CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 273/17

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA MUSADDIK FAHME	Second Applicant
KUZIKESA JULES VALERY SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent
and	
PEOPLE AGAINST SUFFERING, OPPRESSION AND POVERTY	First Amicus Curiae
LAWYERS FOR HUMAN RIGHTS	Second Amicus Curiae
DE SAUDE ATTORNEYS INC	Third Amicus Curiae

Neutral citation: *Ahmed and Others v Minister of Home Affairs and Another* [2018] ZACC 39

Coram: Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J

Judgment: Theron J (unanimous)

Heard on: 15 May 2018

Decided on: 9 October 2018

Summary: Immigration Directive 21 of 2015 — validity of directive — imposes blanket ban on asylum seekers applying for visas under Immigration Act 13 of 2002 — inconsistent with Immigration Act — invalid

Immigration Directive 21 of 2015 — validity of directive — prohibits asylum seekers from applying for permanent residence permits — inconsistent with regulation 23 of Immigration Regulations of 2014 — invalid

---

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside.
3. To the extent that Immigration Directive 21 of 2015, issued by the Director-General of the Department of Home Affairs on 3 February 2016, imposes a blanket ban on asylum seekers from applying for visas without provision for an exemption application under section 31(2)(c) of the Immigration Act 13 of 2002, it is declared inconsistent with the Immigration Act 13 of 2002 and invalid.
4. To the extent that Immigration Directive 21 of 2015, issued by the Director-General of the Department of Home Affairs on 3 February 2016, prohibits asylum seekers from applying for permanent residence permits while inside the Republic of South Africa, it is declared inconsistent with

Regulation 23 of the Immigration Regulations, 2014 published under Government Notice R413 in *Government Gazette* 37697 of 22 May 2014 and invalid.

5. There is no order as to costs.

JUDGMENT

THERON J (Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ concurring):

Introduction

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal. This case concerns the question whether asylum seekers, including those whose applications for refugee status have been refused, are eligible to apply for other visas and immigration permits in terms of the Immigration Act.[1] The applicants also seek an order setting aside a Department of Home Affairs (Department) directive, Immigration Directive 21 of 2015 (Directive), which requires Departmental functionaries to refuse all applications for temporary and permanent residence visas made by the holder of an asylum seeker permit.

Background

[2] The first applicant, Mr Tashriq Ahmed, is an admitted attorney specialising in immigration law and the legal representative of the second to fourth applicants. He has joined in the application in the interests of the general public and his clients. Ms Arifa Musaddik Fahme, Mr Kuzikesa Jules Valery Swinda and Mr Jabbar Ahmed, the second

[1] 13 of 2002.

to fourth applicants respectively, are all asylum seekers who have been "refused"[2] visas or permits under the Immigration Act.

[3] The first respondent is the Minister of Home Affairs (Minister). The second respondent is the Director-General of the Department who is responsible for the administration and implementation of the Immigration Act and the Refugees Act.[3]

[4] The first to third amici curiae are, respectively, People Against Suffering, Oppression and Poverty (PASSOP); Lawyers for Human Rights (LHR); and De Saude Attorneys Inc. The first and second amici curiae are non-governmental organisations based in Johannesburg and the third amicus curiae is a Cape Town-based law firm specialising in South African immigration and citizenship law.[4]

[5] This matter originates from an order of the then Western Cape High Court issued in 2003 in *Dabone v Minister of Home Affairs* (*Dabone* order),[5] which ordered the Department to no longer require that an asylum seeker cancel her asylum seeker permit in order to apply for a permanent or temporary residence permit under the Immigration Act or that she must possess a valid passport in order to make such an application.[6]

---

[2] "Refused" is used in the broad sense in that the application of the second applicant was not accepted for processing by the Department. See [9].

[3] 130 of 1998.

[4] Another group, Forum of Immigration Practitioners South Africa, applied to be admitted as amicus curiae. However, their application was not sent in the form prescribed by this Court's Rules and their application is refused.

[5] *Dabone v Minister of Home Affairs*, order of the High Court of South Africa, Western Cape High Court, Case No 7526/03 (11 November 2003).

[6] The *Dabone* order provides:

> "2. [A]sylum seekers in possession of a permit issued in terms of section 22 of the Refugees Act, 1998 (Act No. 130 of 1998) ('asylum seeker permit holders') and refugees can apply for one of the temporary residence permits contemplated in the Immigration Act, 2002 (Act No. 13 of 2002) ('the Immigration Act'), as well as permanent residence in terms of sections 36 or 27 of the Immigration Act.
>
> 3. When applying for permanent residence in terms of section 26 or 27 of the Immigration Act, asylum seeker permit holders are no longer required to cancel their asylum seeker permits.
>
> 4. When applying for permanent residence in terms of section 213 or 27 of the Immigration Act, refugees are no longer required to give up their refugee status."

