

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 2693/2022

In the matter between:

A K	First Applicant
A K obo A V K	Second Applicant
A K obo R V K	Third Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email on 10 March 2023.

JUDGMENT

FRANCIS, J

INTRODUCTION

- [1] The first applicant is a Russian citizen by birth who resides in South Africa as an illegal foreigner without any valid status in terms of the Immigration Act 13 of 2002 (as amended) (“the Immigration Act”). She was found in possession of a fraudulent work visa, declared to be a prohibited person, and was ordered to leave the Republic.
- [2] This is an application to review the decision of the second respondent (“the DG”) refusing the first applicant’s application to be declared not to be a prohibited person (“the impugned decision”). The impugned decision was taken by the DG as a consequence of a successful review application brought by the first applicant in respect of the same issue which presently falls to be determined by this court: the upliftment of the declaration of prohibition that will enable the first applicant, if successful, to apply for a permanent residence visa.
- [3] The second applicant (“A”) and the third applicant (“R”) are the biological children of the first applicant and J J C V (“J”). Both children are South African citizens by virtue of the fact that they were born in South Africa and their father is a South African citizen¹. At the time the impugned decision was made, A and R were five and three years old, respectively. The first applicant brings this application on behalf of both A and R with the consent of J.

¹ Section 2(1)(b) of the South African Citizenship Act 88 of 1995 (as amended) states that any person “*who is born in ... the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth*”.

[4] The first respondent is the Minister of Home Affairs and is cited in his official capacity as the member of the Executive responsible for the administration of the Immigration Act.

[5] The DG is the Director-General of the Department of Home Affairs (“the Department”) and is responsible for the implementation of the Immigration Act and the management of the Department, including the determination of applications such as the one that is the subject matter of the review before this Court.

[6] The applicants seeks the following relief:

[6.1] Setting aside the impugned decision;

[6.2] Substituting the impugned decision with a decision declaring the first applicant not to be a prohibited person, alternatively remitting the decision to the DG for further reconsideration;

[6.3] Directing the DG to authorise the first applicant in terms of section 32(1) of the Immigration Act to remain in South Africa pending her application for a status, and that such authority be given within ten days of the order; and

[6.4] Directing the DG to pay the costs of this application.

[7] This application impacts on the interests of A and R who are minors. Children are entitled to have their voices heard on any judicial decision that may have an impact on them. This may be achieved by a court listening to children and their parents², or it may require the appointment of a *curator ad litem*³, or may require information to be provided by the relevant court officers⁴. Indeed, the Constitution recognises this principle and provides a mechanism for ensuring that the voice of the child is heard in particular circumstances. In this regard, s 28(1)(h) of the Constitution states that children have the right “*to have a legal practitioner assigned to[them]...by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result*”. In cases such as this where a parent is subject to the law enforcement actions by the state, the interest of the children should ideally be assessed independently of their parents⁵.

[8] In this matter, it is not disputed that the practical effect of the impugned decision is that the first applicant will either have to leave her minor children behind in South Africa or depart with them to Russia which is in a state of war with Ukraine. Given the potential impact that the decision of this Court may have on the minor children, the Cape Bar Council was requested to appoint a legal representative on a *pro bono* basis to assist this Court by making submissions in relation to A and R. As a consequence of the request, Mr SC Kirk-Cohen SC, Ms E De Waal, and Mr DN Mjyako were appointed as *amici curiae*. They prepared extensive heads of argument and appeared at the

² *C v Department of Health, Gauteng* 2012 (2) SA 208 (CC) at para [27]].

³ *Van Der Burg and Another v National Director of Public Prosecutions* 2012 (2) SACR 331 (CC) at para [72].

⁴ *M v S* 2008 (3) SA 232 (CC) at para [36].)

⁵ *Van Der Burg* above n.3 at paras [71] and [72].

hearing. The Court is grateful to both the Cape Bar Council and the *amici curiae* for rendering this public service.

[9] In accordance with Practice Note 36 B(1)⁶ of the Practice Directives of the Western Cape Division of the High Court, a copy of the application papers was served on the Office of the Family Advocate. After interviewing the relevant parties, a report was compiled and furnished to this Court by Mr P Sechaba from the Office of the Family Advocate. The Court expresses its gratitude to the Office of the Family Advocate for the assistance provided.

[10] The first applicant arrived in South Africa in 2010. She was sought out in Moscow, Russia, to be a dancer at the Mavericks Revue bar in Cape Town and, to that end, obtained a work permit at the South African Embassy in Moscow to take up this work position. The work permit was issued in 2010 and was valid until July 2013.

[11] Prior to the first applicant's work permit expiring, she successfully applied for a study visa (or "study permit" as it was then known) to study business management at the College of Cape Town. She used the services of an immigration consultant, Immigration Campus, to make the application. A study visa valid until 30 July 2015 was granted to the first applicant. Immigration Campus attended to all aspects of the first applicant's application and she did not personally engage with the Department.

