

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case no.: 273/2017
SCA Case no.: 1383/2016
WCHC Case No.: 3096/2016

In the matter between:

TASHRIQ AHMED First Applicant

ARIFA MUSADDIK FAHME Second Applicant

KUZIKESA JULES VALERY SWINDA Third Applicant

JABBAR AHMED Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL OF HOME AFFAIRS Second Respondent

APPLICANTS' WRITTEN SUBMISSIONS

Introduction

1. Should asylum seekers be allowed to apply for visas and permanent residence permits?

2. The respondents, unequivocally and unconditionally, answer this question in the negative in Directive 21 of 2015 (“Directive 21”). It is their “considered view” that a foreigner who happens to hold an asylum seeker permit cannot, under any circumstances, apply for a temporary visa or a permanent residence permit.
3. The applicants submit that the question must be answered in the positive for two reasons.
 - 3.1. First, a proper reading of the Immigration Act 13 of 2002 (“the Immigration Act”) and Refugees Act 130 of 1998 (“the Refugees Act”) reveals that all foreigners are able to apply for temporary visas or permanent residence permits. This includes asylum seekers. To pass directives that contradict this rule is ultra vires, unlawful, and an unjustifiable limitation of the applicant’s rights to just administrative action.¹
 - 3.2. Second, Directive 21 unjustifiably limits the right to dignity of those asylum seekers with familial relations in South Africa.
4. The applicants applied to declare Directive 21 unconstitutional and for the respondents to (re)consider the second to fourth applicants’ applications for visas in terms of the Immigration Act. In the Western Cape High Court, Sher AJ (as he then was) granted the applicants the relief sought.² The respondents

¹ Section 33 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

² *Ahmed and Others v Minister of Home Affairs and Another* (3096/2016) [2016] ZAWCHC 123 (21 September 2016); 2017 (2) SA 417 (WCC).

appealed to the Supreme Court of Appeal, which upheld their appeal.³ It is against this decision that the applicants seek leave to appeal.

5. These written submissions deal with the following:
 - 5.1. The reasons for granting the applicants leave to appeal;
 - 5.2. A brief factual background to this application;
 - 5.3. The grounds for the unconstitutionality of Directive 21;
 - 5.4. The Supreme Court of Appeal's judgment; and
 - 5.5. The conclusion and relief sought.

Leave to Appeal

6. 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.⁴
7. This application raises various constitutional issues. It concerns whether Directive 21 is unlawful and contravenes the applicant's right to just administrative action. It also concerns whether Directive 21 unjustifiably infringes the applicants' right to dignity.
8. The interests of justice dictate that leave to appeal be granted. This is because:

³ *Minister of Home Affairs and Another v Ahmed and Others* (1383/2016) [2017] ZASCA 123 (26 September 2017); 2017 (6) SA 554 (SCA).

⁴ 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* (CCT 105/10) [2011] ZACC 30 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (17 November 2011) paras 48-49.

- 8.1. The application has strong prospects of success. This is demonstrated in the later sections of these heads;
- 8.2. This matter raises an important question—whether asylum seekers’ applications under the Immigration Act can be refused simply because they are asylum seekers. Such a determination affects the rights of many (thousands of) particularly vulnerable persons entitled to the assistance of the State, whose potential to contribute meaningfully to our society is one which the Immigration Act enjoins the State to maximise, not to negate.
- 8.3. This court has acknowledged 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.”⁵

⁵ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006) paras 28 and 29.

8.4. Moreover, asylum seekers and refugees are by definition foreigners. The Immigration Act aims to promote economic growth through needed *foreign*, skilled labour.⁶ Another is to prevent and counter xenophobia.⁷ This application raises the critical issue of whether these aims are being thwarted by Directive 21, and whether Directive 21 infringes on the rights of a vulnerable group of people.

9. Therefore, leave to appeal should be granted.

Brief factual background

10. In September 2003 the Cape Town office of the Legal Resources Centre brought an application in this Court in which they sought relief against the Minister and Director-General of Home Affairs (“the Department”) on behalf of thirteen asylum seekers.⁸

11. The application was set down for hearing on 11 November 2003, but it was never heard. Instead, an order was granted by agreement between the parties (“the *Dabone* Order”). It provided that the department would accept Immigration Act applications from asylum seekers, and that the order would be transmitted to all Departmental managers ‘immediately’.

