CONSTITUTIONAL COURT OF SOUTH AFRICA

Nandutu and Others v Minister of Home Affairs and Others

CCT 114/18

Date of hearing: 21 February 2019

MEDIA SUMMARY

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

On Thursday 21 February 2019 at 10h00, the Constitutional Court will hear an application for direct leave to appeal against a decision of the High Court, Western Cape Division, Cape Town (High Court). The applicants seek a declaration that regulation 9(9)(a) of the Immigration Regulations is unconstitutional. The first and second respondents, the Minister of Home Affairs and the Director-General of the Department of Home Affairs oppose the application.

The first applicant, Ms Nandutu, is a Ugandan citizen and the spouse of the second applicant, Mr Tomlinson, who is a South African permanent resident. Ms Nandutu entered South Africa on a visitor's visa that was issued under section 11(1) of the Immigration Act (Act). At the time of entering South Africa, Ms Nandutu was pregnant with Mr Tomlinson's child. Several months after she entered South Africa, Ms Nandutu married Mr Tomlinson and gave birth to their son, whose birth has not yet been registered due to Ms Nandutu's lack of status. In order to be able to remain in South Africa with her husband and son, Ms Nandutu applied for a "spousal visa" under section 11(6) of the Act. Her application was rejected on the grounds that in terms of section 10(6) of the Act it is not possible to change the status of a temporary visa while being in South Africa, and any applications for a change to visa status must be made from outside South Africa. Ms Nandutu's administrative appeals of that decision were dismissed.

The third applicant, Mr Demerlis, is a Greek citizen and the partner of the fourth applicant, Mr Ttofalli, a South African citizen. Mr Demerlis also entered South Africa on a visitor's visa issued under section 11(1) of the Act. Whilst in South Africa, he applied for a spousal visa under section 11(6). His application was rejected for the same reason as that of Ms Nandutu, as well as the further reason of insufficient documentation. Mr Demerlis' administrative appeals were also unsuccessful.

Aggrieved, the applicants approached the High Court to have regulation 9(9)(a) declared inconsistent with the Constitution, because it does not make an exception for section 11(1) visitor's visa holders who are spouses or children of a South African citizen or permanent resident to apply for a section 11(6) spousal visa from within South Africa, and thus infringes their constitutional right to dignity. The High Court dismissed the application. In doing so, it disagreed with its own previous decision about what it means to "change status" in terms of visitor's visas issued under section 11. The High Court found that changing from a section 11(1) visitor's visa to a section 11(6) spousal visa is a change in visa status, even though both visas fall under the broader category of section 11 visitor's visas. Due to there being a change in status, the High Court held that persons seeking to change from a section 11(1) visa to a section 11(6) visa can only do so from outside of South Africa. The High Court also found that foreign nationals who marry whilst in South Africa should not be able to circumvent the requirements that other foreign nationals applying for spousal visas outside of South Africa are subject to. The High Court ultimately held that regulation 9(9)(a) did not infringe human dignity or the equal treatment of visa applicants, and was reasonably capable of being read consistently with the Constitution. Aggrieved by this, the applicants applied for leave to appeal directly to the Constitutional Court.

In the Constitutional Court, the applicants ask the Court to apply the reasoning of its previous decision in *Dawood v Minister of Home Affairs*, being that regulation 9(9)(a) impairs the ability of spouses to cohabit, and thereby limits the right to dignity. They also ask the Court to consider the impact of the regulation on the child's best interests and the child's right to family care. The applicants submit that the Court should read in to regulation 9(9)(a) the words, "(iii) is the spouse or child of a South African citizen or permanent resident" to remedy the constitutional invalidity of the regulation.

The first and second respondents submit that the application should be dismissed. They submit that it is more appropriate for the applicants to obtain a decision from the Supreme Court of Appeal. They further submit that the requirement that visitor's visa holders leave South Africa to apply for a spousal visa is justified by a reasonable and rational government purpose, and that regulation 9(9)(a) is not constitutionally invalid because of the available means to apply directly to the Minister to waive that requirement under section 31(2)(c) of the Act. The first and second respondents also submit that the reading in proposed by the applicants as a remedy is not appropriate even if there is a breach of rights, as it would amount to a substantive amendment of the legislation and would thus breach the separation of powers principle.