⁶ Practice Note 36B(1) states that: "*In all matters where minor children are involved pleadings, including properly paginated documents must be served on the relevant Office of the Family Advocate. Jurisdiction of the Office of the Family Advocate will be the office where the minor child/ren reside.*"

[12] Prior to the expiry date of her study visa, the first applicant employed the services of an immigration consultant, Umran Aksu Sesli (“Aksu”) of Sun Consulting (Pty) Ltd, to assist her with obtaining a work visa. Aksu attended to all aspects relating to this visa which was obtained on 13 August 2015 and endorsed in the first applicant’s passport. The work visa was valid until 5 July 2020 and the first applicant relied on this work visa to obtain employment.

[13] The first applicant met J sometime in 2011 and moved in with him in 2014. A and R were subsequently born on [...] November [...] and [...] November [...], respectively.

[14] Prior to the birth of R, the first applicant, having co-habited with J for more than two years, submitted an application for a visitor’s visa together with a request for work authorisation in terms of section 11(6) of the Immigration Act through Visa Processing SA (Pty) Ltd (“VFS”). Section 11(6) states that:

“(6) Notwithstanding the provisions of this section, a visitor’s visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and does not qualify for any of the visas contemplated in sections 13 to 22: Provided that -

(a) such visa shall only be valid while the good faith spousal relationship exists;

(b) on application, the holder of such visa may be authorised to perform any of the activities provided for in the visas contemplated in sections 13 to 22; and

(c) the holder of such a visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa.”

The visas contemplated in sections 13 to 22 of the Immigration Act include a study visa, treaty visa, business visa, crew visa, medical treatment visa, relative’s visa, work visa, retired person visa, corporate visa, and exchange visa.

[15] On 22 November 2018, the first applicant’s section 11(6) visa application was rejected on the basis that she was in possession of a fraudulent visa.

[16] On 29 November 2018, shortly after R’s birth, the first applicant was arrested on a charge of fraud and incarcerated at the Somerset West Correctional Services Prison on fraud charges relating to the alleged acquisition and possession of a fraudulent work visa. It was only when the first applicant was arrested that she became aware that the work visa obtained on her behalf by Aksu, and issued by the Department, was obtained fraudulently.

[17] Being in possession of a fraudulent visa, the first applicant was designated a “prohibited person”. Section 29 (1) of the Immigration Act lists certain categories of foreigners who are *“prohibited persons and do not qualify for a port of entry visa, admission to the Republic, a visa or a permanent resident’s permit”*. The list, in sub-section (f) thereof, includes *“anyone found in possession of fraudulent visa, passport, permanent resident’s permit or*

identification document". A permanent residence visa cannot be issued if the holder is a prohibited or undesirable person⁷. A prohibited person is in South Africa illegally and the deportation of such a person is inevitable⁸, unless an application is made to uplift the prohibition. In terms of section 29(2) of the Act, "[t]he Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person".

[18] R was born prematurely and, immediately upon his birth, was placed in an incubator in the Neo-Natal Intensive Care Unit ("the ICU") at the Vincent Palotti Hospital. He remained in the ICU for approximately thirty-five days, much of the time on a ventilator. An immigration officer employed at the Department opposed the granting of bail to the first applicant and, as a result, she remained in jail for three weeks while R was in the incubator.

[19] The first applicant was eventually released on bail on 19 December 2018. After four appearances in the Somerset Magistrates Court, the charges relating to the alleged fraud were provisionally withdrawn.

[20] During February 2019, the first applicant submitted an appeal to the DG against the Department's rejection of her application for a spousal visa. This appeal was rejected by the DG on 2 April 2019, on the following basis:

⁷ Section 25 (3) of the Immigration Act.

⁸ Section 34 (1) of the Immigration Act provides that: "Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported ...".

“Any fabricated or falsified permit, certificate, written authority or other document; or any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding four years. You submitted a fraudulent visa with control number B00241684. You are instructed to depart and you are of no good sound character.”

[21] The first applicant approached an immigration consultancy, TIES Immigration Services, to prepare and submit an application to the DG in terms of section 29(2) to declare her not to be a prohibited person. Before the DG could make his decision, this application was withdrawn and the first applicant’s current attorneys of record submitted a fresh section 29(2) application. This application was rejected by the DG for the following reasons:

“You submitted a fraudulent work visa in support of your application for a temporary residence visa. You have been residing illegally in the country since 2015-07-30.”

[22] On 17 May 2021, the first applicant launched an application in this court to review the DG’s decision. The application was granted and the impugned decision was remitted to the DG for reconsideration. Pursuant to the remittal, the DG dismissed the first applicant’s representations on the basis that her representations did not satisfy the good cause requirements set out in section

29 (2) of the Act. It is this decision that now forms the subject matter of the application before this Court.

