Registering and Removing Foreign Sex Offenders From the South African National Register for Sex Offenders

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SUMMARY

Section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act provides that a person who has been convicted of a sexual offence must have their details included in the National Register for Sex Offenders. This obligation is imposed on persons convicted not only in South Africa but also outside South Africa. The author argues that there should be circumstances in which the South African authorities can decline to include in the Register the details of a person who was convicted abroad. It is suggested that such details should not be included if there is evidence that the foreign trial leading to the conviction was a gross miscarriage of justice. It is also argued that the principle of double criminality will be applied before the details of a person convicted in a foreign country are included in the Register. Although section 51 of the Act provides for the circumstances in which the details of a person who has been convicted by a South African court can have their details removed from the Register, it is silent on the circumstances in which a person convicted in a foreign country can have their details removed from the Register. It is recommended that section 51 be amended to address that loophole. The article also discusses some of the issues that are likely to be encountered when dealing with the extraterritorial application of the Act.

KEYWORDS: Sexual offenders, register, foreign conviction, Criminal Law (Sexual Offences and Related Matters) Amendment Act, section 42, section 51

1 INTRODUCTION

Section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] (the Act) provides:

> "A National Register for Sex Offenders containing particulars of persons convicted of any sexual offence or are alleged to have committed a sexual

[1] 32 of 2007.

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> offence and who have been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic, must, in accordance with the provisions of this Chapter and the regulations made thereunder, be established and maintained by the Minister."

Under section 41 of the Act, a person whose particulars have been included in the National Register for Sex Offenders (the Register) is prohibited from taking up employment in various sectors.[2] A person convicted of a sexual offence will have their details included in the Register, whether the offence was "committed in or outside the Republic". Thus, the Act is also applicable to foreign convictions. Media reports and case law[3] show that some South African citizens or residents have been convicted of offences abroad. Some have been convicted of sexual offences in foreign countries.[4] Some of these individuals have been convicted in circumstances where their trials did not meet the international minimum standards for a fair trial.[5] Others were convicted in absentia.[6] Some scholars have written on the various aspects of the National Register for Sex Offenders.[7] There are many cases in which

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2 S 41 provides: "A person who has been convicted of the commission of a sexual offence or is alleged to have committed a sexual offence and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register, may not– (*a*) be employed to work with a person who is vulnerable in any circumstances; (*b*) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a person who is vulnerable; (*c*) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a person who is vulnerable; or (*d*) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person with a mental disability."

3 See, for example, *Minister of Home Affairs v Hellens* [2024] NASC 1 (South African citizens convicted in Namibia for working without work permits).

4 For example, *Director of Public Prosecutions, Western Cape v Tucker* 2021 (12) BCLR 1345 (CC); 2022 (1) SACR 339 (CC) (South African resident convicted of sexual offences in the United Kingdom).

5 See, for example, Fabricius "SA Won't Pay 'Ransom' for Release of Two Citizens Jailed in Equatorial Guinea" (3 September 2024) https://www.dailymaverick.co.za/article/2024-09-03-sa-wont-pay-ransom-for-release-of-two-citizens-jailed-in-equatorial-guinea/ (accessed 2025-11-20).

6 See, for example, *Director of Public Prosecutions, Western Cape v Tucker supra* par 2; *Gavric v Refugee Status Determination Officer, Cape Town* 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) par 8–9 (the applicant entered South Africa in 2007, and in 2008 was convicted of murder by a Serbian court).

7 See, for example, Mollema "The Viability and Constitutionality of the South African National Register for Sex Offenders: A Comparative Study" 2015 18(7) *Potchefstroom Electronic Law Journal* 56; De Bruyn "The Lack of Protection for Juvenile Sex Offenders in South African Law: A Critical Analysis of Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and Section 18 of the Criminal Procedure, Act 51 of 1977" 2018 *De Jure* 65–81; Stevens "Recent Developments in Sexual Offences Against Children: A Constitutional Perspective" 2016 19 *Potchefstroom Electronic Law Journal* 44; Hansungule "Protecting Child Offenders' Rights: Testing the Constitutionality of the National Register for Sex Offenders" 2014 *SA Crime Quarterly* 25–30.

