CONSTITUTIONAL COURT OF SOUTH AFRICA

Dobrosav Gavrić v Refugee Status Determination Officer, Cape Town and Others

CCT 217/16

Date of hearing: 6 February 2018
Date of judgment: 28 September 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 28 September 2018 the Constitutional Court handed down judgment in the application instituted by Mr Dobrosav Gavrić for leave to appeal against the whole judgment of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The High Court's decision had confirmed the refusal of the Refugee Status Determination Officer (RSDO), Cape Town to grant Mr Gavrić refugee status in terms of section 3 of the Refugees Act.

Mr Gavrić, a Serbian national seeking refugee status, illegally entered South Africa in 2007 under a false name and passport in order to conceal his identity as he was fleeing his native country. Mr Gavrić had fled because he feared for his life following the assassination of Mr Željko Ražnatović, better known as Arkan. Arkan was commander of the Arkan Tigers, a paramilitary unit closely aligned with the Milošević government during the Yugoslav conflict in the 1990s and as such, was considered a popular nationalist icon. On 15 January 2000, Mr Gavrić was present when Arkan was murdered in Belgrade. Despite Mr Gavrić's contentions to the contrary, he became the main suspect in the murder and was arrested for participating in Arkan's assassination. On 9 October 2008 he was convicted for murder and sentenced to 20 years imprisonment.

On 21 January 2012 Mr Gavrić applied for refugee protection in terms of section 3 of the Refugees Act on the grounds that he had been falsely believed to be a member of the political group that orchestrated Arkan's assassination and had a well-founded fear of being killed. The RSDO refused to grant Mr Gavrić refugee status and came to the conclusion that Mr Gavrić was excluded from being granted refugee status in terms of

section 4(1)(b) of the Refugees Act on the grounds that he had committed a serious non-political crime. The RSDO found that since murder was a non-political crime, Mr Gavrić was excluded, 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. Mr Gavrić then launched an application in the High Court seeking to have the RSDO's decision reviewed and set aside and a declaration that section 4(1)(b) of the Refugees Act is unconstitutional. In the alternative, Mr Gavrić sought to a declaratory order prohibiting the respondents from extraditing, deporting or compelling his return to Serbia. The High Court did not find that there was any risk of persecution should Mr Gavrić return to Serbia and found no impropriety or deficiency in the RSDO's decision. The matter was then taken on appeal to the Supreme Court of Appeal which refused leave to appeal on the grounds that Mr Gavrić had no reasonable prospects of success.

Before the Constitutional Court, Mr Gavrić' argued that the RSDO's decision was procedurally unfair and that the RSDO had wrongly concluded that Mr Gavrić had committed a non-political crime. At the hearing, Mr Gavrić, along with the amicus curiae (friend of the court) People Against Suppression, Suffering, Oppression and Poverty (PASSOP), also argued that there should be an internal remedy available to asylum seekers who are excluded in terms of section 4 of the Act.

The majority judgment of the Constitutional Court, penned by Theron J (Mogoeng CJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J and Petse AJ concurring), held that an internal appeal was available to applicants excluded under section 4. The Court held that Mr Gavrić need not exhaust internal remedies under PAJA and that the Court could consider his review application rather than remitting it back to the Refugee Appeal Board. In respect of the constitutionality of section 4(1)(b), the majority held that the section was in line with international standards and treaties. Further, section 2 which encapsulates the principle of *nonrefoulement*, ensures that individuals who will face persecution or harm if returned to their country of origin cannot be deported or extradited. The majority concluded that section 4(1)(b), when read with section 2, was constitutional.

The majority then set aside the RSDO's decision to exclude Mr Gavrić on two grounds: firstly, it was procedurally unfair for the RSDO to rely on documents which Mr Gavrić had not been given an opportunity to see or make submissions on; and secondly, the RSDO had not provided adequate reasons for her decision. The majority held that there were exceptional circumstances warranting an order substituting the decision of the RSDO. In substituting the decision, it was necessary to determine the test for what would constitute a political crime under the Act. Relying on international and foreign law as well as the laws applied to the Truth and Reconciliation Commission, the majority judgment outlined four factors to be used: (a) whether the motive was political rather than for personal or financial gain, (b) whether there was a direct link between the crime, the political motivation and the specific political goal, (c) whether the crime was proportional and (d) 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

about the motivation for the crime and thus there was no evidence upon which the Court could conclude that the crime was politically motivated. The majority therefore declared that Mr Gavrić was excluded from refugee status.

In a minority judgment by Jafta J (Dlodlo AJ concurring), the minority reasoned that an order for remittal was appropriate in the circumstances and not substitution as the majority judgment had held. The minority held that it was not appropriate for the Constitutional Court to decide the application for asylum on the merits because it is undesirable for the Constitutional Court to sit as the court of first and last instance as this deprives litigants of their right to appeal. The minority further held that other reasons that militate against the determination of the application for asylum by the Constitutional Court include that no argument had been placed before the Court pertaining to the issue of the meaning of "non-political crimes". Jafta J remarked that it would not be in the interest of justice for the Constitutional Court to decide whether Mr Gavrić should be granted asylum without the benefit of argument. In addition, Mr Gavrić had not first exhausted all the available internal remedies, namely an appeal to the Refugee Appeal Board, and no exceptional circumstances had been shown to exist in this case which indicated that it would be in the interests of justice to adjudicate the review proceedings notwithstanding that internal remedies had not been exhausted.

The minority also held that this was not the sort of case in which the Constitutional Court should itself exercise the administrative powers conferred on administrative functionaries. Jafta J pronounced that the general rule when administrative action is set aside is to remit the matter to the decision-maker for reconsideration and held that it is only in exceptional cases that the court may substitute, vary or correct a defect in the administrative action. The minority judgment also found that an application for determination for asylum requires special qualifications, experience and knowledge which the courts do not possess. For those reasons, it was not in the interests of justice for the Constitutional Court to consider the application for asylum and grant the substitution order. Therefore, the minority would have granted leave to appeal but ordered the matter to be remitted to the decision maker (the RSDO).