[6] In essence, the Circular, which was included in the *Dabone* order, provided that asylum seekers who were in possession of a temporary asylum seeker permit[7] could apply for a temporary residence permit contemplated in the Immigration Act, as well as permanent residence permits. The Circular directed that all employees of the Department accept applications for temporary visas and permanent residence permits from asylum seekers and refugees. In addition, it confirmed that applicants did not need to give up their status as asylum seekers in order to make these applications and that a valid passport would no longer be a prerequisite.[8]

[7] Issued in terms of section 22 of the Refugees Act above n 3 which provides that:

> "(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit."

[8] Following the *Dabone* order, the Department issued a circular, Circular 10. of 2008 (Circular), which adopted the wording of the order, and read:

> "Department Circular No 10 of 2008 confirming the 11 November 2003 Dabone Court Order
> WITHDRAWAL OF PASSPORT CONTROL INSTRUCTION NO. 29 OF 2004
>
> 1. Passport Control Instruction No 29 of 2004 is hereby withdrawn.
>
> 2. In terms of the Court Order of the High Court of South Africa (Cape Provincial Division) in the matter of Dabone and Others v the Minister of Home Affairs and Another, case no. 7526/03, asylum seekers in possession of a permit issued in terms of section 22 of the Refugees Act, 1988 (Act No. 130 of 199) ('asylum seeker permit holders') and refugees can apply for one of the temporary residence permits contemplated in the Immigration Act, 2002 (Act No. 13 of 2002) ('the Immigration Act'), as well as permanent residence in terms of section 26 or 27 of the Immigration Act.
>
> 3. When applying for permanent residence in terms of section 26 or 27 of the Immigration Act, asylum seeker permit holders are no longer required to cancel their asylum seeker permits. When applying for permanent residence in terms of section 213 or 27 of the Immigration Act, refugees are no longer required to give up their refugee status.
>
> 4. Possession of a valid passport is no longer a prerequisite for processing applications by asylum seekers in possession of asylum seeker permits or refugees for: (a) a temporary residence permit; or (b) an amendment to a temporary residence permit held by an asylum seeker or refugee.
>
> 5. Possession of a valid passport is no longer a prerequisite for the issuance of (a) temporary or permanent residence permits, as the case may be; or (b) an amendment to a temporary residence permit held by an asylum seeker or refugee, to asylum seeker permit holders; or refugees."

[7] The *Dabone* order was complied with by the Department for just over a decade. In February 2016, the Department issued the Directive which is headed "Withdrawal of Circular No. 10 of 2008 confirming the 11 November 2003 *Dabone* Court Order". The Directive provided that:

> "It is the considered view of the Department that no change of condition or status should be premised on the provisions of the Immigration Act for a holder of an asylum seeker permit whose claim to asylum has not been formally recognised by SCRA [Standing Committee for Refugee Affairs].
>
> Section 27(c) of the Refugees Act stipulates that a Refugee is entitled to apply for an immigration permit after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.
>
> The immigration permit referred to in the Refugees Act is the permanent residence permit of section 27(d) of the Immigration Act. It therefore follows that a holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit.
>
> In view of the above provisions I wish to advise all immigration officials that Departmental Circular No. 10 of 2008 has fallen away since the 26th of May 2014 and is hereby officially withdrawn."

[8] The Directive ends with:

> "In view of the above provisions I wish to advise all immigration officials that Departmental Circular No. 10 of 2008 has fallen away since the 26th of May 2014 and is hereby officially withdrawn.. All applications for change of status from asylum seeker permit to temporary residence visa which are still pending in the system should be processed as per this directive regardless of the date of application."

[9] The second applicant applied for a visitor's visa in terms of section 11(1)(b)(iv)[9] of the Immigration Act, read with regulation 11(4)(a),[10] which would allow her to remain in the country with her husband and their children, while her husband is here under a general work permit. VFS Global, an entity acting as an agent for the Department, refused to accept her application on the basis that, in terms of the Directive, it was unable to accept applications from asylum seekers for temporary visas.

[10] The third and fourth applicants each applied for a critical skills visa in terms of section 19(4)[11] of the Immigration Act on the basis that they possess a skill[12] which falls under critical skills as provided in the Regulations. Their applications were rejected on the ground that their asylum claims were subject to an appeal before the Refugees Appeal Board.[13] They have both appealed against this rejection and the appeal is pending.

---

[9] This section is headed "Visitor's visa" and provides:

> "(1) A visitor's visa may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who complies with section 10A and provides the financial or other guarantees prescribed in respect of his or her departure: Provided that such visa–
>
> …
>
> (b) may be issued by the Director-General upon application for any period which may not exceed three years to a foreigner who has satisfied the Director-General that he or she controls sufficient available financial resources, which may be prescribed, and is engaged in the Republic in–
>
> …
>
> (iv) any other prescribed activity."

[10] Immigration Regulations, 2014 published under Government Notice R413 in *GG* 37697 of 22 May 2014 (Regulations). Regulation 11(4)(a) is also headed "Visitor's visa" and provides that:

> "An activity contemplated in section 11(1)(b)(iv) of the Act shall be work conducted for a foreign employer pursuant to a contract which partially requires conducting of certain activities in the Republic and relates–
>
> (a) to the spouse or dependent child of the holder of a visa issued in terms of section 11."

