. During his tenure, he brought all organs of state under his control, weakened the rule of law and eroded human rights, and he increasingly allowed corruption and violence to become a part of governance. Milošević then used a variety of underhanded methods to coerce non-Serbs to flee from their homes, including the use of paramilitary groups to commit atrocities. The most feared and famous of these paramilitary groups was Arkan's Tigers – whose commander was Željko "*Arkan*" Ražnatović.

[8] The atrocities and ethnic cleansing that were being committed, often against innocent civilians, were so egregious that the United Nation ("*UN*") and North Atlantic

Treaty Organisation ("*NATO*") were forced to intervene with peacekeeping efforts. After the war, the International Criminal Tribunal for Yugoslavia ('*ICTY*") was established in the Hague by the UN Security Council under Chapter VII of the UN Charter, in order to bring those guilty of war crimes, crimes against humanity, and genocide to justice. Among those indicted by the ICTY was Željko Ražnatović known as "*Arkan*" and leader of the paramilitary group "*Arkan Tigers.*" As he commanded this group, he made hundreds if not thousands of paramilitary soldiers rich. Whilst he was not a military man, he was a career criminal who committed crimes all across Europe. These crimes ranged from murder and robberies. He rose to prominence in Serbia, partly as a result of his links to Milošević who needed someone like Arkan to carry out the ethnic cleansing operations which could not be performed by ordinary soldiers.

[9] Applicant personally attested to the close links and or relationship between Arkan and Milošević as he was posted to Pajzos in Croatia during the wars, and Arkan's Tigers were based nearby in Erdut. It was common sight to the applicant to see the Arkan's Tigers arrive at their camp to collect weapons and ammunition for their operations.

[10] After the war, Arkan transformed from being a paramilitary leader to being a powerful underworld figure. Although he was indicted for war crimes, many people in Serbia admired him and regarded him as defender of Serbian people. He was a very powerful and feared man as he amassed a large personal fortune in the war. He owned a number of businesses, football clubs, he started a political party and he married a popular Serbian singer known as Ceca.

[11] Arkan was assassinated on 15 January 2000, in the lobby of Belgrade Intercontinental Hotel. The applicant was present when that happened. Although he was the main suspect, he did not kill Arkan. He had come to Belgrade to meet some friends, celebrate the New Year on 13 January, in the Orthodox calendar and relax for a few days, as it was the turn of the millennium. He arrived at the hotel and was meeting a friend, Djuricić Milan. There was nothing unusual in their presence there. The lobby was a very large area with different restaurants and bars. These all opened up in the same area. He went there to socialise with friends as it was one of

the decent places in Belgrade after the war. There were a large number of people in the lobby. While waiting for his friend, he remembered seeing Arkan in the lobby – but not near to him. He had no interest in him and simply ignored him. He was not armed and he drove to the hotel in his own car.

[12] Applicant first knew of the assassination when he heard the gunshots. He was not looking at the direction of the gunshots, and cannot say what exactly happened to Arkan. His only goal like everyone else's in the lobby was to get away as far as possible from the gunshots. Applicant remembered rolling and ducking down to his right side and wanted to reach the exit which was nearby. He immediately got up and started running towards it. As he was running towards the door, he was hit in the back by a stray bullet. The bullet pierced his spine causing serious injury. He had no idea who fired the shot. To this day, he walks with crutches and a pronounced limp. During this incident, he was spotted by his friend, Milan with few other friends who put him in his car and took him to hospital in Loznica. On arrival in hospital he lost consciousness due to shock and blood loss.

[13] When he woke up, he was under a heavy police guard. They told him that he was not under arrest, but they were protecting him. At that time, no one knew who killed Arkan. Rumours about his death had created chaos. The local police knew that he was a wounded officer arriving from the scene of Arkan's assassination; hence he was heavily guarded until his fate was clear. He was thereafter transferred to a military hospital in Belgrade, and thereafter to prison when he was healthier.

[14] According to applicant, he was not immediately charged with the murder of Arkan. A few months passed before it became clear that he was the prime suspect. He consistently stated that he was completely innocent of any involvement in the assassination of Arkan. However, there was a lot of pressure on the police to produce a suspect in Arkan's assassination. It was only sometime later that he was charged with Arkan's murder.

[15] It is applicant's version that he did not know Arkan; he had no motive to kill him and did not kill him. Although he knew him to be a powerful and dangerous man in Serbia, applicant and Arkan moved in entirely different circles and had no

connection whatsoever. As such, there is no reason for him to have attempted to assassinate him in public, when he would have nothing to gain and would almost certainly be killed, or imprisoned even if he succeeded. According to applicant, the only person with the power to assassinate a man like Arkan and with a motive to do so was President Slobodan Milošević. He was known to be willing and able to assassinate opponents. By 2000, NATO forces had defeated Milošević, and the atrocities committed during his time in office were being investigated. It was expected that an indictment from the International Criminal Court accusing Milošević of war crimes and / or genocide be received. This increased pressure on Milošević. The investigation would require a high profile witness who could personally testify to Milošević's knowledge and approval of the atrocities committed during the war. In this regard, Arkan was the obvious choice. For this reason, it was widely believed that it was Milošević who ordered Arkan's assassination, in an attempt to hide Milošević's own criminal involvement during the wars.

[16] It is applicant's contention that when he was first tried, the Supreme Court of Serbia found that there was insufficient evidence to convict him. He had no motive or relation to Arkan, he was not armed, and could not be identified by anyone as a shooter. The Supreme Court referred the matter back to the Belgrade district court for new trial. According to applicant the evidence against him was amplified, and the evidence for him was weakened in various ways. Ultimately he was convicted on 9 October 2008.

[17] Prior to conviction, for the first three (3) years of his trial, he was kept in solitary confinement in prison. This was for his sole protection, as it was accepted by all parties that if he was put with the general prison population, which included many of Arkan's associates he would be killed. However, Serbian law limits an awaiting trial imprisonment to three (3) years. After the expiry of three (3) years he was released in prison and moved back to Loznica and took a job with his father. Besides, he continued to attend trial as and when the matter was set down for hearing. Even after his release from prison he asserts that he and his family were not safe. As Loznica is a relatively small town, he was often warned by people and friends to avoid certain places, as dangerous men had been seen waiting for him. He would receive anonymous threats and would constantly be on guard. He

managed to avoid certain areas without a risk of losing his job, as he was working for his father. Further, whenever he travelled to Belgrade to attend trial, or for any other reason, he would be accompanied by six (6) to seven (7) friends or former police colleagues fully armed for his protection.

[18] According to applicant, by 2006, it became clear that Arkan's allies wanted to kill him. It was not safe in Loznica, and it became increasingly clear that evidence was being manufactured to secure his conviction and imprisonment. Once imprisoned, he would fall victim to Arkan's former comrades. He had no choice but to flee Serbia.

[19] Applicant obtained a passport from Bosnia and Herzegovina in the name of Sasa Kovacević, and fled via Croatia, Italy, Cuba and to Ecuador. He stayed there for almost a year. In 2007, he travelled to South Africa, to his intended destination. Upon arrival in South Africa, he kept using the *alias* of Sasa Kovacević. Applicant did not reveal his true identity. He came to South Africa on a three (3) month visitor's visa, and thereafter fetched, or invited his wife and two (2) daughters to join him in South Africa. His reasons for concealing his true identity were that he was afraid that as soon as his whereabouts became public knowledge he and his family would be targeted, as he is a fugitive, suspected of killing one of the most infamous men in Europe. If he were to be sent back to Serbia, Arkan's comrades would kill him as they have done to all those suspected of killing Arkan. In fact, he was wrongly convicted of the murder of Arkan, immediately after he fled Serbia.

[20] Applicant's true identity as a fugitive from justice came to the fore after being a victim, and witness in a shooting incident involving one Cyril Beeka on the evening of 21 March 2011. He was arrested and charged with unlawful possession of 9.524 grams of cocaine, fraud – related to him having obtained a driver's licence, passport and a firearm licence, all under the false name of Sasa Kovacević. Subsequent thereto, applicant was detained on 27 December 2011. Pursuant to the information supplied by INTERPOL - Pretoria, advising about the arrest of applicant, the Republic of Serbia, Ministry of Justice dispatched a request for extradition to Serbia of applicant to the Ministry of Justice of the Republic of South Africa on 29 December 2011.

[21] Applicant is currently in custody pending the finalisation of the criminal charges, his extradition to Serbia, and more importantly this review application.

C ISSUES TO BE DECIDED

[22] This Court is now called upon to decide this review application based on applicant's grounds for review provided – whether procedural, or substantive in nature; the facts provided whether they justify the relief sought; the legal framework supports the relief sought, i.e. the Refugees Act read with its regulations; the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*"), the Constitution of the Republic of South Africa, the list of authorities cited, and the applicable international instruments. Whether the relief sought by applicant is legal and justifiable in the circumstances; and, or whether the legal framework pass the Constitutional muster as contended by the applicant.