courts have ordered that the details of offenders be included in the Register.[8] What is common about these publications and cases is that they do not deal with the question of the circumstances in which a person who has been convicted abroad can have their details registered or not registered in the Register. Even the Regulations that make sections 41 and 42 of the Act operative are silent on how a foreign conviction can be entered in the Register.[9] In this article, the author argues that there is a need to develop the criteria that should be followed before the details of a person who has been convicted of a sexual offence in a foreign country can be entered in the Register. The criteria should focus on the extent to which the trial leading to the conviction meets the international minimum requirements of a fair trial. In cases where there is evidence that the trial leading to the foreign conviction did not meet the international minimum standards of a fair trial, the details of the person convicted of a sexual offence pursuant to that trial should not be entered in the Register. It is also illustrated that for a foreign conviction to be entered in the Register, the conduct of the person convicted in a foreign country must be an offence in both South Africa and the foreign country (double criminality). The article also illustrates that section 51 of the Act is silent on the circumstances in which a person who has been convicted abroad can have their details removed from the Register. The article also deals with the issue of the extra-territorial application of the Act. The discussion starts with the ways in which the names of people who have been convicted of sexual offences, whether in South Africa or in foreign jurisdictions, are entered in the Register.

2 INCLUDING THE DETAILS IN THE REGISTER

Section 49 of the Act deals with "contents of Register" and section 49(*b*) stipulates the details of the sex offender that must be included in the Register. These include the offender's name, physical address, identity or passport number, the offence of which they were convicted and the court that convicted them.[10] Section 49 should be read with section 50 of the Act. The latter imposes a duty on various government departments to send the details of a person who was or has been convicted of a sex offence in South Africa to the Registrar of the National Register for Sex Offenders for inclusion in the Register. The duty is imposed on the court that convicted the offender (under section 50(2)),[11] the National Commissioner of Correctional

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8 See, for example, *Tsiba v S* [2023] ZANWHC 27; *Diniso v S* [2023] ZANWHC 11; *Mochole v S* [2024] ZANWHC 155; *Mosolo v S* [2021] ZAFSHC 142; *MWW v S* [2025] ZAGPJHC 1082; *Nkosi v S* [2025] ZAKZPHC 106; *Sejam v S* [2025] ZAFSHC 276.

9 Criminal Law (Sexual Offences and Related Matters) Regulations (published under GN R561 in *GG* 31076 of 2008-05-22 and amended by GN R2383 in *GG* 46736 of 2022-08-19).

10 S 49(*b*) of the Act.

11 S 50(2)(*a*) of the Act provides: "A court that has– (i) convicted a person of a sexual offence and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or (ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence, in the presence of that person, must, subject to paragraph *(c)*, make an order that the particulars of the person be included in the Register."

Services (under section 50(5)),[12] the National Commissioner of the South African Police Services (under section 50(6)),[13] and the Director-General of the Department of Health (under section 50(2)).[14] Under section 50(1)(*b*), the names of the following persons must also be included in the Register:

> "any person – (i) who, in any foreign jurisdiction, has been convicted of any offence equivalent to the commission of a sexual offence; (ii) who, in any foreign jurisdiction, has been dealt with in a manner equivalent to that contemplated in paragraph *(a)*(ii);[15] or (iii) whose particulars appear on an official register in any foreign jurisdiction, pursuant to a conviction of a sexual offence or as a result of an order equivalent to that in paragraph *(a)*(ii)."

Section 49(*c*) provides that "if the conviction and sentence took place in a foreign jurisdiction", the Register must "contain as far as possible the equivalent information as is contemplated in paragraph *(b)*, as obtained from the relevant country or any other legal source". A combined reading of sections 50(1)(*b*) and 49(*c*) shows there are three ways in which details of a person who has been convicted of a sex offence in a foreign country reach the Registrar of the National Register for Sex Offenders. The first two related ways are provided for under section 49(*c*). Under this provision, the Registrar has a duty to obtain the details of a person who was convicted of a

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The particulars of the offender can only be included in the Register if he/she is convicted of a sexual offence. See *Mmago v S* [2023] ZALMPPHC 80.

12 S 50(5) of the Act provides: "(*a*) The National Commissioner of Correctional Services must, in the prescribed manner, forward to the Registrar the particulars referred to in section 49 of every prisoner or former prisoner which he or she has on record, who, at the commencement of this Chapter, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence, as referred to in paragraph (*a*) of the definition of 'sexual offence' in section 40, five years preceding the commencement of this Chapter, and the Registrar must forthwith enter those particulars in the Register. (*b*) The National Commissioner of Correctional Services must, in the prescribed manner and period, inform each serving prisoner whose particulars have been forwarded to the Registrar of the implications thereof." Since South Africa does not have a prisoner-transfer agreement with another country, all the inmates in correctional services centres are those convicted by South African courts.