[11] Section 19 is headed "Work visa" and subsection 4 provides:

> "Subject to any prescribed requirements, a critical skills work visa may be issued by the Director-General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the Gazette and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed."

[12] The third applicant is an information technology specialist and the fourth applicant is a sheep shearer.

[13] The rejections were on the following basis:

In the High Court

[11] The applicants approached the High Court of South Africa, Western Cape Division, Cape Town (High Court) for an order declaring that the Directive was invalid as it was inconsistent with the Constitution and should be set aside. In addition, the applicants sought an order that the respondents consider (or reconsider) the second to fourth applicants' visa applications.

[12] The High Court held that, viewed through the prism of the Constitution, the Immigration Act and the Refugees Act should be read together in a complementary fashion and not be treated as separate and distinct legislative regimes. The High Court pointed to the fact that the Immigration Act distinguishes between "citizens" and "foreigners". A foreigner is defined as "an individual who is not a citizen".[14] The High Court reasoned that this provision includes all categories of foreigners, including asylum seekers.[15] The High Court found that it was not offensive to the legislative scheme to allow an asylum seeker to apply for temporary residence in terms of the Immigration Act. In addition, the High Court held that there was nothing in either the Immigration Act or Refugees Act which prevented asylum seekers from applying for temporary residence permits from within the country.[16]

> "The applicant cannot be granted a temporary residence visa until their asylum application has been finalized and their asylum claims have been proven to be true as currently the application has been referred to [the Refugees Appeal Board] as the asylum claims were found to be unfounded and thereby rejected. The applicant has been granted an opportunity to exhaust his or her rights of appeal and sec 26 of the Refugees Act no 130, 1998 states that the appeal board may after hearing an appeal confirm, set aside or substitute any decision taken by a refugee status determination officer, as an adjudicator in permitting a decision to grant trv [temporary residence visa] would not be correct/premature as the applicant's asylum status has yet to be finalized (which could result in confirmation, setting aside or substitution of the current rejection), such decision will then provide direction in the processing of a trv."

[14] Section 1 of the Immigration Act.

[15] *Ahmed v Minister of Home Affairs* [2016] ZAWCHC 123; 2017 (2) SA 417 (WCC) (High Court judgment) at paras 41 and 45.

[16] Id at paras 45 and 53.

[13] The High Court held that denying the second applicant an opportunity to apply for a visitor's permit in order to remain with her spouse and children "constitutes an unjustifiable violation of her right to dignity as well as that of her spouse".[17] The High Court further held that it could find no reason why the third and fourth applicants, and persons similarly placed, should be denied the right to apply for temporary work rights if they meet the requirements for such a visa.[18] It held that this interpretation would further the aims and objectives of the Immigration Act.[19] The High Court concluded that the second respondent had acted irrationally, that the Directive was arbitrary, and fell to be set aside.[20]

In the Supreme Court of Appeal

[14] Dissatisfied with the decision of the High Court, the respondents approached the Supreme Court of Appeal. The Supreme Court of Appeal held that an application for a visa by a foreigner "must be made abroad and not in South Africa."[21] The Supreme Court of Appeal held that the High Court's conclusion was based on an erroneous interpretation of the Immigration Act and that asylum seekers are subject to the Refugees Act which is a separate regime to that of the Immigration Act.[22]

In this Court

[15] In this Court the applicants submit that the provisions of the Immigration Act that relate to temporary and permanent residence permits refer only to "foreigners" and do not expressly exclude asylum seekers. The applicants contend that the fact that section 27(d) of the Immigration Act makes express provision for refugees to apply for permanent residence five years after their recognition as a refugee does not mean that

[17] Id at para 63.

[18] Id at para 64.

[19] Id.

[20] Id at paras 68-70.

[21] *Minister of Home Affairs v Ahmed* [2017] ZASCA 123; 2017 (6) SA 554 (SCA) (Supreme Court of Appeal judgment) at para 10.

[22] Id at para 13.

an asylum seeker or a refugee may not be eligible for any other permit in terms of the Immigration Act. In addition, they argue that the Directive is unlawful as it is *ultra vires* and unjustifiably limits the right to dignity of asylum seekers with familial relations in the country.

[16] The respondents support the conclusion of the Supreme Court of Appeal. The respondents submit that the Directive is consistent with the legislative and regulatory framework of the Refugees Act and Immigration Act. They further contend that even if the Directive is invalid, the officials of the Department, in any event, have no discretion to accept and consider applications made within the country.

[17] The amici curiae each applied for condonation for the late filing of their applications to be admitted. Their explanations were reasonable and all three condonation applications must be granted.

[18] The issues raised by the amici were not fully canvassed by the parties and were of assistance to this Court. It is therefore in the interests of justice to admit them as amici curiae.

[19] In addition, LHR and De Saude Attorneys Inc applied to adduce further evidence. At the hearing, LHR abandoned its application while De Saude Attorneys Inc neither addressed nor pursued their application. In view of this it would not be in the interests of justice to admit the further evidence.