[23] The DG's decision was conveyed in a letter to the first applicant dated 31 December 2021 ("the rejection letter"). In this letter, the reasons for the DG's decision are provided under two headings: [i] victim of fraud and [ii] minor children. I now consider each of these issues in turn.

Victim of fraud

[24] The relevant part of the rejection letter under this heading is reproduced verbatim below:

- "4. You returned to South Africa in July 2011 and in early 2012 you applied for a study visa. You were duly given a study visa which expired on 30 July 2015. In the circumstances, my office and the Department of Home Affairs ('DHA') reasonably expect you to be conversant with its processes and offices to apply for relevant visas and related permits due to your patent experience in that regard.
5. I find your explanations and attempt to shirk any responsibility and liability for being found in possession of a fraudulent visa / permit insufficient. The attempt to instead place responsibility for the actions of the agent of your choice when you are conversant with the offices of DHA is therefore unreasonable and unacceptable.

6. *The DHA is mandated to perform its functions in terms of the Immigration Act and the possibility of fraud within its line Departments does not alter its primary mandate nor defer the effectiveness of the consequences for contravening the Immigration Act.*
7. *Section 29(1)(f) Immigration Act is clear on that possession is the threshold for accountability.*
8. *The fact that you were fully aware, as far back as 2015, of the operations and processes to successfully acquire valid visa / permit through the offices of the DHA as all citizens and non-citizens are expected, your explanation and claims of being a victim fraud are therefore insufficient nor acceptable in the circumstances.*

[25] In essence, the DG contends that because the first applicant had previously obtained a visa, she should have been conversant with the Department's processes. Accordingly, the first applicant was not a victim of fraud and could not rely on her assertion that she was not complicit in obtaining the fraudulent visa. Although not evident from the rejection letter, it was also argued by Counsel for the respondents that when making his decision, the DG considered the fact that the first applicant did not take any steps to lay a charge against Aksu for the crime of fraud or to recover the money that she paid Aksu for the visa.

[26] The first applicant has set out in great detail the manner in which she obtained the impugned visa. Her testimony was that she did not know, or could have known, that the visa was fraudulent. All her previous visas were procured through immigration specialists and she never had the need to familiarise herself with the Department's processes. Prior to 26 May 2014, it was not necessary to apply for any visa in person. It was only after 26 May 2014 that it became necessary for an applicant for a visa to appear personally before the VFS. However, having obtained her study visa through Immigration Campus in 2013 (valid for 2 years), she was unaware of the new departmental procedures introduced in 2014.

[27] The DG did not dispute the facts advanced by the first applicant of how she had obtained the fraudulent visa or why she was not aware of the Department's processes relating to the acquisition of a visa. Apart from harbouring a suspicion that the first applicant may have been complicit in Aksu's fraudulent conduct, no evidence has been presented by the DG to controvert or gainsay the first applicant's testimony. A mere suspicion, however, even if genuinely held, cannot be elevated to a finding of fact without more. Furthermore, even if the first applicant was conversant with the processes of the Department for obtaining a visa, that in itself would not constitute a rational basis for the DG to find that she was necessarily complicit in the fraud perpetrated by Aksu. Quite simply, there was no information whatsoever before the DG to contradict the first applicant's representation that she was an innocent victim of fraud.

[28] Similarly, the DG was misdirected in concluding that the first applicant's failure to take action against Aksu meant that she may have been complicit in obtaining the fraudulent passport. This is an impermissible leap of logic. The fact that the first applicant did not pursue Aksu either civilly or criminally does not in itself indicate that she was complicit in the fraud. The first applicant explained in her founding affidavit that she did not have the financial means to pursue criminal charges or to take action against Aksu. The question that really needs to be asked is why the Department did not pursue Aksu or investigate the circumstances in which she managed to obtain the visa. As the first applicant pointed out in her founding affidavit, the respondents and the Department bore the onus of investigating and explaining how the impugned visa label was taken out of the ordinary, securitised, supply chain of the labels delivered by the Government Printing Works to the Department and found its way into Aksu's hands.

[29] There is no suggestion in the rejection letter that the first applicant provided an explanation that was false and her application was certainly not turned down on this ground. The application appears to have been rejected primarily, if not exclusively, on the basis that the first applicant had obtained a fraudulent visa.

[30] From the DG's submissions and the arguments proffered by his counsel at this hearing, it seems that the DG has conflated section 29(1), which is a strict liability provision, with section 29(2) which attempts to ameliorate the potentially harsh consequences of section 29(1) by allowing for an upliftment

of a prohibition where good cause is shown. Section 29(2) of the Act is designed as a safety net for persons who, for example, are found in innocent possession of a fraudulent visa. This means that where a person is prohibited in terms of section 29(1), section 29(2) envisages that a person may well be deserving, for good cause, of having his or her prohibition uplifted.