13 S 50(6) provides: "The National Commissioner of the South African Police Service must, in the prescribed manner, forward to the Registrar all the available particulars in his or her possession referred to in section 49 of every person who, at the commencement of this Chapter, has a previous conviction for a sexual offence, as referred to in paragraph (*a*) of the definition of 'sexual offence' in section 40, five years preceding the commencement of this Chapter, and the Registrar must forthwith enter those particulars in the Register."

14 S 50(7) provides: "(*a*) The Director-General: Health must, in the prescribed manner, forward to the Registrar the particulars referred to in section 49 or every person, who, at the commencement of this Chapter or in the period of five years preceding the commencement of this Chapter, is or was subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence [against a child or a person who is mentally disabled], as referred to in paragraph (*a*) of the definition of 'sexual offence' in section 40, and the Registrar must forthwith enter those particulars in the Register. (*b*) The Director-General: Health must, in the prescribed manner and period, inform each person referred to in paragraph (*a*) whose particulars have been forwarded to the Registrar of the implications thereof."

15 That is, the person is alleged to have committed a sexual offence but the court finds they cannot stand trial under s 77(6) or s 78(6) of the Criminal Procedure Act because "by reason of mental illness or mental defect not capable of understanding the proceedings" or because of a "mental effect" or "illness" they are incapable "(*a*) of appreciating the wrongfulness of his or her act or omission; or (*b*) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission".

sex offence in a foreign jurisdiction from that country or "any other legal source". The Act does not describe or define "other legal source". However, implied in this is that the details must be obtained legally – in accordance with the laws of the foreign jurisdiction. Once received, the details "must" be included in the Register. The third "route" is under section 50(1)(*b*), where the Registrar obtains the details from the official register of a foreign jurisdiction. Common to both domestic and foreign convictions is that an offender is not obliged to provide their details to the Registrar. Put differently, in the case of South African convictions, the details must be submitted by a relevant government department and in the case of foreign convictions, the Registrar must "look" for the details from those foreign jurisdictions. The Registrar is not first required to submit a foreign conviction to a court or any other statutory body to classify the nature of the conviction in order to determine when or whether such a person will qualify to have their name removed from the Register. It is argued that the Registrar's decision to include in the Register the details of a person who has been convicted in a foreign jurisdiction is an administrative action within the meaning of section 1 of the Promotion of Administrative Justice Act[16] (PAJA). Section 1 defines an "administrative action" to include "any decision taken … by an organ of state, when exercising a public power or performing a public function in terms of any legislation". The Registrar is an organ of state within the meaning of section 239 of the Constitution of the Republic of South Africa, 1996 (Constitution).[17] Section 1 of PAJA defines "decision" as "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to – doing ... any other act or thing of an administrative nature".[18] Since the Registrar's decision to include a person's details in the Registrar is an administrative action, it can be reviewed by a court under section 6 of PAJA on the ground(s) that "relevant considerations were not considered"[19] or that "the action itself is not rationally connected to the purpose of which it was taken"[20] or "the action itself is not rationally connected to the purpose of the empowering legislation".[21] As the discussion below illustrates, in cases where a person was convicted of a sexual offence in a foreign jurisdiction and the conviction did not meet the minimum requirements of a fair trial, one cannot rule out the possibility that they did not commit the offence. Registering their details in the Register defeats the purpose of the Act – to protect the community from sexual offenders. We now turn to the issue of the fairness of the trial.

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16 3 of 2000.

17 S 239 of the Constitution defines an "organ of state" to mean "(*a*) any department of state or administration in the national, provincial or local sphere of government; or (*b*) any other functionary or institution– (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".

18 For the interpretation of s 1 of PAJA, see, for example, *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC).

19 Under s 6(2)(*e*)(iii) of PAJA.

20 Under s 6(2)(*f*)(ii)*(aa)* of PAJA.

21 Under s 6(2)(*f*)(ii)*(bb)* of PAJA.

3 FAIRNESS OF THE TRIAL

Section 35(3) of the Constitution provides for the right to a fair trial. South African courts have developed rich jurisprudence on the right to a fair trial. However, the South African Constitution does not have extra-territorial application.[22] Thus, a South African citizen or resident who commits an offence abroad should not expect their trial to comply with section 35(3) of the Constitution. However, that does not mean that the fairness of their trial cannot be assessed against certain standards. South Africa is a state party to the International Covenant on Civil and Political Rights (ICCPR) (1966),[23] and there are cases in which the Constitutional Court has cited the ICCPR in its judgments.[24] Article 14 of the ICCPR provides for the right to a fair trial.[25] All the elements of the right to a fair trial contained in articles 14 and 15[26] of

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[22] See generally, *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); 2005 (1) SACR 111 (CC).

