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DOBROSAV GAVRIĆ V REFUGEE STATUS DETERMINATION OFFICER, CAPE TOWN AND OTHERS

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In September 2018, the Constitutional Court ruled in an application by Mr Dobrosav Gavrić for leave to appeal a Western Cape High Court judgment, which confirmed the decision of the Refugee Status Determination Officer (RSDO) to refuse to grant Gavrić refugee status in terms of the *Refugees Act* (the Act). This case was important because it emphasises South Africa’s international law obligations under the principle of *nonrefoulement* - the general prohibition against the return of a person to any country where that person’s life, physical safety or freedom will be threatened. The judgment also establishes a test for the vagueness of the term “political crime” as a requirement for the granting of refugee status.

Briefly, the facts of the case are that Gavrić fled his country of Serbia because he feared for his life after the assassination of a commander of a paramilitary unit closely aligned with the Milošević government during the Yugoslav conflict in the 1990s. Gavrić was present at the assassination and became the main suspect for the murder. He was later arrested, convicted and sentenced to 20 years’ imprisonment. He was released to await trial at home after serving three years of his sentence and fled to South Africa in 2007 and entered illegally under an alias. In 2012, Gavrić applied for refugee status in South Africa in terms of the Act on the grounds that he was falsely believed to be a member of the political group responsible for the commander’s death, and that he had a well-founded fear of being killed by his supporters. The RSDO refused to grant refugee status under section 4(1)(b) of the Act, which states that a person does not qualify for refugee status if there is reason to believe that he/she committed a crime which is not of a political nature and which, if committed in South Africa, would be punishable by imprisonment.

The RSDO said that Gavrić had committed a serious non-political crime (murder) and was therefore excluded from the Act’s protection, regardless of the political context surrounding the crime. Mr Gavrić appealed the decision to the Standing Committee on Refugee Affairs but the Standing Committee did not decide the issue as they held that they did not have jurisdiction. He then approached the Western Cape High Court and sought a review and setting aside of the RSDO’s decision and a declaration that section 4(1)(b) of the Act was unconstitutional, as it violated his rights to life, dignity, equality and security of the person. Further, he argued that the Act gives the RSDO broad powers that can unfairly affect constitutional rights of individuals. Alternatively, he sought a declaratory order prohibiting the RSDO from either extraditing, deporting or compelling his return to Serbia. The High Court found that Gavrić faced no risk of persecution should he return to Serbia and found no fault with the RSDO’s decision. Gavrić then approached the Supreme Court of Appeal which refused leave to appeal because it did not believe he had reasonable prospects of success.

Before the Constitutional Court (the Court), Gavrić argued that the RSDO’s decision was procedurally unfair and that the RSDO had wrongly concluded that he had committed a non-



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political crime. Together with People Against Suffering, Oppression and Poverty (PASSOP), a community-based non-profit organisation, which aims to protect and promote the rights of refugees, asylum-seekers and immigrants in South Africa, he argued that there should be an internal remedy for asylum-seekers excluded by section 4 of the Act. The majority judgment stated that there are indeed internal remedies in the form of the Standing Committee on Refugee Affairs and the Refugee Appeal Board. Furthermore, one can appeal under the *Promotion of Administrative Justice Act (PAJA)*, in addition to going via the judicial system.

Regarding the question of *nonrefoulement*, the Court further held that section 4 of the Act is in line with international standards. The Court referred to section 2 of the same and said that the principle of *nonrefoulement* - as protected in this provision - ensures that all individuals who will face persecution or harm if returned to their country of origin cannot be deported or extradited. Therefore, section 4(1)(b), read together with section 2, is not unconstitutional. In addition, the Court held that that in order to make a fair decision, it was necessary to determine the test for what a political crime is.

Four factors were identified as important factors in this determination. The first was whether the motive was political, rather than for personal or financial gain. The second asked whether there was a direct link between the crime, the political motivation and the specific political goal. The third asked whether the crime was proportional and the fourth asked whether the political goal is in line with our constitutional values. In applying this test, the majority found that Mr Gavrić had only been able to provide speculation regarding his involvement with the murder, as well as the motivation behind it.

The Court set aside the RSDO's decision to exclude Gavrić because it was procedurally unfair to rely on documentation that he had not been given the opportunity to see or make submissions on. Furthermore, the RSDO did not provide adequate reasons for the decision.

While Gavrić was successful in challenging the RSDO's decision, the Court found that he did not meet the requirements for refugee status according to the Act. In addition, while the Court recognised the imperative behind the principle of *nonrefoulement*, Gavrić had not committed a political crime, which would lead to his persecution should he be extradited to Serbia. The judgment speaks to the duty of South Africa to abide by its international obligations and, to simultaneously protect the rights of those who, by whatever unfortunate circumstance, find themselves seeking refuge within its borders.