Jurisdiction and leave to appeal

[20] This Court will grant leave to appeal where the application raises a constitutional issue and where it is in the interests of justice to grant leave to appeal.[23] This matter raises various constitutional issues. It involves the lawfulness of the Directive and

[23] Section 167(6)(b) of the Constitution; Rule 19(2) of the Constitutional Court Rules; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at paras 48-9.

whether it contravenes the applicants' right to just administrative action. It also concerns whether the Directive unjustifiably infringes the applicants' right to dignity.[24]

[21] In addition, it raises questions about the inter-relationship between refugee and immigration law. This Court's jurisdiction is engaged.

[22] The question whether asylum seekers and refugees are entitled to apply for visas under the Immigration Act is of significance and a determination by this Court will impact on numerous persons, not just the applicants. This Court, in *Union of Refugee Women*,[25] recognised the vulnerability of refugees:

> "Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.
>
> The condition of being a refugee has thus been described as implying 'a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse'."[26]

[23] Further, though not decisive, there are prospects of success in this matter. It is in the interests of justice to grant leave to appeal.

---

[24] See *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at paras 9 and 40.

[25] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC).

[26] Id at paras 28-9.

Merits

The scheme of the Refugees Act

[24] The Refugees Act distinguishes between asylum seekers and refugees.[27] An asylum seeker is someone who has arrived in South Africa and applied for asylum, that is, for recognition as a refugee. A refugee is someone who has been granted asylum. The Refugees Act protects both groups but their rights vary significantly.

[25] Section 23 of the Immigration Act[28] and regulation 22 of the Regulations provide that the Director-General may issue an asylum transit visa to any person who arrives at a South African port of entry and claims to be an asylum seeker. The visa is valid for five days and it allows the asylum seeker only to travel to the nearest Refugee Reception Office in order to apply for asylum.

[26] Once asylum seekers have entered South Africa, they must apply for asylum at a Refugee Reception Office.[29] The Refugee Reception Officer must issue an asylum

[27] Section 1(1).

[28] Section 23 reads:

> "(1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.
>
> (2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act No. 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act."

[29] Section 21 of the Refugees Act reads:

> "(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.
>
> (2) The Refugee Reception Officer concerned—
>
> (a) must accept the application form from the applicant;
>
> (b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;
>
> (c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and
>
> (d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24."

seeker permit to the applicant pending the outcome of her application for asylum.[30] If the asylum seeker's transit visa has not already expired, it is in any event rendered "null and void" by section 22(2) when an asylum seeker's permit is issued to her.

[27] The asylum seeker's application for asylum is determined in terms of section 24(3). If the application for asylum succeeds, the applicant becomes entitled to all the rights of refugees provided for in sections 27 to 34. These include the rights to live and work in South Africa,[31] and to apply for a permanent residence permit.[32]

Visa applications

[28] The Immigration Act distinguishes between two types of visas, namely, temporary residence permits, on the one hand,[33] and permanent residence permits, on the other.[34] Section 10(2) entitles any foreigner to apply for a temporary residence permit visa. This includes a study visa (section 13); a visa permitting the holder to establish a business (section 15); a visa to stay with a relative (section 18); a critical skills visa (section 19(4); a retired person visa (section 20); and a spousal visa (section 11(6). Section 10(2) stipulates that all visa applications must be made "in the prescribed manner".

[29] Regulation 9(1) and (2) prescribe the manner in which most visa applications must be made. In terms of regulation 9(2), visa applications must be made at a foreign mission of the Republic (foreign mission). It reads:

> "Any applicant for any visa referred to in sub-regulation (1) must submit his or her application in person to –

[30] Section 22 of the Refugees Act.

[31] Section 27(b) and (f) of the Refugees Act.

[32] Section 27(c) of the Refugees Act.

[33] Sections 10-4 of the Immigration Act.

[34] Sections 25- 8 of the Immigration Act.

(a) any foreign mission of the Republic where the applicant is ordinarily resident or holds citizenship; or

(b) any mission of the Republic that may from time to time be designated by the Director-General to receive applications in respect of any country in which a mission of the Republic has not been established."

[30] Section 10(6)(a) of the Immigration Act allows certain foreigners who are in South Africa to apply for a change of status:

> "Subject to this Act, a foreigner, other than the holder of a visitor's or medical treatment visa, may apply to the Director-General in the prescribed manner to change his or her status or terms and conditions attached to his or her visa, or both such status and terms and conditions, as the case may be, while in the Republic."

[31] Section 1(1) defines "status" as "the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act". Additionally, the section 1(1) defines a "visa" as "the authority to temporarily sojourn in the country for a purpose specified in the Immigration Act".