[23] UNGA *International Covenant on Civil and Political Rights* 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976 (ICCPR).

[24] See for example, *Zuma v Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC); *Jordaan v Minister of Home Affairs* 2025 (11) BCLR 1249 (CC); *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC).

[25] Article 14 provides "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt."

[26] Article 15 of the ICCPR provides "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

the ICCPR are also included in section 35(3) of the Constitution.[27] This means, among other things, that a trial conducted in compliance with section 35(3) meets the requirements of a fair trial under article 14. Under article 4 of the ICCPR, some of the elements of the right to a fair trial are non-derogable. The same approach is followed under the South African Constitution.[28] Therefore, if there is evidence to prove, on a balance of probabilities, that the trial leading to the conviction of the sexual offence did not meet the minimum requirements of a fair trial, the person's details of the conviction should not be entered in the Register. In other words, the conviction should be disregarded, and the person should be taken never to have committed the offence. The approach of refusing to recognise some foreign convictions has been followed in some countries such as the United Kingdom. For example, in *Mueen-Uddin v Secretary of State for the Home Department*,[29] the Supreme Court of the United Kingdom held that a conviction by a Bangladesh tribunal was inadmissible as a foreign conviction because the applicant had proved that the trial leading to the conviction was a gross miscarriage of justice. This was because the legislation establishing the tribunal included provisions that made it impossible for the accused to get a fair trial as provided for in international human-rights law. For example, the court found that the legislation

> "bars any challenge to the composition of a tribunal or the appointment of its members, disapplies the ordinary rules of evidence and procedure set out in the Criminal Procedure Code and the Evidence Act, provides that the tribunal is not bound by rules of evidence and can, in particular, rely on newspaper reports, and empowers the tribunal to impose the death penalty. Under its rules of procedure, the ICT's decisions as to the admission of evidence are final and cannot be challenged."[30]

Likewise, the European Court of Justice has held, relying on the jurisprudence of the European Court of Human Rights, that a conviction that resulted from a trial amounting to a flagrant denial of justice is inadmissible. The court gave the following as examples of what amounts to a flagrant denial of justice:

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27 S 35(3) of the Constitution provides: "Every accused person has a right to a fair trial, which includes the right– (*a*) to be informed of the charge with sufficient detail to answer it; (*b*) to have adequate time and facilities to prepare a defence; (*c*) to a public trial before an ordinary court; (*d*) to have their trial begin and conclude without unreasonable delay; (*e*) to be present when being tried; (*f*) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (*g*) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (*h*) to be presumed innocent, to remain silent, and not to testify during the proceedings; (*i*) to adduce and challenge evidence; (*j*) not to be compelled to give self-incriminating evidence; (*k*) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (*l*) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (*m*) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (*n*) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (*o*) of appeal to, or review by, a higher court."

28 See the table of non-derogable rights in the Constitution.

29 [2024] UKSC 21.

30 *Mueen-Uddin v Secretary of State for the Home Department supra* par 13.

> "a conviction in absentia without the possibility of obtaining a re-examination of the merits of the charge; a trial that is summary in nature and conducted in total disregard of the rights of the defence; detention whose lawfulness is not open to examination by an independent and impartial tribunal; and a deliberate and systematic refusal to allow an individual, in particular an individual detained in a foreign country, to communicate with a lawyer. The European Court of Human Rights also attaches importance to the fact that a civilian has to appear before a court composed, even if only in part, of members of the armed forces who take orders from the executive."[31]

Although the South African High Court has held that South African courts should not question the fairness of foreign trials,[32] this was in the context of a case in which there was no evidence of a flagrant denial of justice. Practice shows that some South African government departments are prepared to ignore foreign convictions where there is evidence that the trial was a gross miscarriage of justice. Furthermore, section 4(1)(*a*) of the Refugees Act[33] provides that

> "[a] person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she – has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes."