D SUBMISSIONS BY THE PARTIES

[23] Applicant submitted that he is entitled to protection by this country under the Refugees Act, as he was wrongly convicted in Serbia of assassinating the infamous warlord and gangster Željko Ražnatović commonly known as Arkan. Applicant fled to South Africa and applied for asylum on the basis that he is falsely imputed to be a member of the social and / or political group that orchestrated Arkan's assassination. If he is returned to Serbia, Arkan's allies will have him killed as they have killed many others suspected of involvement in Arkan's death.

[24] Applicant's asylum application was refused by the first respondent on the basis that he is excluded in terms of Section 4(1)(b) of the Act from being protected as a refugee because he committed a non-political crime. According to applicant excluding him from refugee status is not the same as refusing his refugee application. A person whose application is refused has been found by a Refugee Status Determination Officer ("RSDO") to have no well-grounded fear of persecution. Such application is rejected on merits.

[25] In considering this application, firstly, respondent committed a wide variety of procedural and substantive errors in making the exclusion decision. Even if applicant is thought to have assassinated Arkan, it would have been a political crime. The RSDO failed to consider relevant documentation, and was biased against the applicant. As a result, applicant seeks to be declared a refugee in terms of the Act, as there is a compelling evidence that he will be killed due to his imputed political opinion if he returns to Serbia.

[26] Further, applicant seeks to declare section 4(1)(b) of the Act to be inconsistent with the Constitution and therefore invalid. As this section stands, it allows foreigners to be sent back to their home countries to face death, torture, rape and / or other forms of unacceptable and unconstitutional persecution on the sole basis that they committed a non-political crime. Applicant submitted that this is inconsistent with South Africa's own jurisprudence in terms of which foreign criminals will never be extradited to face the death penalty, no matter their crime. In the alternative, applicant seeks that even if he cannot be recognised as a refugee, that he nevertheless may not be returned to Serbia due to the risk to his life. Even if the Act does not extend to protecting the applicant from being returned to Serbia, the Constitution grants him such protection.

[27] This application was opposed by the respondents on the basis that currently, South Africa is sitting with a very large number of asylum seekers. In the context of this case, it is of utmost importance to ensure that the refugee system is not exploited by people wishing to avoid responsibility and punishment for crimes committed by them in their country of origin. Respondents contended that applicant was rightfully excluded for refugee status as there was reason to believe that he committed a non-political crime which is murder, in Serbia. Such crime is punishable in South Africa.

[28] It was respondent's argument that all applications for asylum are considered in terms of Section 3 of the Act, which provides that subject to an application for asylum being made under sections 21 to 24 of the Act;-

"a person qualifies for refugee status for the purposes of this Act if that person-

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it, or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part of 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 refugee elsewhere; or

(c) is a dependent of a person contemplated in paragraphs (a) or (b)."

First respondent considered applicant's application in terms of this aforementioned section before moving over to Section 4(1)(b) of the Act, which pertinently provides that one of the grounds disqualifying a person from being given refugee status is, where there is reason to believe that such person "*has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment.*" On the strength of the facts where first respondent concludes that Section 4(1)(b) of the Act is to be applied, the provisions of Section 24(3) of the Act do not apply, as the RSDO is not required to consider the application for asylum under the provisions of Sections 21 to 24 of the Act. In coming to her decision, first respondent took into account the facts gathered from the interview she had with the applicant and his legal representative, Advocate Simonsz. The documentation that was provided by the applicant, the judgment of the Serbian District Court sitting in Belgrade, which sets out exhaustively the reasons for its conviction of the applicant, as well as the reasons for its imposition of a term of imprisonment of thirty (30) years on him; and the judgment of the Serbian Supreme Court, which not only confirmed

the District Court's conviction but which also increased the applicant's sentence to thirty five (35) years imprisonment. According to respondent's Counsel, the argument by applicant that excluding the applicant from refugee status is not the same as refusing his refugee application has to be rejected.

[29] According to the respondents, the documents furnished by applicant, were considered by first respondent and demonstrated according to applicant's assertions that he was falsely implicated in the murder of Arkan; he was wrongly convicted; the Judge who presided over his trial, and who had sentenced him to thirty (30) years imprisonment had borrowed money from Dusan Spasojević, who was once a leader of the Zemun Clan, and a criminal organisation; he was wrongly implicated in the murder of Arkan – an indicted war criminal with strong criminal connections – he feared that Arkan's criminal associates would avenge his death by killing him whether in or out of prison; he did not disclose his true identity upon his arrival in South Africa because he was afraid that he and his family would be targeted if his identity and whereabouts became public knowledge; a number of people who were suspected of being associated with the assassination of Arkan, had already been murdered; and he was unable and unwilling to avail himself of his country's protection. With such information before her, she was capable of weighing all the issues and reaching a conclusion.

[30] So, all what was required from first respondent was to consider all these documents and thereafter make a finding. In this case, it was in terms of Section 4(1)(b) of the Act. This Court has no justifiable reason to interfere with first respondent's decision – ***In Pharmaceutical Manufacturers Association of South Africa – in re Ex Parte President of the Republic of South Africa 2002 (2) SA 674 CC at para – 90 E-F*** the Constitutional Court held that:

> "*the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.*"

Respondents further submitted that lawfulness dictates the taking of a decision consistently with the powers accorded to the decision-maker under Article 1(2) of the 1951 Refugee Convention. First respondent had reason to believe that applicant fell within the provisions of Section 4(1)(b) of the Act, and therefore, did not qualify for asylum.

[31] Applicant disputes that he is not entitled to political asylum. His claim to refugee status is that if he is returned to Serbia, he will certainly be killed by Arkan's allies – as he is imputed to be a member of the social and / or political group that orchestrated Arkan's assassination on 15 January 2000. The Zemun clan and Arkan's followers have killed many people to avenge Arkans death. He listed them all by their names. Applicant's life was also threatened during his time in Serbia. For instance, for the first three (3) years of his trial, he was kept in solitary confinement in prison for his own protection. If he is sent back to Serbia, many of the comrades of Arkan in prison would kill him. Also, subsequent to his release on bail, applicant stayed in his small town of Loznica with his family. He was often warned by locals to avoid certain areas, as dangerous men had been seen loitering about waiting for him. He received anonymous threats and constantly needed to be on his guard. It was only because he was working for his father that he could stay away from certain areas whenever such threats emerged without worrying about losing his job. Further, whenever he needed to travel to Belgrade for his trial, the risk to his life was such that he would travel accompanied by six (6) or seven (7) armed friends or former police colleagues.

[32] It was denied by respondents that applicant was facing any danger whilst in Loznica, or could face any possible danger should he be sent back to Serbia. After he was released on bail, he has not alleged any danger on his life, or family that he encountered. He fled Serbia because his conviction on his criminal actions was imminent and nothing else.

[33] Respondent submitted that applicant fell within the provisions of Section 4(1)(b) of the Act, as such, he did not qualify for asylum status. As a result thereof this prayer must fail.

E THE LEGAL FRAMEWORK

I. Constitution

[34] Applicant contended that the Constitution is the supreme law of South Africa, and any law or conduct inconsistent with it is invalid. Therefore, applicant is protected by the Bill of Rights. The rights can only be limited if the requirements of Section 36 of the Constitution are met. Section 36 provides as follows:

> *"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
>
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose.*
>
> *(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

It was submitted by the applicant that Section 4(1)(b) of the Act fails to meet the requirements of Section 36 of the Constitution and is accordingly unconstitutional. If this Court is faced with a conduct, as in this case, it has no discretion but must declare the conduct inconsistent with the Constitution and therefore unlawful, in terms of Section 172(1)(a) of the Constitution and make any order that is just and equitable in terms of Section 172(1)(b) of the Constitution. Further, in determining whether a right in the Bill of Rights has been infringed by a statute, Section 39(1) of the Constitution applies, it provides as follows:

> *"When interpreting the Bill of Rights, a court, tribunal or forum –*

(a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*

(b) *must consider international law; and*

(c) *may consider foreign law".*

II The Refugees Act 130 of 1998

[35] It was submitted by applicant that the Act was enacted to give effect to South Africa's obligations under international instruments and the Constitution. It is inspired by international treaties protecting vulnerable individuals facing danger and threats to their lives. For instance, Section 2 of the Act reflects the international customary law principle on *non-refoulement.* Section 3 of the Act deals with the refugee status. It provides 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)."

Applicant submitted that he falls within Section 3(a) of the Act, as he has a well-founded fear that if he is returned to Serbia he will be killed due to his imputed membership of the social or political group associated with Slobodan Milošević which is blamed for Arkan's death. According to applicant, an applicant for refugee status does not need to actually be a member of the persecuted social or political group in question: it is sufficient if he, or she is perceived or imputed to be a member by the persons carrying out the persecution.