12. Five years later, the second respondent issued Circular 10 of 2008 (hereafter “Circular 10”). The text of the *Dabone* Order was included in the Directive. Directive 10 directed all department employees to accept applications for temporary visas and permanent residence permits from asylum seekers and

⁶ Preamble para (d) of the Immigration Act.

⁷ *Ibid*, para (m).

⁸ Annexure S to the founding affidavit, pp 53 – 82.

refugees. It confirmed that such applicants did not need to give up their status as asylum seekers in order to make such applications, and it confirmed that valid passports would no longer be required from such applicants.⁹

13. The *Dabone* Order was complied with by the Department for over a decade.
14. On 3 February 2016, the second appellant issued Directive 21.¹⁰
15. Directive 21 is headed: “*Withdrawal of Circular No 10 of 2008 confirming the 11 November 2003 Dabone Court Order*” and provides in part as follows:

“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 recognized by [the 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 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.”
16. The Directive ends with the following:

⁹ Circular 10, annexure R at p50

¹⁰ Annexure Q at p48

“In view of the above provisions I wish to advise all Immigration Officials that Departmental Circular 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.”

17. Importantly, moreover, Directive 21 declares that Directive 10 is deemed to have fallen away since 26 May 2014. Directive 21 was only issued on 3 February 2016. This means that Directive 21 has a retrospective effect for a period of 21 months preceding the issuing of the Directive.

18. Amongst those asylum seekers whose Immigration Act applications were not even accepted for processing were the third and fourth applicants. They had both applied for critical skills visas – the third applicant contends that he is an IT Security Specialist; and the fourth applicant contends that he is a sheep shearer. That is not disputed in this matter. Both are listed critical skills. The rejections were on the following basis:

“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 [note: 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 trav."¹¹

19. Both those applications were already in the system. The second applicant's was not and in her case the Department's agent (VFS) simply refused to accept the application at all. She had applied for a permit permitting her to accompany her spouse while he is in the country on a valid work permit, as she is entitled to do by section 11(1)(b)(iv) of the Immigration Act.¹²

Grounds for unconstitutionality

20. There are two broad reasons, apart from its own self destructive and irrational reasoning, why Directive 21 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.

Ultra Vires

21. If Directive 21 conflicts with the provisions, purpose and scheme of the Immigration Act, then it is unlawful. The making of a directive is the exercise of public power, and all public power must be exercised lawfully.¹³ The Director-General of Home Affairs can only make directives that fall within the

¹¹ Annexure J, p38 (Swinda); Annexure N, p44 (Ahmed). Underlining supplied.

¹² As regards Mrs Fahme: p9 para 19.8, and para 33 of the answering affidavit, p114, where this is not denied.

¹³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 para 56; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1 para 79.

four corners of the empowering legislation (in this case, the Immigration Act). To make a directive that contradicts or extends beyond the powers given to the Director General by the Immigration Act is to act without legal authority, and violates the rule of law.¹⁴ The directive would be unlawful, unconstitutional, and invalid for that reason alone.

22. The issue then is whether the Immigration Act envisages a directive that retrospectively prohibits asylum seekers from applying for visas or permits in terms of that Act.

23. A proper interpretation of the Immigration Act demonstrates otherwise. The general rule is that all foreigners are entitled to apply for visas and permits in terms of the Immigration Act. Sections 10(1) and 10(2) of the Immigration Act entitle any foreigner to apply for a temporary visa. These include:

- 23.1. a study visa (s13);
- 23.2. a visa permitting the holder to establish a business (s15);
- 23.3. a visa to stay with a relative (s18);
- 23.4. a “critical skills visa” (s19(4));
- 23.5. a retired person’s visa (s20); and
- 23.6. a so-called “spousal visa” (s11(6) of the Act).

24. Section 25(2) is in effect identical vis-à-vis permanent residence permits. These are granted to a foreigner who is:

¹⁴ It is trite that the rule of law is a founding value of South Africa’s constitutional democracy. See s1(c) of the Constitution.