In *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa*,[34] the applicants argued, *inter alia*, that one of the respondents should not have been granted refugee status on the ground, among others, that the military court in Rwanda had sentenced him in "absentia to life imprisonment" for terrorism.[35] However, the Department of Home Affairs refused to revoke his refugee status. The decision by the Department of Home Affairs to disregard the Rwandan military court conviction and refuse to cancel Mr Nyamwasa's refugee status creates room for the argument that it considered the trial to have been a sham.

Since the Criminal Law (Sexual Offences and Related Matters) Amendment Act is silent on the criteria that should be used to assess the fairness of a foreign trial, it may need to be amended to emulate section 83 of the United Kingdom's Sexual Offences Act.[36] In terms of that section, a person who has been convicted of a sexual offence has to provide specific information about themself to the relevant authorities. However, different convictions are governed by different rules. In the case of convictions by the UK courts, the information must be submitted. In the case of foreign convictions, different rules apply to different convictions. Convictions from

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

32 In *Director of Public Prosecutions, Western Cape v Magistrate, Cape Tow*n 2023 (1) SACR 245 (WCC) par 66, the court held that "[f]or a magistrate in an extradition enquiry to express an adverse view in relation to a foreign, requesting state's legal system is inappropriate and a cause of judicial and political embarrassment".

33 130 of 1998.

34 [2014] ZAGPPHC 753.

35 *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa supra* par 15.1.

36 (2003) c. 42.

courts in Council of Europe member states are governed by section 96A of the Act. It states:

> "(1) This section applies to a person (P) if the following 3 conditions are met with respect to P.
> (2) The first condition is that under the law in force in a country outside the United Kingdom– (a) P has been convicted of a relevant offence (whether or not P has been punished for it), (b) a court exercising jurisdiction under that law has made in respect of a relevant offence a finding equivalent to a finding that P is not guilty by reason of insanity, (c) such a court has made in respect of a relevant offence a finding equivalent to a finding that P is under a disability and did the act charged against P in respect of the offence, or (d) P has been cautioned in respect of a relevant offence.
> (3) The second condition is that– (a) the first condition is met because of a conviction, finding or caution which occurred on or after 1st September 1997, (b) the first condition is met because of a conviction or finding which occurred before that date, but P was dealt with in respect of the offence or finding on or after that date, or has yet to be dealt with in respect of it, or (c) the first condition is met because of a conviction or finding which occurred before that date, but on that date P was, in respect of the offence or finding, subject under the law in force in the country concerned to detention, supervision or any other disposal equivalent to any of those mentioned in section 81(3) (read with sections 81(6) and 131).
> (4) The third condition is that the period set out in section 82 (as modified by subsections (6) and (7) below) in respect of the relevant offence has not expired."

In terms of section 96A, a person convicted of an offence in any Council of Europe member country must, if the conditions therein are present, notify the authorities of the relevant details. Thus, a conviction by a court from any Council of Europe member state is open to challenge. However, a different approach is followed when dealing with convictions from states that are not members of the Council of Europe. Section 96AA of the Act deals with these convictions and provides:

> "(1) The further provisions referred to in section 96A(5)(b) are as follows.
> (2) Where P is charged with an offence under section 91(1)(a), it is a defence for P to prove that the relevant conviction, finding or caution falls within subsection (4).
> (3) P shall cease to be subject to the notification requirements of this Part by virtue of section 96A if the High Court, on an application made by P in accordance with rules of court, so orders; but the High Court shall not make such an order unless it is satisfied that the relevant conviction, finding or caution falls within subsection (4).
> (4) A conviction, finding or caution falls within this subsection if the relevant court is satisfied– (a) that any investigations or proceedings leading to it were conducted in a way which contravened any of the Convention rights which P would have had if those investigations or proceedings had taken place in the United Kingdom; and (b) that contravention was such that, in the opinion of the court, the conviction, finding or caution cannot safely be relied on for the purposes of meeting the condition in section 96A(2)."

Section 96AA(5) defines the "relevant conviction, finding or caution" and "the relevant court". Therefore, if the court is satisfied that the person's trial was unfair, the obligation to notify the authorities falls away. In South Africa, a similar approach could be adopted. The general rule should be that

convictions from jurisdictions that are known for respecting human rights should be entered in the Register unless there is evidence to the contrary (first category). The opposite should be true when dealing with convictions from courts in jurisdictions where there are substantial grounds to believe that the conviction was a result of an unfair trial (second category). In the first category, the duty should be on the person challenging the "validity" of the conviction to convince the relevant authorities, on a balance of probabilities, that the conviction should not be recognised. In the case of the second category, the duty should be on the person (the Registrar) who would like the conviction to be entered in the Register to convince the relevant authorities that the trial met international minimum standards.