[36] The constitutional challenge turns on Section 4 of the Act which deals with "*exclusion from refugee status.*" It provides as follows:

"(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 Organisations, or 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 rights 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."*

Applicant's Counsel submitted that Section 4(1)(b) of the Act is the section in terms of which the exclusion decision was made and has parallels in Article 1F of the Convention and the OAU Convention.

[37] It was Counsel's submission that the provisions of Section 4(1)(b) were considered in **Mail & Guardian Media Ltd v Chipu NO 2013 (6) SA 367 (CC) at para [30]** where it was stated that:

> *"A literal reading of s4(1)(b) is that an applicant for asylum who has committed a non-political crime which, if committed in South Africa, would be punishable by imprisonment, is disqualified from refugee status. However, it may well be that s4(1)(b) should not be read literally and rigidly. Section 4(1)(b) seeks to give effect to, among others, the 1951 Refugee Convention. A reading of part of the United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) dealing with the provisions of the 1951 Refugee Convention reveals that the relevant provisions of the convention should not be read rigidly and that there are circumstances in which a person who has committed a non-political crime may nevertheless, qualify for refugee status."*

In light of this *dicta*, it was applicant's submission that first respondent failed to take into account what is contained thereof when making the exclusion decision, inasmuch as there was no attempt to weigh the severity of the applicant's alleged crime against the risk and nature of the persecution he would face in Serbia.

III Constitutional challenge of Section 4(1)(b) of the Act

[38] Applicant argued that Section 4(1)(b) of the Act is unconstitutional and invalid as it creates a situation wherein a person might face inhumane persecution –

including death, torture, cruel, or inhumane and degrading treatment – simply because he or she has committed a serious non-political crime in another country. Section 4(1)(b) of the Act therefore defies logic as it denies a person refugee status based on the crimes that he, or she has committed. The potential consequence is that a person who has "a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group," or who "owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part, or the whole of his or her country of origin or nationality, is compelled to leave his or her place or habitual residence in order to seek refuge elsewhere" might be compelled to leave South Africa and return to their home country to face treatment that, without exaggeration, might be horrific and inhumane.

[39] As the situation stands, applicant is at risk of being sent to Serbia and then being killed by Arkan's supporters, as he allegedly was involved in Arkan's murder. It was submitted that there are forms of death, torture, or racial discrimination that the Constitution does not condone. Section 4(1)(b) exposes people to such persecution and that is against the spirit and purport and values of the Constitution and the Bill of Rights and is invalid.

[40] Section 4(1)(b) infringes on the rights to life, dignity, equality and freedom and security of the person in terms of the Constitution. Further, it has to be asked whether Section 4(1)(b) can be justified in terms of Section 36 of the Constitution. In considering this question, it was submitted further that five (5) factors need to be considered under Section 36 of the Constitution and they are:

40.1 What is the nature of the right?
40.2 What is the importance of the purpose of the limitation?
40.3 What is the nature and extent of the limitation?
40.4 What is the relation between the limitation and its purpose?
40.5 Are there less restrictive means to achieve the purpose?

[41] Nature of the right – It was contended that the rights that are most likely to be at risk in refugee claims are the rights to life, dignity, equality, freedom and security

of the person in terms of Section 37 of the Constitution, and they are non-derogable. The rights to dignity and equality, non-racialism and non-sexism are founding values of the Constitution.

[42] Purpose of Section 4(1)(b) – Applicant traced the origins of this Section to international instruments and particularly Article 1F(b) of the Convention. The 1951 UNHCR Guideline 5 states as follows at paragraph 2:

> "*The rationale for the exclusion clause, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators underserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do no abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.*"

It was submitted that at least part of the rationale behind Section 4(1)(b) – arose in the early years after the Second World War – and therefore not consistent with the modern conception of human rights as enshrined in the Constitution. Under the Constitution, human rights cannot be denied to any person, regardless of the crime they committed. South Africa, and the world, has already begun to recognise that there are some persecutions to which a person cannot be sent back to, regardless of their crimes. For instance, there is a global acknowledgment that torture is not acceptable. The Convention against Torture, and other Cruel Inhumane or Degrading Treatment or Punishment ("CAT") at Article 3(1) states that: "*No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*" This absolute prohibition has been incorporated into South

African domestic law by Section 8 of the Prevention and Combating of Torture of Persons Act 13 of 2013.

[43] It was submitted further, that the ultimate question is, and must always be whether, the Constitution allows for the person to be returned in such circumstances. Though there is no rule of customary international law prohibiting States from imposing the death penalty on criminals. The Constitution prohibits the death penalty in South Africa. This Constitutional guarantee was illustrated in the ***Minister of Home Affairs v Tsebe 2012 (5) SA 467 (CC)***, where the Constitutional Court was called upon to decide whether the two (2) murderers could be extradited to Botswana, when Botswana had not given any assurances that it would not impose the death penalty. Zondo AJ held at paragraphs 67 – 68:

> *"We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the imposition and execution of the death penalty upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.*
>
> *If we as a society or the state hand somebody over to another state where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone. This Court's decision in Mohamed said that what the South African authorities did in that case was not consistent with the kind of society that we have*

committed ourselves to creating. It said in effect that we will not be party to the killing of any human being as a punishment – no matter who they are and no matter what they are alleged to have done."

[44] Applicant's Counsel submitted that similar considerations arise in this matter with applicant if he is sent back to Serbia he will be killed. His right to life will be finally violated as a result of the conduct of the South African government.

[45] The nature and extent of limitation – It was submitted that applicant's exclusion from refugee status is as drastic a limitation. For the Section to be read not to create total exclusion, is when it can be interpreted to provide protection even to persons that are not recognised as refugee.

[46] The relation between the limitation and its purpose – In this regard, it was argued that the principle laid down in **Chipu** (*supra*) and the UNHCR Handbook is relevant, that is, a balance must be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. The fundamental effect of Section 4(1)(b) still makes a person's rights contingent upon their behaviour – which is not consistent with the Constitution. The approach in **Chipu** (supra) also amplifies another constitutional deficiency within Section 4(1)(b), that is, its vagueness and the overboard discretion it grants to the decision-maker. Reference was made to **Dawood, Shalabi and Thomas v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)**, where the rights of spouses in South African citizens and permanent residents to obtain visas were made contingent on the exercise of discretion by Department officials. This discretion was unbounded and unguided by the relevant legislation which the Constitutional Court held was unconstitutional. Similarly, the exercise of discretion under Section 4(1)(b) of the Act is undefined and overbroad – particularly when the **Chipu** (*supra*) approach is followed. An illustration was made of government officials seeking to make exclusion decisions – without any guidance from the legislature – what kinds of past crimes justify being sent back to face persecution. It was therefore contended that there will inevitably be an element of arbitrariness in making such a difficult decision.

[47] Whether less restrictive means exist to achieve the purpose – It was submitted that the purpose of Section 4(1)(b) is to deprive those guilty of heinous acts of refugee protection, and to ensure that the asylum system is not abused by those who wish to avoid being held legally accountable for their crimes. It was argued that the first purpose should be discarded, as the Constitution does not make the protection of human rights contingent on a person's conduct. The second purpose retains some value as it is achieved not by any exclusion clause but by proper implementation and assessment of whether an applicant meets the requirements of refugee status. If an applicant does meet the requirements – then the refugee status should be granted. If he, or she does not meet the requirements – then no "exclusion" is needed, the claim falls on its own merits.

[48] Respondents argued against the constitutional invalidity of Section 4(1)(b) of the Act. In so doing, they gave an illustration that Section 3, and Section 4(1)(b) of the Act are the principal provisions reflecting respectively, the inclusionary and exclusionary requirements mandated by international law. Section 3 defines persons eligible for refugee status. Section 4(1)(b) is the exclusionary clause which reads as follows"

> *"4. Exclusion from refugee status –*
>
> *(1) A person does not qualify for refugee status for the purposes of the Act if there is reason to believe that he or she -*
>
> *(a) ...*
> *(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment."*

As it has been the practice, exclusion assessments are mandatory under international law and under the Act. The need to determine whether a person falls under any exclusion clause is not optional. This forms an integral part of the refugee determination process. The rationale behind the exclusion clause is two-fold:-

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

48.2 It ensures that those who have committed serious crimes do not escape prosecution.

[49] In fact it was accepted by both parties that both the 1951 Refugee Convention and the 1969 OAU Convention recognise classes of persons who are not eligible for refugee status, even if they satisfy the inclusionary criteria. To this end, both conventions recognise that individuals who have committed serious political crimes outside the country of refuge, are to be excluded. Article 1F(b) of the 1951 Refugees Convention materially mirrored the provisions of the OAU Convention as it provides as follows:

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

It was therefore argued by respondents' Counsel that it is through these provisions that refugee law and the objectives of international criminal law, and other sovereign States' domestic criminal law intersect. The inclusionary provisions serve to protect the vulnerable, and the exclusionary provisions serve to ensure that the grant of refugee status is not afforded to individuals who are not deserving of such protection. The purpose of Section 4(1)(b) of the Act is not only clearly rational and reasonable, but it conforms to the relevant laws, norms and standards of international law. It does not in any way challenge the right to life, nor the right to freedom and security of persons. Otherwise, a state is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded. The state concerned can choose to grant the excluded individual a stay on other grounds; but obligations under international law may require that the person concerned be criminally prosecuted or extradited. Be that as it may, it was argued

further, that an excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments, for example, the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment – as it prohibits the return of an individual to a country where there is a risk that he, or she will be subjected to torture. Applicant's principal complaint has been that he feared that should he be returned to Serbia, Arkan's allies would kill him. It was respondents' submission that whether, or not there is a real risk of the applicant being killed were he to be returned to Serbia, was not an issue for the first respondent to consider under Section 4(1)(b) of the Act, this is the issue which the Executive will be compelled to determine when it considers Serbia's request for the extradition of the applicant.