[32] Regulation 9(5) elaborates on these provisions:

> "A foreigner who is in the Republic and applies for a change of status or terms and conditions relating to his or her visa shall –
>
> (a) submit his or her application, on Form 9 illustrated in Annexure A, not less than 60 days prior to the expiry date of his or her visa; and
>
> (b) provide proof that he or she has been admitted lawfully into the Republic,
>
> Provided that no person holding a visitor's or medical treatment visa may apply for a change of status to his or her visa while in the Republic, unless exceptional circumstances set out in sub-regulation (9) exist."

[33] Section 10(6)(a) and regulation 9(5) are an exception to the general provision that visa applications must be made at a foreign mission. They also make it clear,

however, that the exception only applies to the holders of certain categories of visas issued in terms of the Immigration Act. The exceptions do not apply to asylum seekers who are in the country on asylum seeker permits issued in terms of the Refugees Act.

[34] Upon arrival at a South African port of entry, asylum seekers are given an asylum transit visa for five days to allow them to apply for asylum at the nearest Refugee Reception Office. This is in terms of the Immigration Act. Thereafter, they become subject to the Refugees Act. Section 22(2) of the Refugees Act puts this beyond doubt. It says that, upon the issue of an asylum seeker permit to an applicant–

> "any permit issued to the applicant in terms of the [the Immigration Act], becomes null and void, and must forthwith be returned to the Director-General for cancellation."

[35] The second to fourth applicants' applications for a visitor visa in terms of section 11 and work visas in terms of section 19 of the Immigration Act are governed by regulations 9(1) and (2) of the Regulations. Read together, these regulations make it clear that the second to fourth applicants could not lawfully apply for visitor's and work visas whilst in South Africa. Applications for visas of that kind may only be made at a foreign mission, as was held by the Supreme Court of Appeal.

[36] The applicants have not attacked the constitutional validity of the legislation or its application to asylum seekers.

Nature of the Directive

[37] The applicants contend that there are two broad reasons why the Directive is unlawful. The first is that it contravenes the Immigration Act and is *ultra vires*. The second is that it unjustifiably limits the applicants' right to dignity.

[38] If the Directive overrides, amends or conflicts with the provisions and/or scheme of the Immigration Act, then it is unlawful.[35] Similarly, the Directive may not be in conflict or inconsistent with the Constitution. The making of a directive is the exercise of public power, and all public power must be exercised lawfully.[36] The Director-General of the Department can only make directives that fall within the four corners of the empowering legislation (in this case, the Immigration Act). For the Director-General to issue a directive that contradicts or extends beyond the powers given to him by the Immigration Act would be to act without legal authority and violate the rule of law.[37]

Can the Directive be set aside?

[39] The Supreme Court of Appeal did not consider the validity of the Directive. Rather, it looked to the Immigration Act and the Regulations to determine whether asylum seekers, in the position of the second to fourth applicants, were entitled to apply for a visa or permit. It concluded that asylum seekers are subject to the requirement that applications for visas or permits must be made from outside the borders of the country, and as the second to fourth applicants did not apply for exemption from this requirement, they were not entitled to make such an application once inside the country. It noted that applications for exemption from this requirement were possible under section 31(2)(c) of the Immigration Act.

[40] This interpretation of the Act and the Regulations cannot be faulted. The only remaining issue is whether it is necessary for this Court to go any further. Can this Court set aside the Directive? To answer this question regard must be had to the nature of a directive. The applicants argue that the Directive is binding on all employees of the

[35] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59; 2001 (4) SA 501 (SCA) at para 7.

[36] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 79; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56;

[37] It is trite that the rule of law is a founding value of South Africa's constitutional democracy. See section 1(c) of the Constitution.

Department and thus they are obliged to adhere to and act in accordance with it. The respondents contend that the Directive is merely a statement of policy which has no force in law and which cannot confer any rights nor deprive a person of rights.

[41] The nature and status of a directive is unclear. A directive is an official policy document, which guides government departments on how to apply legislation. According to Baxter, directives belong to a "body of rules which are of great practical importance" and which constitute "instructions issued without clear statutory authority to guide the conduct of officials in the exercise of their powers."[38] Baxter refers to departmental circulars and directives as "administrative quasi-legislation" which are neither legislation nor subordinate legislation.[39] This does not necessarily mean that a directive is unenforceable or that it has no legal status.[40] Where it appears that an Act has anticipated the creation of a directive, a court will be more willing to find that it has legal authority and is enforceable. The fact that directives are not promulgated and there is uncertainty as to their legal status, may lead to a situation where an official or body relies on a directive that is not aligned to applicable law.

[42] The nature of policy directives differ. They may be statutorily required, in which case their lawfulness is assessed against the empowering legislation seen through a constitutional lens.[41] In other cases, the application of the statutory policy in individual instances may be challenged on the grounds of the infringement of certain fundamental rights, like the right to equality. In *Barnard*, this Court held that there was no discrimination against the applicant because the policy was flexible and the functionary's exercise of discretion in accordance with that flexibility could not be faulted.[42] Lastly, the policy may not be expressly required by legislation, but be an

[38] Baxter *Administrative Law* 3ed (Juta & Co Ltd, Cape Town 1991) at 200.

[39] Id at 202.

[40] Id at 201.