- 24.1. a holder of a work visa for five years who has an offer of permanent employment, as provided for in section 26(a) and 27(a);
 - 24.2. a spouse of a citizen or permanent resident who has been a spouse of that citizen or permanent resident for five years, as provided in section 26(b);
 - 24.3. a child under the age of 21 of a citizen or permanent resident as provided for in section 26(c) and (d);
 - 24.4. a possessor of extraordinary skills or qualifications, as provided in section 27(b);
 - 24.5. a person who can establish a business here, as provided in section 27(c);
 - 24.6. a retiree, as provided in section 27(e);
 - 24.7. a person possessed of wealth, as provided by section 27(f);
 - 24.8. a relative of a citizen or permanent resident in the first step of kinship, as provided in section 27(g).
25. A foreigner is an individual who is not a citizen. The Immigration Act does not exclude any foreigner from applying for a temporary visa. Instead, the definition of foreigner is broad and contains no exceptions. It simply “means an individual who is not a citizen”.¹⁵
26. The Legislature’s omission to limit the scope of the definition of foreigner suggests that it should be interpreted broadly. The legislature must have

¹⁵ Immigration Act, s1 definition of “foreigner”.

intended to include all foreigners, along with asylum seekers, when it gave foreigners the ability to apply for visas and permits.

27. Asylum seekers and refugees are - because they are not citizens - by definition foreigners. Ordinarily, they would be able to apply for temporary visas and (if they met the requirements for that visa) they would be entitled to that visa. They are not specifically excluded by any provision in the Immigration Act from doing so. Once again, given the breadth of “foreigner”, this suggests that Parliament intended for asylum seekers and refugees to be able to apply for visas in terms of the Immigration Act. If Parliament meant for asylum seekers to be excluded, it would have said so.
28. There is, moreover, nothing to suggest why Parliament would have intended otherwise. There is no reason why, for example, the legislature would have wanted to prevent a spouse from obtaining permanent residence on the basis of her marriage to a South African citizen – just because she happens to be an asylum seeker. Nor is there any reason why it would want to prevent people with critical skills from obtaining critical skills visas – just because they are asylum seekers. Quite the reverse: The preamble to the Immigration Act in fact enjoins the Department to take full advantage of attracting such foreigners, and asylum seekers are not necessarily not such foreigners.
29. Directive 21 argues otherwise by invoking s27(c) of the Refugees Act. Section 27(c) of the Refugees Act provides a further category of permanent residence, available only to refugees. It reads:

“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.”¹⁶

30. This is complemented with s27(d) of the Immigration Act, which provides that:

“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 130 of 1998), subject to any prescribed requirement”.

31. Directive 21 reasons (irrationally it is contended) that because refugees have this avenue for applying for permanent residency, all other avenues are closed for them, and also asylum seekers. Directive 21 reads:

“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 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.”¹⁷

32. However, just because there is a specific avenue for *refugees* (not asylum seekers) to apply for visas or permits does not mean asylum seekers cannot use

¹⁶ The Aliens Control Act is the predecessor legislation of the Immigration Act, which repealed it.
¹⁷ Emphasis added.

all the other avenues to apply for visas or permits. To suggest otherwise is absurd and indeed irrational.

33. For example, it means that spouses, for whom there is also a specific avenue for acquiring a visa, cannot rely on other avenues (like work or special skills) to acquire permits or visas. Instead, they must rely on one avenue, viz. the spousal one.
34. Parliament clearly intended that being eligible for one visa or permit via one avenue does not preclude you from *applying* for a visa or permit through another avenue.
35. In any event, asylum seekers are not eligible to apply for permanent residence permits via s 27(d) of the Immigration Act, because they are not refugees in terms of the Refugees Act.
36. It is wholly unclear how the existence of s 27(d) is of any relevance to asylum seekers at all, let alone how it precludes them from applying for visas or permits, or how it erodes from the general rule (as intended by Parliament) that all foreigners, other than prohibited persons and undesirable persons as defined are eligible to apply for visas or permits.
37. Moreover, one purpose of the Immigration Act is to promote economic growth through needed foreign, skilled labour. Another is to prevent and counter xenophobia, and to issue visas or permits as expeditiously as possible and on the basis of simplified procedures.
38. It is unclear how either of these purposes is achieved (or in fact how *any* legitimate purpose is achieved) if asylum seekers and refugees are *retrospectively* prevented from applying for visas *simply because* they are

asylum seekers or refugees. The effect of this on the limitation of the right to dignity is discussed below. But for now, the point is that Directive 21 does not further (but indeed undermines) the purposes of the Immigration Act.