[50] Respondents submitted that this is a matter, on the facts pertaining thereto, capable of resolution without resorting to determine, the constitutionality of Section 4(1)(b) of the Act. Applicant has not made out a case for declaring Section 4(1)(b) of the Act unconstitutional and this prayer must fail.

IV Grounds for Review

[51] Applicant based his application for review on the wide variety of grounds, such as the paucity of reasoning, a material error of law, the failure to consider relevant information, bias, procedural unfairness, and the unconstitutionality of Section 4(1)(b) of the Act.

Paucity of Reasoning

[52] According to applicant, the most striking feature of the exclusion decision is not what it says, but what it does not say. As applicant view the decision, it is unreasonable, unlawful and irrational. First respondent failed to provide any genuine reasons for its conclusion that applicant committed a serious non-political crime. Further, she did not challenge the facts that were provided by applicant by providing her analysis of applicant's version of events, and revealing circumstances, or by providing countervailing facts. Instead, in her finding, she included new facts that are immaterial to applicant's claims, or help whether Arkan's assassination was

political in nature. First respondent failed to deal with the crime allegedly committed by applicant, the motive if any, the relationship between Arkan and Milošević; or whether the assassination was political in nature, or whether, indeed, many people were killed as a result of their link to Milošević and the death of Arkan, or any attempt to explain why the assassination of head of state does not, at least have a political component. She did not explain why applicant does not face persecution in Serbia on the basis of his imputed political opinion/ or membership of a social group. As a result thereof, first respondent's exclusion decision is beyond justification, not only unreasonable but irrational and falls to be reviewed and set aside.

[53] Respondents submitted that applicant's contention that first respondent's decision lacks reason and substance is unfounded. First respondent concluded that *"she had reason to believe that applicant committed a serious offence (the murder of Arkan and his two bodyguards) which is not political in nature and which is punishable by imprisonment in South Africa."* Applicant himself admits that he was convicted in Serbia for the killing of Arkan and his two (2) bodyguards before fleeing to South Africa. However, he denies involvement in the killing of Arkan. He was falsely implicated and the killing was political in nature. Because of his perceived implication, he stands in jeopardy of losing his life at the hands of Arkan's criminal associates. These were all considered by first respondent and she duly concluded that applicant was excluded in terms of Section 4(1)(b) and her reasons were that – applicant was convicted by a competent court of law in Serbia for the murder of Arkan and his two (2) bodyguards; murder is punishable in South African law by imprisonment; applicant's allegation that the murder of Arkan was political was not substantiated in that applicant was not a member of any political party. Applicant himself confirmed that he does not have any political affiliation or membership in Serbia, though Arkan might have had political aspirations, had political enemies and his death may have been politically inspired. There is no evidence to suggest that his killers had political motives to kill him. Arkan also had criminal connections and there is no telling that his killing was gang related or the fighting over turf.

[54] First respondent argued that though applicant's assertion that he did not have a fair trial was not a question she had to consider under Section 4(1)(b), but she nevertheless took into account that applicant actively participated in the trial proceedings without any objections to the way in which the trial was being

conducted. She also took into account the allegations that the presiding Judge was biased against him as he borrowed money from Dusan Spasojević a one-time leader of the Zemun clan, which is a criminal organisation. Since this was a serious allegation and no evidence was placed before her – she did not attach any weight thereto. She also took into account that should he return to Serbia, his life would be in danger. First respondent's reasons for dismissing such claim were that applicant was implicated in Arkan's murder immediately after the incident; despite his implication, he was in prison for three (3) years and there were no attempts on his life; there were similarly no attempts on his life whilst working for his father in the following three (3) years.

[55] It was respondent's submission that applicant's contention that he was wrongly convicted has no merit, if regard has to be had to two (2) judgments, that is the Serbian District Court, and Serbian Supreme Court which set out exhaustively the reasons for applicant's conviction and sentence to thirty (30) and thirty five (35) years respectively. On the evidence before her, first respondent had reasonable grounds for believing that applicant ought to be excluded by virtue of the provisions of Section 4(1)(b) from qualifying for refugee status. Applicant's contention that such reason is based on paucity of reasoning is misconceived and has to be rejected.

A material error of law

[56] According to applicant, as a result of the paucity of reasoning, first respondent failed to apply her mind to an important legal question that is apparent from the Constitutional Court dictum in **Chipu** *(supra)* at paragraph [30] which quoted with approval from the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") at paragraphs 156 – 257 as follows:

> *"In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the*

persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.

In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that despite the pardon or amnesty, the applicant's criminal character still predominates."

It was therefore submitted that, this legal question was not addressed in first respondent's decision. So this misdirection vitiates the exclusion decision as a whole.

[57] Respondents denied the assertion that first respondent committed an error of law. Counsel submitted that she assessed the claim in accordance with the guidelines and principles contained in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of refugees, more particularly, Chapter IV – Exclusion Clauses. The standard of proof which she took into account is set out in this Handbook which was used in conjunction with the Act and the relevant international conventions, dealing with the exclusion clause under Section 4(1)(b). In determining the applicant's status, it was paramount for the first respondent to apply the provisions stated above from paragraph 156 of the UNHCR Handbook. Be that as it may, it was not for the first respondent to engage in weighing up the gravity of the offence allegedly committed by applicant as against the degree of persecution feared. This exercise must be engaged in by the Executive, once it considers whether, or not to

extradite the applicant to Serbia. For present purposes, first respondent was obliged as a matter of law to determine whether, applicant should be excluded from obtaining asylum once she had concluded that there was reason to believe that the applicant committed a crime which is not of a political nature and which, if committed in the Republic would be punishable by imprisonment. Applicant's contention in respect of an error of law is without basis.

Failure to consider relevant considerations

[58] There are twenty six (26) crucial documents that applicant was said to have provided to first respondent at his refugee status determination hearing on 25 September 2012. It is alleged that first respondent omitted these documents from the Rule 53 record and did not refer to any of these documents in her reasons for the exclusion decision. However, the omitted documents are referred to in first respondent's manual transcript which in itself unintelligible and cannot serve as a comprehensive compilation of the evidence of the applicant, and also contradicting herself about which annexures she received. In applicant's observation, first respondent mixed up some documents and claimed not to have received them. For these reasons, it was contended that first respondent failed to read and consider the omitted documents. She failed to consider relevant considerations as required by PAJA and Section 33 of the Constitution. For instance, in ***Tantoush v Refugee Appeal Board 2008(1) SA 232(T)*** the Court held that:

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

little doubt that her decision was fatally vitiated by irregularity and must be set aside."

For similar reasons, it was submitted that the exclusion decision is fatally defective and must be reviewed and set aside.

[59] Applicant's contention that first respondent failed to consider all the relevant and / or material facts before her when she made her decision was said to be incorrect by the respondents. In fact, she denied that the so-called "omitted" documents were provided to her. Further, applicant did not attach the twenty six (26) documents to his supplementary affidavit. This Court cannot ascertain whether those documents are relevant to the question which the first respondent was called upon to consider. Respondents submitted that first respondent had all the material documents in her possession which had a bearing on the primary issue, and was properly qualified on facts to make the decision that she did. In the circumstances, there is no merit to applicant's complaint.