[41] Compare *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (9) BCLR 1099 (CC).

[42] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) (*Barnard*).

internal document that regulates the implementation and application of statutory powers granted to functionaries.[43]

[43] The Directive here appears to fall into the third category. The difficulty then is whether its contents may be challenged directly in the same way as legislation by way of legality review, or whether only its application in individualised instances may be challenged under administrative review. However the two are, at times, closely interlinked.

[44] The Directive was issued by department officials and in practice, employees of the Department, and its agent VFS Global, believed that they were bound by the terms of the Directive. Standing alone, the Directive could be said to constitute an exercise

---

[43] See *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) at 365C-G where the rules of the JSE were found binding because they were contemplated in section 10(1)(c) of the Stock Exchange Control Act 7 of 1947.

This Court dealt with the status of a directive in the context of provincial powers being amended in the *Constitution in Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) at para 120:

> "The issuing of a directive in terms AT 100(1)(a) has no consequences in itself; it only has relevance as part of a process which requires a directive to be issued before the intervention sanctioned by AT 100(1)(b) takes place. If intervention in terms of AT 100(1)(b) occurs, the requirements of AT 101(2) have to be complied with. These successive steps constitute the process referred to in AT 100(3) which may have to be regulated by legislation."

For example, the North West Roads Bill and North West Roads Agency Bill published for comment in PG 6528 of 12 September 2008 dealt with the enforcement of directives. Conversely, section 82 of the Constitution of the Western Cape, 1997 deals specifically with the legal status of certain directives and reads: "[t]he directive principles of provincial policy contained in this Chapter are not legally enforceable, but guide the Western Cape government in making and applying laws."

See *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* [2013] ZASCA 206; 2014 (3) SA 149 (SCA) where the Court considered whether the Minister's directives under the National Water Act 36 of 1998 were enforceable against a landowner who ceased to be a landholder. The Court stated:

> "The wording of subsection (3) makes it plain that the Legislature intended to vest the Minister with wide discretionary powers and to leave it to him or her to determine what measures a defaulting landholder must take and for how long it must continue to do so. I find nothing in the wording of subsection (3) or in the other provisions of section 19 which warrants the conclusion that the Minister's powers under subsection (3) are intended to be limited. The Minister's powers under subsections (4) to (8) are also triggered by a landholder's default (in this instance its failure to comply fully with the Minister's directive issued under subsection (3)), but the Minister's powers under subsections (4) to (8) are much more extensive"

In *Investec Employee Benefits Ltd v Marais* [2012] ZASCA 99; 2012 JDR 0913 (SCA) at para 5, the purpose of tax directives issued by SARS were confirmed as a directive that "sets out the amount of tax to be deducted from the benefit payable to the beneficiary and must be obtained and complied with before any payment can be made."

of public power which is reviewable, be it under the Promotion of Administrative Justice Act[44] (PAJA) or the principle of legality. The application of its terms by officials would merely be an extension of this conduct. If that conduct – the issuing of the Directive and its subsequent application by officials – was based on a material error of law the result under legality or administrative review would be the same: it would be invalid and unlawful.

[45] In my view, it is not necessary to make a pronouncement on the status of the Directive or directives falling into the third category. Similarly, it is not necessary for me to make a pronouncement on whether the review should take place under PAJA or the principle of legality as the distinction was never raised by the parties.[45] That the Directive is treated as binding by the people tasked to implement it is sufficient for this Court to make a determination on whether the Directive is *ultra vires* and thus invalid.

Ultra vires

[46] The overarching purpose of the Directive is to withdraw the Circular. However, the Directive goes further than a mere withdrawal in that it, in addition, provides:

> "[A] holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit."

[47] Does this impose a blanket ban on asylum seekers from applying for temporary or permanent residence visas, and if yes, is this permissible? The Directive reads:

> "It is the considered view of the Department that no change of condition or status should be premised on the provisions of the Immigration Act for a holder of an asylum seeker permit whose claim to asylum has not been formally recognised by SCRA."

[44] 3 of 2000.

[45] *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) (*Aurecon*) at para 36.

[48] The Directive goes on to refer to a dispensation in terms of which refugees may apply for an immigration permit under section 27(d)[46] of the Immigration Act, read with section 27(c) of the Refugees Act. On a plain reading of the Directive it is clear that the only exception provided for in the Immigration Act is for refugees in terms of section 27(d). It necessarily follows that asylum seekers, who have not been certified as refugees, are not entitled to apply for visas or permits under the Immigration Act. The Directive imposes a blanket ban on asylum seekers applying for temporary or permanent residence visas under the Immigration Act.

[49] The question is whether this is permissible.

[50] There is nothing in either the Immigration Act or Refugees Act to support the Directive's reasoning that the process available in section 27(d) renders all other pathways to immigration unavailable to an asylum seeker to obtain a permanent residence permit. The immediate difficulty is that the permit referred to in section 27(d) is only available to a successful asylum seeker who has been granted asylum status. This interpretation of the Acts would deprive unsuccessful asylum seekers of any pathway to lawful presence in South Africa once their application for asylum is rejected. Such an interpretation is inconsistent with the provisions of the Immigration Act which provide that all non-citizens may apply for visas.