39. Directive 21 is inconsistent with the Immigration Act. The latter allows all non-citizens to apply for visas. Yet Directive 21 deprives asylum seekers (and refugees) from just administrative action (the lawful processing of their applications) to which they are otherwise entitled. It also runs counter to the stated purposes of the Immigration Act. For these reasons, Directive 21 is unlawful and invalid.

The Right to Dignity

40. The following is trite of the right to dignity:
- 40.1. Human dignity has no nationality. All those in South Africa, including asylum seekers and refugees, are entitled to the right to dignity.¹⁸
- 40.2. The right to dignity includes the ability to form and maintain familial relationships, particularly marriage.¹⁹
- 40.3. Any law that interferes with the right to enter into and sustain familial relationships thus limits the right to dignity.²⁰
- 40.4. If any law of general application limits the right to dignity, that limitation must be reasonable and justifiable. Otherwise that law is unconstitutional.²¹

¹⁸ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 25.

¹⁹ *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 30-1.

²⁰ *Ibid.*

41. Directive 21 limits the right to dignity of people such as Mrs Fahme, the second applicant, as a married woman with children. This is because Directive 21 prevents such asylum seekers from applying for a visa or permit, which would afford their familial relations greater protection. Instead, they are expected to remain in the country and with their families on a s22 asylum seeker permit.

42. However, refugee status is an unstable status, in the sense that it may be lost at any time. The circumstances that made a person a refugee may change. Refugee status, if it has been recognized, may then cease (amongst other reasons) if the circumstances in the refugee's own country change such that asylum is no longer required or, as it is put in section 5 of the Refugees Act, when:

“he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.”

43. The change of these circumstances, moreover, is obviously beyond the control of the asylum seeker. In politically volatile countries, this change may also occur rapidly and suddenly. This makes refugee status precarious. And because sans the status of being an asylum seeker or refugee Mrs Fahme may not remain in the Republic, it makes her maintenance of familial relationships in the Republic precarious.

44. At best, on the respondent's version, the asylum seekers or refugees would have to return to their country of origin, leaving their families in the Republic, and apply for a visa from there.
45. One remedy for this precariousness is to hold a permit or visa, like a spousal or relative's visa. Such visas or permits allow for a more stable status in the Republic, and thus protect to a greater extent existing familial relationships. Moreover, all things being equal, asylum seekers like Mrs Fahme are entitled to apply to remain in the country with her husband in terms of the Immigration Act if they applied to do so.
46. However, by denying asylum seekers like Mrs Fahme the ability to apply for visas and permits, Directive 21 subjects their familial relationships to the precariousness of an asylum seeker or refugee status. This interferes with genuine efforts to maintain and protect familial relations by securing a visa or permit, and thus limits the right to dignity.
47. The question then becomes whether the limitation of the right to dignity passes the requirements of s36 of the Constitution. The first of these is that the right must be limited by a law of general application.
48. A directive, which has not been officially published, for example in the Government Gazette, or made accessible to the public issued by the Director General of the Department of Home Affairs to all immigration officials as to how they are to operate can hardly be suggested to be a law of general application.
49. If a directive is to be regarded as a law of general application, the court must consider whether the limitation is reasonable and justifiable. This includes

considering, firstly, the nature of the right in question.²² There is no doubt that the right to dignity is fundamental to South Africa's constitutional dispensation. It is the first and foremost value upon which the Republic is founded.²³

50. Secondly, the purpose of the limitation must be considered, and whether the limitation is linked to achieving that purpose. This must then be weighed against the extent of the limitation.²⁴ In casu, Mrs Fahme is seeking a visa to remain with her spouse who is lawfully in the country. She has four children in the country. There is simply no reason for why she should not be able to apply for a visa.

51. Indeed, there is no reason for denying any asylum seekers the ability to apply for visas or permits. As mentioned above, the Immigration Act's purposes include promoting economic growth through needed foreign, skilled labour and preventing and countering xenophobia. It is unclear how Directive 21 contributes to these legitimate aims. Indeed the respondents put up no facts as to the purpose of Directive 21 at all.