Bias

[60] It was applicant's argument that first respondent was biased against the applicant, or at least is reasonably suspected of being biased. She was not truthful about the documents she received from applicant. Further, she had her decision before applicant could receive it, he had to sign the record of the hearing he had before her. First respondent showed applicant her dictaphone and claimed that the content of her decision was based on the recording on the said device. In doing so, first respondent lied to applicant. Should she have listened to or analysed the contents of recording, she should have known that there was actually nothing recorded. The fact that applicant refused to sign for the record led to first respondent also refusing to give applicant her decision, stating that she needed to prepare the record properly. If applicant did not object, first respondent would have delivered to him a flawed record and the decision based on that record. This showed bias on first respondent's part. More evidence of her biasness was the fact that she went out of her way to obtain new evidence to support her decision. Further, first respondent accepted a decision from the Department officials made under the Immigration Act

13 of 2002 that declared applicant and his family to be prohibited and undesirable persons. Such decisions were unrelated to first respondent's duties and functions. She not only accepted such decision, but failed to bring it to the attention of applicant. First respondent's actions to consider matters under the Immigration Act were *ultra vires*. Furthermore, applicant's attorney obtained a copy of her manual transcript at the court hearing on 12 October 2012. Shortly thereafter, first respondent called the attorney and requested that he delete or return the transcript. This was highly unusual and indicative of an attempt to conceal previous errors. All these reasons pointed to first respondent's bias, hence her decision is susceptible to review.

[61] Respondent's submitted that the complaint on first respondent's bias has no merit, frivolous and fantastical. To the extent that there is some merit on the dictaphone incident, it was adequately explained by first respondent in her answering affidavit. For instance, when she explained to applicant that he could later have full record of the interview, she was not aware at the time that there was no recording as she had not properly activated her recording device. In any event, the greater part of the record contained the oral exchange on the material that was placed before her – which she was able to read afterwards. No facts were ignored relating to an interview with applicant, and such were taken into account when first respondent arrived at her decision on 10 October 2012. Further contentions were deliberately not addressed by respondents as it was said that they were based on suspicion founded upon mere allegations and weak inferential reasoning. It was submitted that there is no merit in the application's submission that first respondent was biased against applicant in the way she treated the evidence before her.

Procedural unfairness

[62] Applicant contended that first respondent acted unlawfully and unfairly, when she considered and relied upon documents and information that was not disclosed to applicant. More fundamentally, applicant was not provided with an opportunity to

comment on those documents. First respondent's "research information" was an unfair procedure. Applicant contends that he should have been made aware of the case against him. This is in accordance with the maxim *audi alteram partem*, which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in Section 33 of the Constitution. It was therefore submitted that in ***Foulds v Minister of Home Affairs and Others 1996 (4) SA 137 (W)***, Streicher J held that a decision-maker was under an obligation to disclose adverse information and adverse policy considerations, and give an affected person an opportunity to respond thereto. If an administrator is minded to reject the explanations of an interested party he should at least inform them of why he is so minded and afford them the opportunity to overcome his doubts. Failure on the part of first respondent to disclose her information and adverse considerations to this application is procedurally unfair.

[63] Respondent's submitted that the reason for first respondent's research into the legal system in Serbia was motivated by applicant's own assertion that he was wrongly convicted in Serbia. Before making his decision, first respondent wanted to ascertain the independence or legitimacy of their legal system. As a result, based on such research and judgments of Serbian Courts, she could see nothing wrong related to applicant's assertions. In light of this explanation, applicant's complaint on procedural unfairness was said to be without merit.

[64] So, according to applicant, all five (5) considerations, individually and cumulatively, support the conclusion that Section 4(1)(b) of the Act unjustifiable infringes on the constitutional rights – for reasons that are not consistent with the modern constitutionally – mandated approach to human rights in a vague and overbroad fashion, and in a manner that could be achieved in a less restrictive way. In essence, Section 4(1)(b) of the Act should be declared to be invalid and inconsistent with the Constitution.

V **Substitution**

[65] For the reasons proffered by applicant, it was his submission that the exclusion decision must be set aside and first respondent's decision be substituted, instead of remitting this application back to first respondent. If this decision were to

be remitted, this would amount to a third hearing. This Court should recognise applicant as a refugee. In terms of Section 8(1)(cc)(ii) of PAJA, this Court is empowered to make substitution orders in exceptional circumstances. In a recent judgment of the Constitutional Court, **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) ("Trencon")**, the Court discussed the test for substitution orders in detail, and held at paragraph [47]:

> *"To my mind, given the doctrine of separation of powers, in conducting this inquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two (2) factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."*

It was submitted by applicant that, all four (4) criteria set out in the aforementioned judgment by the Constitutional Court, militate in favour of granting a substitution order. Firstly, the Court is in as good a position as the administrator to make the decision. All the documents that were before first respondent are before it. There is no specialised industry knowledge or polyantric complexities required to determine this matter. The elements that must be met for a determination of the refugee status are already known. This Court is therefore in a superior position to determine this matter than first respondent. Secondly, it is a foregone conclusion that applicant meets the standard of persecution required for a successful refugee claim. There is a reasonable possibility that he meets the requirements for refugee status. Applicant has provided extensive evidence linked to Arkan's death being killed in order to avenge Arkan and that his life would be threatened in Serbia and numerous other reasons. Thirdly, there has been a significant delay by the decision-makers to the

great prejudice of applicant. Applicant was arrested on 27 December 2011. He has been in detention ever since that date and separated from his family for almost four (4) years. The delay has been the failure of the respondent's to deal with his asylum application in a lawful and reasonable manner. The first decision was overturned by the Standing Committee on Refugee Affairs ("SCRA") on 18 April 2012. When first respondent made the exclusion decision, she erroneously directed applicant to take his review to the SCRA again. This was incorrect, as the SCRA refused to hear the review and thereby causing the delay. Fourthly, first respondent has shown both bias and incompetence. She failed to ask, let alone answer, vital and basic questions. First respondent's reasoning is so bare that the conclusion reached is not merely unreasonable but also irrational, the transcript is unintelligible, she failed to consider important documents, she contradicted herself on the documents that were before her, and that she lied about the contents of his interview that was contained in her dictaphone.

In light of all the reasons mentioned by applicant reference was made to **Trencon** (*supra*) at paragraph 54:

> *"If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence."*

In essence, it was submitted that it would be unfair to ask applicant to re-submit himself to the jurisdiction of first respondent. This is one of those exceptional cases where the Court should bring finality to this matter and declare applicant to be a refugee.

[66] Respondent submitted that substitution order by applicant is based on the fact that his case is an exceptional one. Counsel referred to **Gauteng Gambling Board v Silverstar Development Ltd 2005 (4) SA 67 (SCA) @ pages 75 – 76, paras [28]-[29]** where it was stated:

"The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair …

An administrative functionary that is vested by the statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations … That is why remittal is almost the prudent and proper course."

[67] According to respondents, this is not an exceptional matter where this Court should substitute first respondent's decision with an order that applicant should be granted a refugee status pursuant to the provisions of Section 3(a) of the Act. First respondent made her decision in terms of Section 4(1)(b) and her decision cannot be substituted by an order in terms of Section 3(a). Parliament has entrusted the functions relating to the adjudication and determination of refugee status to administrative organs and officers such as the RSDO's and SCRA. The Courts should not readily substitute their decision for that of an administrative functionary where, by doing so, it may be contrary to the doctrine of separation of powers. The Court should dismiss this prayer.

VI **Declaratory relief**

[68] Lastly, it was argued by applicant's Counsel that if this Court is not inclined to review and set aside the exclusion decision, and or grant a substitution order for whatever reason, this Court can and should declare that respondents may not

extradite, deport or otherwise return or compel the return of applicant to Serbia. Such a declaratory order would uphold a different approach to refugee protection. In effect, it would mean, that applicant could lawfully be excluded from refugee status for their previous crimes, but they could still not be returned to countries where they would face persecution on the grounds specified in Section 2 of the Act. According to applicant, this would give effect to **Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) and Tsebe (*supra*)** – Section 2 of the Act enshrines the international customary law rule of non refoulement and it protects all the citizens and not only refugees. This means therefore that as per the language used in Sections 2 and 3 of the Act, even persons who are found not to be refugees, if they meet the requirements in Section 2 can be protected against return to their home countries – but if Section 4 applies, this may not be the case. The interpretation employed by applicant in the alternative was said to be balancing the protections and privileges granted to applicant. Further, it was submitted that this is consistent with the approach laid down in **Tsebe *supra***, concerning the grant of basic constitutional protection to all persons regardless of their conduct.

[69] In turn, respondent submitted that the provisions of Section 2 cannot be interpreted to apply to applicant, who has been rightfully excluded from applying for refugee status in South Africa. The Constitutional Court in **Tsebe** decision ruled that the State may not extradite or deport a person if this will expose them to a real risk of the imposition and execution of the death penalty. If the foreign state furnishes an assurance that it will not impose the death penalty or if it is imposed, that it will not execute it, then there is no such risk and the state may deport or extradite him. In this case, applicant faces a thirty five (35) year prison sentence in Serbia which is a penalty imposed at a conclusion of a criminal trial. The Serbian government has assured the South African government that the death penalty is not part of their legal and penal system and hence there is no possibility that applicant will be executed. In any event, it was respondent's submission that applicant does not face any risk of being killed if he is returned to Serbia. Further, risk factors have to be considered by the Executive when it considers a question as to whether or not to extradite or deport applicant to Serbia. Otherwise, respondent's argued that the reliance on **Tsebe**

judgment for a declaratory order that applicant may not be deported or extradited to Serbia is clearly misconceived and has to be rejected.