[51] To the extent that the Directive imposes a blanket prohibition on asylum seekers applying for permits under the Immigration Act, it is *ultra vires*. However, it does not

[46] Section 27(d) of the Immigration Act provides:

> "The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act, 1998 (Act No. 13 of 2002), subject to any prescribed requirement."

Section 27(c) of the Refugees Act provides:

> "A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely."

follow that the requirements imposed on these applications by the Immigration Act and the Directive are automatically invalid as well.

Permanent residence permits

[52] The second applicant is a married woman with children. Her husband and children reside in South Africa. The Directive prevents her, and similarly placed asylum seekers, from applying for a permanent residence visa, which would afford their familial relations greater protection. Instead, they are expected to remain in the country with their families on an asylum transit visa issued in terms of regulation 22.

[53] On the interpretation of the Directive contended for by the respondents, in order to apply for a permanent residence permit, asylum seekers would have to return to their countries of origin, likely leaving their families in South Africa. This is not a requirement under the Regulations. Unlike temporary visas, there is no requirement in regulation 23 that applications for permanent residence permits must be made at a foreign mission or outside the country.[47] Consequently, the Directive has the effect of prohibiting an application which would otherwise be permitted under the Regulations. The question is whether the Directive can override the Regulations.

[54] A directive which has not been officially published, for example in the *Government Gazette*, or made accessible to the public and merely issued by the

[47] Regulation 23(3) makes provision for applications in a foreign country but unlike regulation 9, it does not require that all applications be made outside the country. Without pronouncing on the constitutionality of regulation 9, it is clear that the requirements for a permanent residence permit are different to those outlined in regulation 9 and thus there is no legal basis to impose those same requirements by way of a directive. Regulation 23(4) provides that:

> "An application made in a foreign country shall be submitted to–
>
> (a) the mission of the Republic in the foreign country of the applicant's usual residence, which includes country of origin, permanent residence and long term temporary residence;
>
> (b) the mission of the Republic in a foreign country of which the applicant holds a valid passport; or
>
> (c) any mission of the Republic that may from time to time be designated by the Director-General to receive applications in respect of an adjoining or nearby foreign country in which a mission of the Republic is not present."

Director-General of the Department to all immigration officials as an operational guide, can hardly be suggested to be a law or carry sufficient weight so as to override the Regulations. Thus, to require that the second applicant leave the country in order to apply for a visa when there is no requirement under law to this effect, would, in these circumstances, be unfair and effectively unlawful.

[55] To the extent that the Directive prevents the second applicant, and similarly placed asylum seekers, from applying for permanent residence permits, it is *ultra vires* and, therefore, unlawful.

Temporary residence visas

[56] The third and fourth applicants are not in the same situation as the second applicant. This is not only by virtue of the fact that their familial relationships are not directly impacted by the Directive but also due to the type of visa they have applied for. The regulatory requirements for temporary residence visas – which have not been challenged in this matter – are different to those for permanent residence permits.

[57] Section 10(1)[48] provides that a foreigner not in possession of a permanent residence permit may only enter and sojourn in the country if they are in possession of a temporary residence visa. Section 10(2)[49] describes the various temporary residence

[48] Section 10(1) of the Immigration Act provides:

> "Upon admission, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period."

[49] Section 10(2) of the Immigration Act provides:

> "Subject to this Act, upon application in person and in the prescribed manner, a foreigner may be issued one of the following visas."

The types of visas which may be issued are specified in section 10(2)(a)-(l) and include visas for the purposes of transit through the Republic (section 10B); a visit (section 11); study (section 13); conducting activities in the Republic in terms of an international agreement (section 14); establishing or investing in a business (section 15); working as a crew member of a conveyance in the Republic (section 16); obtaining medical treatment (section 17); staying with a relative (section 18); working (sections 19 and 21); retirement (section 20); an exchange programme (section 22); or applying for asylum (section 23).

visas which may be issued. An application must be made in person and in the prescribed manner.

[58] The Directive, in so far as it relates to temporary residence permits, is not constitutionally invalid. The Refugees Act provides a mechanism for asylum seekers to obtain immigration permits in the country. The process for asylum seekers is distinct from foreigners who enter the country on a valid visa.[50] This distinction is not unconstitutional and is based on a rational distinction between foreigners who enter the country having acquired a valid visa prior to entry and those who arrive at a South African port of entry without having gone through this or a similar process. Further, the distinction is based on the regulatory requirements not applicable to those applying for permanent residence permits.

[59] This Court is aware of the challenges in the refugee system. It is cognisant of the fact that requiring an asylum seeker to return to their countries of origin, in order to apply, would, in all likelihood, require that the asylum seeker give up their asylum seeker permit.[51] In addition, this Court is mindful of the fact that many asylum seekers may not be in the economic position to enable them to travel to their countries of origin. However, it is not for this Court to unilaterally make a provision, which differentiates asylum seekers from other applicants under the Immigration Act, by directing that the Department receive these applications from asylum seekers from within the borders of the country.