52. It might be argued that the purpose is to mitigate administrative inconvenience. This, in casu is not a legitimate purpose. But whatever administrative inconvenience the respondents may experience by accepting visa applications from asylum seekers is outweighed by the severity and extent of the limitation on the right to dignity. Asylum seeker's familial relations should not be at risk just to make bureaucracy run smoothly.

²² The Constitution, s36(1)(a).

²³ The Constitution, s1(a).

²⁴ The Constitution, ss36(1)(b)-(d).

53. Furthermore, on the respondent's account, they would accept asylum seeker's applications from abroad. But the respondents already accept visa applications from inside the country when visa-holding foreigners apply for a change of status under s10(6) of the Immigration Act. It is also unclear how accepting these applications from within the country is more inconvenient than accepting and processing the applications from foreign missions. It appears then, assuming that the purpose is administrative efficiency, that there is no rational link between this chosen means and achieving that purpose.
54. In any event, there are no doubt less restrictive means for ameliorating administrative issues than placing asylum seeker's familial relations at risk.²⁵
55. It may be argued that the extent of the limitation is mitigated by s31(1)(c) of the Immigration Act. This section allows any applicant to apply to have any requirement in the Immigration Act (including that asylum seekers cannot apply for visas or that they only can apply from abroad) waived by the Minister.
56. The first difficulty with this argument is that there is no requirement in the Immigration Act that precludes asylum seekers from applying for visas or permits.
57. Directive 21 unconditionally prohibits asylum seekers from doing so—not the Act. It is unclear then whether the Minister is empowered by s31(1)(c) to waive Directive 21.
58. Moreover, were he to do so, the Minister would not be waiving a requirement in the ordinary sense. Rather, he would be overriding Directive 21 in its

²⁵ The Constitution, s36(1)(e).

entirety if he allowed asylum seekers to apply for visas or permits. If the respondents are content for the Minister to override Directive 21 in its entirety, then it is unclear why they are opposing this application.

59. However, a response to this may be that the Minister would only override Directive 21 in exceptional circumstances and on good cause shown. This is different from a declaration of invalidity by a court. But this raises further issues. First, asylum seekers and refugees should not be allowed to apply for visas or permits only when the Minister vouchsafes an exemption. They are, in terms of the Immigration Act and their right to dignity, entitled to do so without more. Their applications should be the default, and not the exception.
60. Second, what exactly are those exceptional circumstances under which the Minister would grant the waiver? The Minister has a broad, unfettered discretion in waiving requirements in the Act. This broad discretion, without proper guiding factors, introduces an element of arbitrariness to its exercise that is inconsistent with the constitutional protection of the right to marry and establish a family.²⁶ This is not to say that s31(1)(c) is unconstitutional. But it is to say that asylum seeker's ability to sustain their familial relations (and subsequently their right to dignity) should not hinge on that provision. Instead, they should be allowed to apply for visas and permits as any other foreigner can.
61. Therefore, Directive 21 unjustifiably limits the applicants' right to dignity, and is unconstitutional.

²⁶ *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 58.

The Supreme Court of Appeal's Judgment

62. The respondents and the Supreme Court of Appeal posit the following argument in defence of Directive 21:

Regulation 9(2) of the Immigration Regulations in GNR.413 GG 37679 of 22 May 2014, read with s10(2) of the Immigration Act, requires asylum seekers to apply for temporary visas from abroad. The applicants did not apply from abroad. Therefore, the applicants' applications were invalid (and lawfully not accepted).

63. This argument misses the point of this application. For that reason, it is dealt in this section, separate from the arguments made above.

64. The SCA's and the respondents' argument concludes that the applicants' visa applications were lawfully not accepted and thereafter processed.

65. But the premises it relies on to reach that conclusion are irrelevant to this matter. They do not show that Directive 21 is a lawful basis for refusing to accept and process the visa applications. Instead, they attempt to find some other basis to justify why the applicants should have been rejected in their visa applications. But just because there may be another reason for the applicants to be rejected does not mean Directive 21 is a lawful reason. And the issue in this case is whether Directive 21 is a lawful basis to reject the processing and consideration of the applicants' visa applications.