4 DOUBLE CRIMINALITY

Another important factor to consider is whether the sexual offence of which the person was convicted in a foreign country is an offence in South Africa. For example, in Uganda, homosexuality is a sexual offence under the Anti-Homosexuality Act.[37] However, in South Africa, homosexuality isn't an offence. Hence, not every person who is convicted of a sexual offence in a foreign jurisdiction will necessarily have their details entered in the National Register for Sex Offenders. This can be inferred from section 50(1)(*b*)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act which provides that for the details of a person convicted abroad to be entered in the National Register for Sex Offenders, they must have "been convicted of any offence equivalent to the commission of a sexual offence [in South Africa]".

5 REMOVAL OF DETAILS FROM THE REGISTER

The Criminal Law (Sexual Offences and Related Matters) Amendment Act is silent on the circumstances in which the details of a person who was convicted of a sexual offence abroad can be removed from the Register. Section 51(1) of the Act provides:

> "Subject to subsections (2), (2A) and (3), the particulars of a person–
> (*a*) who–
> (i) has been sentenced for a conviction of a sexual offence to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of 20 years has lapsed after that person has been released from prison or the period of suspension has lapsed;
> (ii) has been sentenced for a conviction of a sexual offence to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may,

[37] Act 6 of 2023. The Constitutional Court declared some of the provisions of this Act unconstitutional. See *Hon Fox Odoi v Attorney General* [2024] UGCC 10.

on application as contemplated in subsection (3), be removed from the Register after a period of 14 years has lapsed after that person has been released from prison or the period of suspension has lapsed; or

(iii) is alleged to have committed a sexual offence in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002), from any restrictions imposed on him or her; or

(*b*) who has been sentenced for a conviction of a sexual offence to any other form of lesser punishment or court order may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed since the particulars of that person were included in the Register."

Section 51(2) provides that particulars of some persons, sentenced in terms of South African law, may not be removed from the Register. Section 51(2A) and (2B) deal with the circumstances in which the particulars of a person who was sentenced as a child may be removed from the Register. A person who would like to have their record removed from the Register must make an application. In other words, the details are not removed automatically after the expiry of the stipulated periods. For the purpose of removing the details from the Register, the time starts running after the release of the person from prison or the expiry of the suspension period. Thus, it does not start running the day the sentence is imposed. This implies that in a case where the offender is placed on parole, the time will start running after the expiration of the parole period. Section 51(1) should be read with section 51(3), which provides:

"(*a*) A person falling into the categories contemplated in subsection (1) may apply, in the prescribed manner, to the Registrar to have his or her particulars removed from the Register.

(*b*) The Registrar must, after considering the application, remove the particulars of the person contemplated in paragraph (*a*) from the Register, unless the person concerned has a charge relating to a sexual offence pending against him or her and the relevant case has not yet been finalised, in which event the finalisation of the application must be postponed until the Registrar has, in the prescribed manner, received information on the outcome of the case.

(*c*) The Registrar may, at the request of a person whose particulars are included in the Register, remove those particulars from the Register, if the Registrar is satisfied that the entry of those particulars in the Register was clearly in error."

The use of the word "may" under section 51(1) creates room for the argument that the Registrar has the discretion whether or not to remove the details of the person from the Register after the expiry of the stipulated period. However, a combined reading of section 51(1) and (3) shows that the Registrar is obligated to remove the details of the applicant after the expiry of the stipulated period(s), provided the person concerned does not have a charge relating to a sexual offence pending against them and the relevant case has been finalised. Thus, section 51(3) provides for only one ground on

which the Registrar can refuse to remove from the Register the details of the applicant – if there is a charge relating to a sexual offence pending against that person. Once the case is finalised and the person is acquitted, the Registrar must remove their details from the Register. However, if they are convicted of that offence, section 51(2) is triggered. It provides:

> "The particulars of a person who has–
> *(a)* been sentenced for a conviction of a sexual offence to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, with or without the option of a fine for a period exceeding 18 months, whether the sentence was suspended or not; or
> *(b)* two or more convictions of a sexual offence,
> may not be removed from the Register."