E ANALYSIS OF EVIDENCE AND APPLICATION OF FACTS OF THE LAW

[70] In analysing the evidence provided by the parties, this Court has to weigh carefully whether applicant is entitled to protection by this country under the Refugee Act as he alleges. Applicant stated in his submissions that he was wrongly convicted in Serbia for assassinating the infamous warlord turned underworld figure, Arkan. In support of this contention, he furnished a whole host of documentation for consideration by first respondent. If applicant is serious and honest about his non-participation in the killing of Arkan, I somehow find it strange that he took issue with first respondent making reference to the judgments of the Supreme Court of Serbia and Belgrade District Court that convicted applicant. In my view, whether these documents did or did not form part of the record of documents that were handed to first respondent, in any event, they are public documents. These documents are readily available in legal sources and online to any person who is interested in what is contained in such judgments. If first respondent was faced with an allegation that should applicant be returned to Serbia, Arkan's allies will have him killed as they have killed many others suspected of involvement in Arkan's death, surely the judgments would have provided some guidance to that effect. Also, those judgments would have reflected that the crime allegedly committed by applicant was politically motivated as per his assertions. It is therefore acceptable that if the government official involved in the determination of applicant's application was a pro-active one, it would have been reasonable for her to have explored those legal sources, in order to confirm the allegations by applicant. In any event, applicant himself provided public documents which are easily accessible online. Actually, I cannot fault the move by first respondent, as she was expected to make a decision concerning the entitlement to protection of applicant by South Africa.

[71] First respondent could not have been expected to make such a decision in a vacuum. Firstly, she was expected to consult some legal sources over and above what was provided by applicant, in order to ascertain the extent on which the rule of law is upheld in Serbia. Secondly, the judgments she perused would have given her an idea on whether there was a disregard for the rule of law and therefore applicant

was wrongly convicted. Thirdly, such judgments would have given an indication on whether the alleged crime was political in nature or he was convicted of a crime that is ordinarily punishable by imprisonment in the Republic. In my view, first respondent "*research information*" was not an unfair procedure. On the strength of applicant's own allegations, it was necessary for first respondent to be proactive in the investigation of such serious allegations. In my view, it would not have been necessary for the applicant to be afforded an opportunity to respond to that "research information" .

[72] Applicant based his review application on the fact that excluding applicant in terms of Section 4(1)(b) of the Act from refugee status is not the same as refusing his refugee application. A person whose application is refused has been found by a Refugee Status Determination Officer to have no well-grounded fear of persecution. Respondent's submitted that applicant's starting point in this application is wrong. All applications for asylum are considered in terms of Section 3 of the Act, which provides for further qualifications for persons to be given such status under Sections 21 - 24 of the Act. First respondent considered applicant's application in terms of Section 3 read with 21 - 24 of the Act before moving over to exclude him in terms of Section 4(1)(b) of the Act. Applicant was therefore excluded on the grounds 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.*" If the RSDO is satisfied that the provisions of Section 4(1)(b) of the Act applies, it is therefore not required to consider the application for asylum under the provisions of Sections 21 - 24 of the Act. In coming to this decision, first respondent took into account all the documentation that was furnished to her as well as both judgments of the Serbian Courts.

[73] In order for this Court to come to a just conclusion, it is therefore necessary to interpret and understand the purpose of the Act. It is stated right at the beginning of the Act that:

> *"... to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith."*

It is therefore common cause that the starting procedure for the determination of the refugee status of all the applications is Section 3 – Subject to Chapter 3 which includes Sections 21 – 24B if an applicant qualifies for such status. If a person does not qualify, then such person is excluded from such status in terms of Section 4(1)(a), (b), (c), (d) and (2). In this instance, applicant was found by first respondent to have been excluded in terms of Section 4(1)(b), after all the sifting process was concluded.

[74] Again, the contention by applicant that excluding applicant in terms of Section 4(1)(b) of the Act is not the same as refusing his refugee application is misplaced. In my view, the fact that the application was excluded does not mean that it was not considered in terms of Section 3, - subject to Chapter 3. If the application is not successful in terms of Section 3, surely the RSDO has to give reasons as to where she basis his decision from, and in this instance she based her decision on Section 4(1)(b). Perhaps applicant was astute or discriminating in his interpretation of the first respondent's decision. The office of first respondent was created by the same Act, and the RSDO's qualifications, experience and knowledge of refugee matters (that are not clearly spelt out) are dealt with at Section 8(2)(b) of the Act. Judging from the decision that was prepared by first respondent, which is now a subject of this review, it was not prepared by someone with practical legal skills, such as legal drafting. In my assessment, it was not pivotal for her that she has to articulate the procedure she took in arriving at a conclusion. This means therefore that she had practical knowledge and understanding of the Act. What was obviously important to her was to apply the facts before her in line with the relevant legislation, and she thereafter took a decision, that is, the exclusion decision in terms of Section 4(1)(b) of the Act. That was done, having considered all the documents that were put before her and further her independent research being the two (2) judgments of the Serbian Courts. To me, first respondent had a working knowledge of the Refugee Act. She was able to discern as to which information that she should take into account in excluding applicant from the refugee status. In this instance, this Court cannot fault first respondent on the way she wrote her decision. Of importance, applicant understood the decision of first respondent, hence he decided to have it reviewed and set aside.

[75] Applicant asserts that his right to life is under threat, if he were to be sent back to Serbia. After he spent three (3) years in prison, he was released from custody and he worked for his father and applicant attended Court for another three (3) years without a single record of threat in his life. This Court was only provided with hearsay type of threats on applicant's life and also the fact that applicant had to be accompanied by 6 – 7 armed man to attend Court or any other matter in Belgrade. Not a single day, did applicant encounter anything that could be interpreted as actual threat to his life. It seems, such allegations were made in order to bolster applicant's case. Besides, even by the time applicant was in custody it was envisaged that his life might be under threat. Even so, the state took that into account and it was agreed with the defence that applicant 'be kept in a secluded place in prison' that is, on solitary confinement. He was not exposed to the entire prison population. This was a clear demonstration that the state was alive to the potential threats, and it took steps to ensure that applicant's life was not at stake, but protected. There has been no evidence before this Court at this stage that applicant would not be protected by the Serbian government, should he be required to go back to Serbia.

[76] To me, it was paramount that first respondent examine all the documents that were before her, which she did, together with the judgments by the Serbian Courts. If applicant asserted that he was falsely implicated in the murder of Arkan and was therefore tried by the Courts based on such false implications and later on convicted, it is therefore logical for first respondent to once more peruse those judgments in order to confirm or refute such assertions. After all, I did not view this decision by first respondent to look at the judgments as negative and or trying to get a reason not to qualify applicant for asylum status. In my view, first respondent's actions were reasonable and *bona fide* in the circumstances as the judgments were the only option available to ascertain if applicant was falsely implicated and / or wrongly convicted. Though most of the documents contained in the Rule 53 record constituted what could be referred to as hearsay evidence (media clippings etc.), at least judgments contained first-hand information in the form of evidence that was adduced in Court and true facts of what transpired during court proceedings. Hence, they were mostly preferred other than the other documentation that was considered.

[77] Besides, this Court accepts the fact that pursuant to applicant's arrest in South Africa he has since filed an application for leave to appeal his conviction in Serbia. If applicant was indeed of the firm view that he was falsely implicated and wrongly convicted, and decided to flee his country of origin on the eve of his conviction, it was expected of him upon arrival to immediately declare to the South African authorities that he is a refugee from Serbia, and furthermore proceed forthwith with the refugee status application and appeal procedures to his conviction. It would appear that if applicant would have proceeded in the normal legal route, he would not have found himself in the situation that he is at this moment.

[78] Applicant's situation has been complicated by the fact that, upon arrival in South Africa, he remained on a three (3) month visa, that he never renewed; he did not disclose his true identity as he was afraid that he and his family would be targeted; he entered South Africa in 2007 and kept using the *alias* of Sasa Kovacević; he later on invited his entire family to join him in Cape Town; and he established a home without his residence or citizenship status being defined. Applicant's true identity became known on 21 March 2011, when he was arrested and charged for numerous crimes. This was after some four (4) years when he has lived a lie, and was caught by authorities that he decided that it was now time to live in the straight and narrow. Otherwise, this Court has to assume that for four (4) years, he did not know that he did not have any defined citizenship status in South Africa. It was only on 21 January 2012, that applicant realised that he was a refugee that is entitled to South African protection. Such application was rejected on 14 February 2012, and was later on overturned on appeal by the Standing Committee for Refugee Affairs. On 21 September 2012, again, applicant once more applied for refugee status. On 25 September 2012, he was accompanied by his legal representative, Advocate David Simonsz to first respondent's offices. It was respondent's submission that applicant was legally represented in this interview session, although this is not the ordinary and necessary procedure, it was allowed in applicant's instance. He was provided with an interpreter that was fluent in his Serbian language. Although that was the case, applicant was fluent and could understand the English language. Communication was never an issue in this

session. This second application was rejected on 10 October 2012. This is the decision that is the subject of this review.