66. The reason why Directive 21 is the focus of this application is clear.

67. Directive 21 (and not regulation 9(2) or any other provision) was relied on by the respondents when they refused to process the applicants' visa applications.²⁷
68. Directive 21 does not invoke regulation 9(2) on its express terms or at all.
69. Furthermore, an administrator who consciously bases his decision on an unlawful empowering provision cannot later seek refuge in a lawful provision that justifies his decision.²⁸
70. Neither can the administrator rely on different, ex post facto reasoning to justify an unlawful decision taken for a particular reason.²⁹ Therefore, the respondents cannot rely on regulation 9(2) (which may or may not be lawful authority to reject to process the applicants' visa application) when they consciously relied on Directive 21 to reject those applications. They also cannot offer different reasons for their decision at the stage of reviewing the Directive.
71. Moreover, regulation 9(2) and Directive 21 conflict and have differing scopes.
72. Regulation 9(2) does not prevent refugees and asylum seekers to apply for temporary visas from outside South Africa.
73. But Directive 21 prevents asylum seekers from applying for temporary visas or permanent residence permits *at all*.
74. So to even rely on regulation 9(2) to apply for a visa from abroad, Directive 21 must be declared invalid first. In other words, regulation 9(2) does not justify

²⁷ p44 of the record

²⁸ *Minister of Education v Harris* (CCT13/01) [2001] ZACC 25 par 18; *Howick District Landowners Association v Umngeni Municipality and Others* (423/05) [2006] ZASCA 153 para 22.

²⁹ *National Lotteries Board v South African Education and Environment Project* (788/10) [2011] ZASCA 154 para 28.

the decision to never accept visa or permit applications from asylum seekers (which is the respondents' position). Rather, it requires those applications to be made from abroad.

75. In any event, regulation 9(2) may be unconstitutional for the same reasons that Directive 21 is unconstitutional. Should the respondents in the future invoke regulation 9(2) to reject asylum seekers' visa applications, then an appropriate application to have regulation 9(2) declared unconstitutional may be brought.

76. Also, as pointed above Directive 21 has two further defects.

77. First, its reasoning is nonsensical and irrational. Not one of its explanatory make any legal or factual sense.

78. And secondly, it compels immigration officers to conduct themselves in relation to applications already in the system, and thus apply the instruction contained in the secret Directive 21 retrospectively. Such a secret instruction cannot stand scrutiny in a legal system with a founding value of the rule of law, which includes the principle of legality.

Conclusion

79. It is submitted that:

79.1. Directive 21 is inconsistent with the Constitution because it:

79.1.1. is unlawful for its conflict with the Immigration Act;

79.1.2. violates the rights of all asylum seekers and refugees protected by section 33 of the Constitution;

79.1.3. violates the dignity of persons in the position of the second respondent in particular.

79.2. That being so, the Directive must be declared inconsistent with the Constitution and invalid in terms of s172(1)(a) of the Constitution.

80. As regards the relief to be granted in terms of section 172(1)(b) of the Constitution, it is submitted that the relief granted by the High Court was just and equitable.

81. The respondents pray that leave to appeal against the order of the Supreme Court of Appeal be granted, and that the appeal be upheld, with costs, including those occasioned by the employment of two counsel

Anton Katz SC

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19 March 2018

List of authorities

Legislation

1. The Constitution of the Republic of South Africa, 1996;
2. Immigration Act, 13 of 2002; and
3. Refugees Act, 130 of 1998.

Case law

4. *Ahmed and Others v Minister of Home Affairs and Another* (3096/2016) [2016] ZAWCHC 123 (21 September 2016); 2017 (2) SA 417 (WCC);
 5. *Minister of Home Affairs and Another v Ahmed and Others* (1383/2016) [2017] ZASCA 123 (26 September 2017); 2017 (6) SA 554 (SCA);
 6. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10) [2011] ZACC 30 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC);
 7. *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC);
 8. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17;
 9. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1;
 10. *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA);
 11. *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC);
 12. *Minister of Education v Harris* (CCT13/01) [2001] ZACC 25;
 13. *Howick District Landowners Association v Umngeni Municipality and Others* (423/05) [2006] ZASCA 153; and
 14. *National Lotteries Board v South African Education and Environment Project* (788/10) [2011] ZASCA 154.
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