Although the word "may" is used under section 52(2)(*b*), there is room for the argument that the intention of the legislature was to prohibit the Registrar from removing the details of the people mentioned thereunder. These are people convicted of serious sexual offences or repeat sexual offenders. Thus, the word "may" should be interpreted as "shall". This implies that these people's details will remain in the Register for the rest of their lives, irrespective of the measures they take to rehabilitate themselves. Thus, they have no second chance in life, as it were. This provision may not withstand constitutionality scrutiny inasmuch as it applies to all persons irrespective of their circumstances. Even for those who are no longer a danger to society, their employment prospects are permanently "encumbered" by the presence of their details on the Register. The order to include a person's details on the Register is a continuation of their punishment. As the Constitutional Court held in *Dodo v S*,[38] the "concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading".[39]

That aside, a combined reading of subsections (1), (2) and (3) of section 51 suggests that the pending sexual charge in question should be in a South African court. Hence, the Registrar cannot refuse to remove the details of a person from the Register on the basis that there are pending sexual charges against them in a foreign country. Section 51 does not have extra-territorial application. Otherwise, the legislators would have stated so expressly. It is evident that section 51 is applicable to persons sentenced in terms of South African legislation (the Criminal Procedure Act). Strictly interpreted, it is limited to South African convictions. It is silent on the circumstances in which the details of a person with a foreign conviction can be removed from the National Register for Sex Offenders. Section 51 therefore needs to be amended to provide expressly for circumstances in which a person with a foreign conviction can have their details removed from the Register. Related to the above is the issue of the process to be followed to categorise the "seriousness" of the foreign conviction for the purpose of removing the details of the offender from the Register under section 50 (should it be amended to cover foreign convictions). Unlike in the case of South African convictions (where the Act is clear on the categorisation of the seriousness or otherwise of the offence for the purpose of removing the details of the

[38] 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).
[39] *Dodo v S supra* par 37.

person from the Register), the Act is silent on the categorisation of foreign convictions. A "one-size-fits-all" approach is taken in the case of foreign convictions – once a person is convicted in a foreign country, their details must be included in the system. The Act is silent on the duration of such details being kept in the Register and the process that is followed to determine such duration. This is different from the approach taken in other jurisdictions. For example, under the New York Sex Offender Register Act, there is a Board that classifies the nature of "out-of-state" convictions for the purposes of determining the duration of keeping the offender's details on the Register.[40]

6 EXTRA-TERRITORIAL JURISDICTION

As a general rule, South African courts do not have jurisdiction over offences committed abroad. However, section 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act creates one of the exceptions to this rule and provides for the extra-territorial jurisdiction of South African courts with regard to sexual offences. It states:

> "(1) Even if the act alleged to constitute a sexual offence or other offence under this Act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place of its commission, has, subject to subsections (4) and (5), jurisdiction in respect of that offence if the person to be charged– (*a*) is a citizen of the Republic; (*b*) is ordinarily resident in the Republic; (*c*) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed; (*d*) is a company, incorporated or registered as such under any law, in the Republic; or (*e*) any body of persons, corporate or unincorporated, in the Republic.
>
> (2) Subject to subsections (4) and (5), any act alleged to constitute a sexual offence or other offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), is, whether or not the act constitutes an offence at the place of its commission, deemed to have been committed in the Republic if that– (*a*) act was committed against a person referred to in paragraphs (*a*) or (*b*) of subsection (1); (*b*) person is found in the Republic; and (*c*) person is, for any reason, not extradited by the Republic or if there is no application to extradite that person.
>
> (3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for purposes of determining the jurisdiction of a court to try the offence, deemed to have been committed– (*a*) at the place where the complainant is ordinarily resident; or (*b*) at the accused person's principal place of business.
>
> (4) No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Act in respect of which such person has already been convicted or acquitted by a court of another jurisdiction.
>
> (5) The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions."

[40] See generally, *The People of the State of New York v Adam Malloy* (273, KA 22-01946) (Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department) (14 June 2024).

Indeed, there has been an attempt to prosecute some people for sexual offences committed abroad.[41] As illustrated above, section 61 is applicable "whether or not the act constitutes an offence at the place of its commission". Thus, if an act, for example, marital rape, is not yet criminalised in some countries such as Malaysia,[42] Djibouti,[43] Tajikistan,[44] Bahrain[45] and Niger,[46] a person who commits such an act in those countries can be prosecuted in South Africa, provided that one of the requirements under section 61(1) and (2) is met.