[79] It is applicant's assertion that he seeks political asylum, as he is unable and unwilling to avail himself of his country's protection. A number of people who were suspected of being associated with the assassination of Arkan had already been murdered. If indeed that were so, that would be more reason for applicant to apply for political asylum on his arrival in South Africa. Applicant is not an illiterate person. Applicant was a police officer who was highly placed in the Serbian government before being charged of this offence. I have no doubt in my mind that he knew exactly what to do in order to remain legally in this country. Applicant's actions point to one direction that he was a fugitive from justice who wanted to conceal his whereabouts. In any event, South African citizens have sought refuge in other countries when they fled from persecution during the apartheid era. It would not have been difficult for South Africa to accommodate a refugee who has met all the requirements in terms of Section 3 of the Act. Unfortunately, first respondent made its finding in terms of Section 4(1) (b) of the Act, which is the category applicant qualified on.

[80] This Court was called upon to interfere with first respondent's decision, review and set it aside because of grounds as set out by applicant, such as the paucity of reasoning, a material error of law, failure to consider relevant information, bias, procedural unfairness and the unconstitutionality of Section 4(1) (b) of the Act. For the reasons specified in my analysis above, I cannot find any impropriety based on the paucity of reasoning, failure to consider relevant information, bias and procedural unfairness or incompetence contended on the part of first respondent. I will now deal with the legal framework set out on the grounds stated in the grounds for review.

I **Constitution**

[81] Applicant contended that Section 4(1) (b) of the Act fails to meet the requirements of the Constitution, and is therefore unconstitutional. As a result thereof, this Court must declare the section inconsistent and unlawful in terms of Section 172(1) (a) of the Constitution and make any order that is just and equitable

in terms of Section 172(1) (b) of the Constitution. In determining whether a right in the Bill of Rights has been infringed by a statute, Section 39(1) of the Constitution applies. It was submitted by the respondent's that applicant interpreted the provisions of Section 4(1) (b) incorrectly, as Sections 3 and 4(1) (b) of the Act are the principal provisions that are both inclusionary and exclusionary in nature and are both mandated by international law. The RSDO cannot reach a conclusion in terms of 4(1) (b) without first satisfying herself in terms of Section 3 that applicant does not qualify for such status. The need to determine whether a person falls under any exclusion clause is not optional. This procedure forms an integral part of the refugee determination process.

[82] I have considered the constitutional point raised by applicant. If Section 4(1) (b) of the Act were to be declared unconstitutional on the basis that it infringed on applicant's constitutional rights, this would mean therefore that this would leave a vacuum in the procedure on the way in which the RSDO determines the applications for a refugee status. I agree with respondent that a starting point for determination of any applicant's status is Section 3 of the Act. Section 3 cannot be read in isolation with Section 4. If the RSDO is not satisfied that Section 3 is applicable, then the process proceeds to Section 4. In this instance, the application was determined and concluded in terms of Section 4(1) (b). Although Section 3 and 4(1) (b), are both inclusionary and exclusionary in nature, Section 3 also serves as a "sifting point", if applicant does not qualify in that Section, there has to be another category that he qualifies on. In the case of applicant, that has to be Section 4(1) (b).

[83] In my view, it is very much important for this Court to weigh applicant's constitutional rights that are said to be infringed against the rule of law (Section 4(1) (b). If Section 4(1) (b) does not meet the requirement of Section 36 of the Constitution, then this Court should declare Section 4(1) (b) to be unconstitutional. Section 36 provides as follows:-

> *"**Limitation of rights** – (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human*

dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

I have carefully considered the provisions of Section 4(1) (b) of the Act and they provide as follows:

"4 ***Exclusion from refugee status*** *– (1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –*

(a) ...

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

South Africa is indeed a Constitutional State, and it frowns upon the abuse of human rights. On proper reading of this Section, there is nothing infringing upon the rights of applicant or any individual for that matter. It only states that, if the RSDO has a reason to believe that if applicant has committed a crime which is not of a political nature, and ordinarily if committed in the Republic of South Africa would be punishable by imprisonment, such applicant is immediately excluded from the refugee status. In other words, such applicant would qualify as a fugitive from justice rather than a refugee. If this Court declares this Section unconstitutional, this would mean that South Africa would be a hub of criminals. With the current rate of crime, that is not desirable, it would lead to more criminals seeking refugee status in South Africa. Applicant confirmed that he is not a member of any political party in Serbia. He is perceived or imputed to be a member of a social or political group associated with President Slobodan Milošević which is blamed for Arkan's death. If that is indeed so, he does not qualify as a refugee in terms of Section 3 (a) of the Act, as

this is not a "well-founded fear of being persecuted" but a fear based on perception. In any event, this Court cannot grant applicant a refugee status based on such perceptions.

[84] As it currently stands, applicant is still convicted of murder and sentenced to a period of thirty-five (35) years in Serbia. Nothing has turned out on his application for leave to appeal. Similarly, South Africa regards murder as a serious criminal offence that carries more or less the same sanction, depending on the circumstances of each case. Applicant's current circumstances could not be compared with the ones such as in ***Minister of Home Affairs v Tsebe 2012 (5) SA 467 (CC) ("Tsebe") at 480 E - F,*** where the Constitutional Court was called upon to decide whether Mr Tsebe and Mr Phale from Botswana could be extradited back to Botswana when Botswana had not given any assurances that it would not impose the death penalty.

> *"[43] The question that arises is: what is the principle that Mohamed established? The principle is that the Government has no power to extradite or deport or in any way remove from South Africa to a retentionist state any person who, to its knowledge, if deported or extradited to such a state, will face the real risk of the imposition and execution of the death penalty. This Court's decision in Mohamed means that if any official in the employ of the state, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in section 7(2) of the Constitution."*

In applicant's circumstances, there is no evidence suggesting that he runs a "real risk" of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way if he were to be sent back to Serbia. Applicant only assumes that his right to life will be threatened by those associated with Arkan if he is sent back to his home country. Even by the time he

was in Serbia, he did not refer to one incident where there was a "real risk" to his life. He only gave allegations that he was warned by third persons that his life was in danger. This Court could not be expected to give much credence to such allegations. In fact, this Court has considered the documents that were allegedly said that first respondent failed to consider. Judging from such documents there is no nexus between applicant and Arkan's associates and or Milošević for that matter to the alleged political component or affiliation. The perception was created by the media, as the actual assassin was not known at that stage when Arkan's death was widely reported.

[85] It is so that Section 4(1) (b) gives effect to international instruments such as the 1951 Refugee Convention; United Nations High Commission for Refugee Handbook; Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR) Handbook and the 1969 OAU Convention. All of these international instruments have inclusionary and exclusionary clauses, and they observe the human rights. They differentiate between classes of persons who are eligible and not eligible for refugee status, even if they satisfy the inclusionary criteria. For instance, the 1951 Refugee Convention and the 1969 OAU Convention recognise individuals who have committed serious political crimes outside the country of refuge and such persons are excluded from qualification as refugee. Also there are circumstances in which a person who has committed a non-political crime, nevertheless qualify for refugee status. This means therefore that there is no blanket application for refugee status. This boils down to the fact that each case is judged on its own merits.

[86] In light of this classification, I am convinced that Section 4(1) (b) mirrored what was intended by these Conventions that were adopted by several states at international level. This means therefore that this rule has been in practice in several countries for many decades and it has passed the human rights and constitutional master. I am not satisfied with applicant's assertion that the exclusionary clause arose in the early years after the Second World War and therefore not consistent with the modern conception of human rights as enshrined in the Constitution. In my view the human rights as enshrined in the Universal Declaration of Human Rights of 1948 is the same as the one in the South African Constitution of 1996. One can argue that respect accorded to and accountability for human rights improves over

time due to awareness. Otherwise they will always remain the same. Section 4(1) (b) therefore cannot be rendered unconstitutional, for the purposes of fitting in the unproven circumstances of applicant. There is no reasonable ground in my mind to declare this section unconstitutional, as it does not offend any rights.