[60] Asylum seekers must be allowed to apply for visas or permits under the Immigration Act, and if they meet the requirements of that Act, they must be granted the visa or permit. Section 31(2)(c) of the Immigration Act provides that an applicant may apply to the Minister for an exemption from any prescribed requirement for the

[50] Section 22 of the Refugees Act.

[51] Section 22(5) of the Refugees Act provides:

> "A permit issued to any person in terms of subsection (1) lapses if the holder departs from the Republic without the consent of the Minister."

issuance of a visa or permit.[52] It was accepted by the parties that there is no reason why the second to fourth applicants, and persons similarly placed, may not apply for an exemption and request that the Minister waive the requirement that an application for a visa be made from outside the borders of the country.

[61] Asylum seekers are often not in possession of valid passports or identity documents and not in the position to readily obtain their documents. With this, and the *Dabone* order in mind, the Department circulated the Circular to its employees and instructed them to accept and consider applications for visas or permits made by asylum seekers not in possession of valid passports. The purpose of the Circular was to ameliorate the precarious position of asylum seekers and to afford them the opportunity to apply for visas or permits in terms of the Immigration Act without a valid passport. It must be stressed that no administrative hurdles, relating to the possession of passports and the like, may be introduced by the Department in order to disallow or discourage these kinds of applications.

Remedy

[62] It follows that the Directive must be set aside in part. The consequence of this is that the general regime as envisaged by the Circular, the Immigration Act and the Regulations remain in force. This ultimately means that there is nothing preventing an asylum seeker from applying for a visa or permit under the Immigration Act without a valid passport.

---

[52] Section 31(2)(c) of the Immigration Act provides:

> "Upon application, the Minister may under terms and conditions determined by him or her–
>
> …
>
> (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may -
>
> …
>
> (c) for good cause, waive any prescribed requirement or form."

[63] It does not mean that an exception has been created in terms of which asylum seekers may apply for temporary residence visas whilst within the borders of the country. This is clear from the terms of the *Dabone* order and the Circular. What the *Dabone* order and the Circular provide is that asylum seekers may apply for a visa or permit under the Immigration Act without a valid passport. It does not state that such an application may be made from within the borders of the country. It does, however, provide that asylum seekers and refugees are not required to give up their status when applying for a permanent residence permit. This was not in dispute before us.

[64] The applicants submit that the order of the High Court, to the effect that the respondents reconsider the applications, is correct. It was argued by PASSOP that such reconsideration should be stayed pending the second to fourth applicants being given a reasonable opportunity to apply for exemption in terms of section 31(2)(c) of the Immigration Act and until PASSOP's intended constitutional challenge to regulation 9(2) has been heard. LHR suggests that an appropriate remedy would be to order that the Director-General of the Department reconsider the applications, alternatively, that the second to fourth applicants apply for exemption.

[65] It is open to the second to fourth applicants, in terms of section 31(2)(c), to apply for exemption from the requirements of regulation 9 in order to allow them to apply for a temporary residence visa from within the country. Those applications must be considered by the Minister. It is not for this Court to direct the future conduct of the parties. Given that the second to fourth applicants would first have to apply for exemption, and the Minister could grant such exemption applications, there is no need to grant PASSOP's stay of consideration of the applications pending its intended litigation in respect of regulation 9(2). In addition, the second applicant may now apply for a permanent residence permit.

Costs

[66] The applicants and the respondents were both partially successful. In any event, the respondents are not pursuing a costs order. It is just and equitable that there be no order as to costs.

Order

[67] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside.
3. To the extent that Immigration Directive 21 of 2015, issued by the Director-General of the Department of Home Affairs on 3 February 2016, imposes a blanket ban on asylum seekers from applying for visas without provision for an exemption application under section 31(2)(c) of the Immigration Act 13 of 2002, it is declared inconsistent with the Immigration Act 13 of 2002 and invalid.
4. To the extent that Immigration Directive 21 of 2015, issued by the Director-General of the Department of Home Affairs on 3 February 2016, prohibits asylum seekers from applying for permanent residence permits while inside the Republic of South Africa, it is declared inconsistent with regulation 23 of the Immigration Regulations, 2014 published under Government Notice R413 in *Government Gazette* 37697 of 22 May 2014 and invalid.
5. There is no order as to costs.

For the Applicants:	A Katz SC, A Brink and Y Ntloko instructed by Kassel Sklaar Cohen and Co.
For the Respondents:	W Trengove SC, K Pillay and A Nacerodien instructed by the State Attorney, Cape Town.
For the First Amicus Curiae:	T Ngcukaitobi and E Webber instructed by the Legal Resources Centre.
For the Second Amicus Curiae:	C McConnachie and C Tabata instructed by Lawyers for Human Rights.
For the Third Amicus Curiae:	D Simonsz instructed by De Saude Attorneys Incorporated.