Section 61(4) protects the right against double jeopardy. This is in line with section 35(3)(*m*) of the Constitution, which provides that an accused person has a right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted". However, for a person to invoke section 61(4) successfully, the trial leading to their acquittal should not have been a sham, and the conviction must have been on merit. As the Constitutional Court held in *S v Basson*:[47]

> "The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of *autrefois acquit* in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity."[48]

However, the mere fact that the rules of procedure and evidence relied on at a trial in a foreign country and leading to the accused's acquittal were abolished in South Africa does not mean that their trial in the foreign country was not "genuine".[49] Similarly, the mere fact that the classification and

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41 For example, *S v Omotoso* [2025] ZAECQBHC 8, the accused, South African residents, were prosecuted for, *inter alia*, sexual offences committed against South African citizens in Nigeria and Israel. However, they were acquitted because the State failed to prove their guilt beyond reasonable doubt. See also *Carolissen v Director of Public Prosecutions* 2016 (2) SACR 171 (WCC) par 58–62, where the court discussed the extra-territorial jurisdiction of the Act.

42 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) *Concluding Observations on the Sixth Periodic Report of Malaysia* (6 June 2024) CEDAW/C/MYS/CO/6 par 26(d).

43 CEDAW Committee *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Djibouti* (26 February 2024) CEDAW/C/DJI/CO/4-5 par 25(c).

44 CEDAW Committee *Concluding Observations on the Seventh Periodic Report of Tajikistan* (20 February 2024) CEDAW/C/TJK/CO/7 par 36(b).

45 CEDAW Committee *Concluding Observations on the Fourth Periodic Report of Bahrain* (2 March 2023) CEDAW/C/BHR/CO/4 par 26(a).

46 CEDAW Committee *Concluding Observations on the Fifth Periodic Report of the Niger* (20 February 2024) CEDAW/C/NER/CO/5 par 31(a).

47 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC).

48 *S v Basson supra* par 254.

49 For example, in South African law, a corroboration of the victim's evidence is not a prerequisite for the accused to be convicted of marital rape. However, in Malawi, the opposite is true. See CEDAW Committee *Concluding Observations on the Eighth Periodic Report of Malawi* (14 November 2023) CEDAW/C/MWI/CO/8 par 21(a), where the CEDAW Committee was concerned that "[t]he absence of legislation specifically criminalizing marital

penalty of a sexual offence are different or lenient compared to those under South African legislation does not mean the person convicted or acquitted of such an offence in a foreign country is deprived of the protection under section 61(4). For example, in Bhutan, "[m]arital rape is … classified as a petty misdemeanour, carrying a maximum sentence of one year's imprisonment, whereas rape outside of marriage is criminalized as a third-degree felony, which carries a higher prison sentence".[50] Likewise, in some countries such as the Gambia, Honduras and Russia, "the definition of rape is based on coercive circumstances",[51] whereas in South Africa, it is based on a lack of consent. Despite these differences between Bhutan and South African law, a person convicted or acquitted of marital rape in Bhutan cannot be prosecuted for the same offence in South Africa. Likewise, a person acquitted of rape in the Gambia, Honduras and Russia cannot be prosecuted for the same offence in South Africa.

7 CONCLUSION

In this article, the author has discussed the circumstances in which a person's details can be included in the Register and also the circumstances in which South African authorities can decline to include in the Register the details of a person who was convicted abroad. The article suggests that such details should not be included if there is evidence that the trial leading to the conviction was a gross miscarriage of justice. The article has also demonstrated that the principle of double criminality will be applied before the details of a person convicted in a foreign country are included in the Register. It has been illustrated that section 51 does not provide for circumstances in which a person who was convicted in a foreign country can have their details removed from the Register. Section 51 will have to be amended to address that loophole.

rape and of legal procedural guidelines for the repeal of the 'corroboration rule', whereby the testimony of a witness is required in addition to a victim's testimony in cases of rape."

50 CEDAW Committee *Concluding Observations on the Tenth Periodic Report of Bhutan* (14 November 2023) CEDAW/C/BTN/CO/10 par 29(a).

51 CEDAW Committee *Concluding Observations on the Sixth Periodic Report of the Gambia* (1 November 2022) CEDAW/C/GMB/CO/6 par 21(b); CEDAW Committee *Concluding Observations on the Ninth Periodic Report of Honduras* (1 November 2022) CEDAW/C/HND/CO/9 par 25(b); CEDAW Committee *Concluding Observations on the Ninth Periodic Report of the Russian Federation* (30 November 2021) CEDAW/C/RUS/CO/9 par 24(a).