CONSTITUTIONAL COURT OF SOUTH AFRICA

Tashriq Ahmed and Others v Minister of Home Affairs and Another

CCT 273/17
Date of hearing: 15 May 2018

MEDIA SUMMARY

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

On 15 May 2018 at 10h00, the Constitutional Court will hear an application for leave to appeal against an order of the Supreme Court of Appeal. The Supreme Court of Appeal overturned a decision of the High Court of South Africa, Western Cape Division, Cape Town (High Court) which declared the Department of Home Affairs Immigration Directive 21 of 2015 (the Directive) invalid and inconsistent with the Constitution, and set it aside.

In 2008, the Director-General of the Department of Home Affairs issued Circular 10 of 2008 (the Circular) which confirmed a court order to the effect that persons classified as asylum seekers and refugees under the Refugees Act 130 of 1998 were allowed to apply for visas or permits under the Immigration Act 13 of 2002. The Circular was withdrawn in February 2016 when the Directive was issued. The Directive withdrew the Circular and provided that the only application a refugee can make under the Immigration Act is for permanent residency in terms of section 27(d) of that Act.

The first applicant, Mr T Ahmed, is an attorney specialising in immigration law and the legal representative of the second to fourth applicants, Ms Fahme, Mr Swinda, and Mr J Ahmed, respectively. The second to fourth applicants are asylum seekers who had applied for asylum in terms of the Refugees Act. Their applications for asylum were denied. Ms Fahme attempted to apply for a visitor's visa provided for in terms of the Immigration Act for the spouse of a work visa holder, in order to remain with her spouse and children lawfully in the Republic. However an agent of the Department of Home Affairs (the Department), citing the Directive, refused to accept her application. Mr

Swinda and Mr J Ahmed both applied, under the Immigration Act, for critical skills visas. Their applications were declined.

The applicants approached the High Court for an order declaring that the Directive was inconsistent with the Constitution and to have it set aside. On 21 September 2016, the High Court handed down judgment. It held that the Directive was arbitrary and liable to be set aside as it was irrational and not supported by a proper interpretation of the provisions within the context of the two Acts. With regard to Ms Fahme, the Court held that her right to dignity had been violated as the refusal to allow her to apply for a Visa under the Immigration Act infringed her right to family life. In respect of Mr Swinda and Mr J Ahmed, the Court could find no reason why an unsuccessful asylum seeker should be barred from applying for temporary working rights, and that an interpretation allowing them to do so better promotes the objects and purposes of the Immigration Act, which include the promotion of economic growth through needed foreign labour.

Dissatisfied with the outcome, the respondents approached the Supreme Court of Appeal. On 26 September 2017, the Supreme Court of Appeal held that the High Court had erred in its interpretation of the Immigration Act. It held that the general rule, subject to a few exceptions, is that a person may only apply for a visa or permit under the Immigration Act from outside the borders of the Republic of South Africa and that, as the second to fourth applicants were in the Republic, they were not entitled to rely on the Immigration Act. The Supreme Court of Appeal held that the applicants were subject to the Refugees Act and not the Immigration Act. It upheld the appeal.

In the Constitutional Court the applicants argue that on a proper reading of both the Immigration Act and Refugees Act, all foreigners – including asylum seekers and refugees – may apply for visas. In addition, they argue that the Directive is ultra vires as it is contrary to the objects and purposes of the Immigration Act. The applicants further contend that it unjustifiably limits the right to dignity of asylum seekers with familial relations in the Republic as it prevents them exercising their right to live together as a family unit.

The respondents argue that a person must be outside the Republic in order to apply for a visa under the Immigration Act. They argue that the second to fourth applicants and all asylum seekers in general, have no status under the Immigration Act as they are covered by the Refugees Act, which is a separate regime. In addition, the respondents contend that the Directive has no force of law and can neither confer nor deprive any person of rights. According to the respondents, it is irrelevant whether or not the Directive is wrong, as the Immigration Act, and the regulations promulgated in terms of the Act, provide for the same outcome. Consequently, the respondents say that the Department had no discretion but was bound to refuse such applications. The respondents argue that the application for leave to appeal should be dismissed or, if leave is granted, that the appeal be should be dismissed.