II **Section 4(1) (b) of the Act**

[87] The purpose of Section 4(1) (b) in my opinion is to regulate the class of persons that are excluded from refugee status. The provisions of the section have to be exercised after the RSDO has carefully considered the circumstances of the applicant in Section 3, and is therefore satisfied that applicant falls within the ambit of Section 4(1) (b). In my analysis above I have dealt with the fact that, there is no evidence before this Court that upon return to Serbia, applicant might face inhumane persecution, including death, torture and/or, inhuman and degrading treatment simply because he committed a serious non-political crime in that country. I turn to agree with respondent that such consideration is pre-mature at this stage, as these proceedings are for the review of first respondent's refusal of his refugee application. As evident in numerous authorities that have been cited by applicant, the question of whether there is "real risk" in applicant's life and that becomes more relevant in extradition proceedings. Applicant's extradition proceedings are still pending and the question of whether there is a "real risk" on the life of applicant will be properly ventilated at that level. In any event, first respondent was not called upon to determine such an issue.

[88] It is without a doubt that the inclusionary clause is there to protect the vulnerable persons from other countries who are seeking refuge in South Africa, and the exclusionary clause – though at certain instances certain individuals or persons may still be protected against return to their countries where there is a risk of human rights abuses. In this instance, I am in agreement with first respondent that applicant is not at risk of human rights abuses. This Court has a reason to believe that Section 4(1) (b) was applied correctly.

[89] It is therefore trite law that, if the issue can be decided without reaching a constitutional point, the matter should be resolved as such. In my view, Section 4(1)

(b) does not and will not offend on individual's human rights in the sense that it is capable of exposing people to persecution, nor it infringes on the right to life, dignity, equality and freedom and security of the person in terms of the Constitution. Section 4(1) (b) cannot be said that it is no longer constitutionally compliant, as it does not protect the "deserving" persons. The circumstances of applicant in this regard cannot be said to be that of a "deserving person". It cannot be said that South Africa and the world at large has begun to recognise that applicant's case forms part of the categories of cases where there is a well-founded fear of persecution to which a person cannot be sent back to his country of origin. Applicant has again not made out a case that he will be tortured and be susceptible to death penalty, should he be returned to Serbia. Applicant referred to Constitutional Court decisions such as ***Mail and Guardian v Chipu 2013 (6) SA 367 (CC); Dawood, Shelabi and Thomas v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)***, where the Court declared sections of the Acts unconstitutional. It was therefore impressed upon that the approach adopted in these cases, should also be adopted in the consideration of the constitutionality of Section 4(1) (b). Even if Section 4(1) (b) could not be read literally or rigidly as *per dicta* in **Chipu** (*supra*), in my view there can be no justification for this Court to deviate from the findings of first respondent. Besides, there is no violation of applicant's human rights warranting Section 4(1) (b) of the Act to be declared unconstitutional.

[90] Applicant somehow conceded that it is a well-established fact that punishment for a criminal offence does not, by itself amount to persecution. A person seeking a refugee status must not evade the lawful punishment for an offence, but must prove his innocence and further his lawful entitlement to protection. So, if an asylum application is properly adjudicated, and there are no prospects that an applicant fulfilled the requirements, that on its own can be interpreted as an abuse of the asylum system to avoid legal accountability. Asylum status, in my view should only be granted to deserving applicants.

[91] If applicant could make such concession, it follows therefore that he should lead by example and be accountable for his criminal actions in his country of origin. In my view there is no threat to his fundamental human rights in general. As a result, there are no constitutional grounds to declare Section 4(1) (b) to be unconstitutional.

III Substitution

[92] Applicant submitted that the exclusion decision must be set aside and this matter should not be remitted back to an RSDO, this Court should make a substitution order and declare applicant as a refugee. It is common cause that the Court is empowered to make substitution orders in terms of Promotion of Administrative Just Act 3 of 2000 ("PAJA"), in terms of Section 8(1)(c)(ii) (aa) and it provides as follows:

> "*The Court … may grant any order that is just and equitable, including orders … setting aside the administrative action and … in exceptional cases substituting or varying the administrative action or correcting a defect resulting from the administrative action …*"

In support of this argument, applicant made reference to the Constitutional Court decision – ***Trencon (supra) at paragraph [65]***.

[93] It was submitted by applicant that they met all the four (4) criteria set out by the Constitutional Court in **Trencon**, and they should be granted the substitution order.

93.1 *First, this Court is in as good a position as the administrator to make the decision;*

93.2 *Second, it is a foregone conclusion that the applicant meets the standards of persecution required for a successful refugee claim;*

93.3 *Third, there has been a significant delay by the decision-makers, to the great prejudice of the applicant;*

93.4 *Fourth, the RSDO has shown both bias and incompetence in the determination of applicant's application.*

[94] Respondents submitted that this matter is not an exceptional one where this Court should substitute first respondent's decision and thereby granting applicant a refugee status. Applicant does not qualify for a refugee status as first respondent

has made a decision in terms of Section 4(1) (b) of the Act. He is therefore excluded from qualification as he committed a crime punishable with imprisonment in South Africa. Parliament has entrusted the functions relating to the adjudication and determination of refugee status to administrative organs and officers such as the RSDO's and SCRA. The Courts should therefore not readily substitute their decision for that of an administrative functionary where, by doing so, it may be acting contrary to the doctrine of separation of powers. This Court should therefore not substitute the decision of first respondent.

[95] This Court has taken due regard of the principles and requirements in ***Trencon*** *(supra).* On reading of paragraph [4] set out in that judgment, the Constitutional Court stated that it is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances. That would mean therefore that this Court should take into account the circumstances of applicant when he arrived in South Africa using *alias* names and false passport; not renewing his three (3) months visa; inviting his entire family to join him in South Africa; establishing a home in South Africa without any citizenship status; staying on the hide-away for four (4) years; realising that he committed a wrong by living as such on his arrest, and ultimately applied for refugee status in 2012; after his refugee status application was refused two (2) times he filed a review application in 2013; he blamed the delay in finalisation of this review wholly to the respondents. Throughout this application, applicant does not accept any wrong, simply because that is not the test for determination of an application for the refugee status. Even if this Court would be required by applicant to believe that he is a victim who fled to South Africa for purposes of refugee, his actions on arrival do not attest to that. In arriving at this conclusion, I am mindful of the fact that there is no timeframe on which one should apply for refugee status. Unfortunately, after consideration of this matter in totality, this Court is unable to reach such a conclusion. For the reasons stated above, this Court is not in a position to substitute the decision of first respondent.

IV Declaratory Relief

[96] It was argued by applicant that if this Court is not inclined to review and set aside first respondent's exclusion decision or grant a substitution order, the Court should declare that the respondents may not extradite, deport or otherwise return or compel the return of applicant to Serbia. Such order would mean applicant could lawfully be excluded from refugee status for their previous crimes but they could still not be returned to countries where they would face persecution. Section 2 of the Act enshrines the international customary rule of non-refoulement which protects all "persons" not just refugees. This approach is consistent with the grounds that were laid down in **Tsebe** (*supra*) concerning the constitutional protection of all persons, regardless of their conduct.

[97] It was denied by respondents that the provisions of Section 2 can be interpreted to apply to applicant who has been rightfully excluded from applying for refugee status in South Africa. Applicant faces a prison sentence when he will be returned to Serbia. According to respondents the Serbian government has assured the South African government that the death penalty is not part of their legal and penal system, hence there is no possibility that applicant will be executed. As applicant has already stated whether or not there is a real risk that applicant might be killed if he were to be returned to Serbia is a factor which must be dealt with by the Executive when it considers the question as to whether or not to extradite or deport applicant to Serbia. Applicant's circumstances could not be equated with that of **Tsebe** (*supra*) as such determination was made at deportation or extradition level when South Africa could not get assurance that Botswana would not impose a death penalty. Respondents argued that applicant's reliance on **Tsebe** (*supra*) is misconceived and has to be rejected.

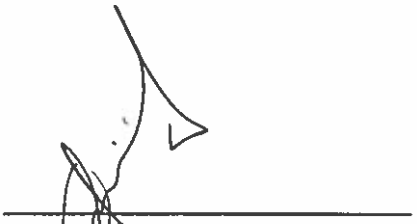
[98] I turn to agree with respondents that Section 2 of the Act is not applicable in this regard as this Court has already rejected the allegations that applicant may be subjected to persecution or that his life would be threatened if applicant were to be returned to Serbia.

[99] Besides, granting a prohibitory order at this stage would be tantamount to anticipating the next procedure or process that respondents or any executive arm of the government will take on applicant. In any event, this Court is not privy to any

future process that would be taken against applicant, which would justify the granting of the deportation or extradition or the return of applicant to Serbia. If this order were to be granted, in my view, it would be tantamount to putting the cart before the horse. At this stage, there are no justifiable reasons in granting this prohibitory order.

[100] Having carefully considered this review application, I am therefore satisfied that there are no legal or justifiable grounds for granting the relief sought.

[101] In the result, applicant's application is dismissed with costs.



MANTAME, J
WESTERN CAPE HIGH COURT JUDGE