[31] In my view, the DG, on appeal, must also take into account factors other than those which resulted in the prohibition under section 29(1) in order to determine whether there exists good cause. This is evident from the Immigration Regulations⁹ which provides in sub-regulations 26(6) and (7) that:

“(6) The Director General shall, in declaring a person not to be a prohibited person, consider the following factors:

(a) the reason for the prohibition;

(b) the seriousness of the offence committed; and

(c) representations by the prohibited person, which should include a police clearance certificate.

(7) The Director-General shall, upon making a decision as contemplated in section 29(2) of the Act, provide written reasons for such decision.”

[32] What this means is that the DG must have regard to all the facts placed before him by way of representations when exercising his discretion under section 29(2) of the Immigration Act. Whether the first applicant knowingly falsified her visa (on the one hand) or is either innocent or merely neglectful

⁹ Published under GN R1238 in GG of 22 May 2014.

(on the other hand) is a material factor. Nowhere in the reasons provided by the DG is there any indication that the DG, or his officials, pursued or attempted to investigate the first applicant's explanation that Aksu had perpetrated the fraud and that the officials of the Department may have been involved. Nor is there any indication that they attempted to ascertain the circumstances surrounding the provisional withdrawal of the charges or the likelihood that these charges would be reinstated. The applicant provided all the evidence at her disposal relating to her interactions with Aksu. It is difficult to ascertain what more she could, or should, have done.

[33] It is apparent that the DG only focused on the alleged transgression of section 29(1) of the Act and ignored all the other pertinent factors put forward by the applicant in relation to the circumstances surrounding the acquisition of her visa. The DG was not called upon to consider whether the applicant obtained a fraudulent visa. Rather, he had to ascertain whether good cause exists why the first applicant's prohibition should be uplifted; by not addressing this issue squarely, the DG failed to properly exercise the discretion conferred upon him by the Immigration Act.

Minor children

[34] In her application, the first applicant advised the DG that she was the biological mother and primary caregiver of the minor children. Her relationship with the minor children's biological father had dissipated. While J continued to play a part in the lives of the children, the first applicant was the primary source of their financial support. It was pointed out to the DG that the directive issued to the first applicant to leave South Africa would have the obvious and

direct consequence of her having to either abandon her two minor children or leave with them for Russia which is in a state of war. To this extent, she argued, her situation was unique. The first applicant also drew the DG's attention to the various statutory enactments, such as the Constitution and the Children's Act, which he was obliged to consider when making his decision on her application.

[35] The DG's response in the rejection letter is reproduced verbatim below:

9. *My office and the Department of Home Affairs ('DHA') is sympathetic to your situation as a parent to minor children and I have taken into account your allegation that you are a caregiver and source of financial support to them. I however bring it to your attention that DHA processes hundreds of thousands of applications with similar circumstances and this circumstance is neither extraordinary nor unique to the DHA.*
10. *The DHA is bound to Act in terms of the Immigration Act and my decision is based on that it would render the work of DHA ineffective and / or purposeless if the presence of minor children should have the effect of supplanting the application of the Act at every turn.*
11. *Without expressing a view or offering gratuitous legal advice, I would like to state that the issue of primary custody and care of minor children and related matters could best be addressed by*

yourself and their father ('J') in terms of the Children's Act and the Constitution of South Africa."

[36] In essence, the DG's response is that the first applicant's circumstances are not unique. According to the DG, the Department processed hundreds and thousands of applications and if the Department had to consider the presence of minor children in each of the applications it received, it would render the Department's work ineffective and/or purposeless. The DG also suggested that the primary custody and care of the minor children were issues that ought to be dealt with by the first applicant and J and, by implication, not by him.

[37] The DG's treatment of A and R in his rejection letter indicates that he views them as mere appendages of the first applicant and that he did not consider their interests, separate and apart from that of the first applicant, when adjudicating the latter's application to uplift her prohibition. In ***Freedom of Religion South Africa***¹⁰, the Constitutional Court held that:

"Children are constitutionally recognised independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans or have parents. The word 'everyone' in this section also applies to them. In S v M this Court gave appropriate recognition to child's rights to dignity in these terms:

¹⁰ ***Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*** 2020 (1) SA 1 (CC) at para [46].

“Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult awaiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them... And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.” (emphasis added and footnote omitted)

[38] International human rights law and domestic family law recognise children as among the most vulnerable members of society. The preamble to the Immigration Act, too, states in part that the regulation of the admission of foreigners to, and their residence within, this country is to be performed by means of a system of immigration control which ensures that the international obligations of the country are complied with¹¹, and according to “the highest applicable standards of human rights protection”¹².

[39] Section 28 of the Constitution deals with the rights of children and provides that every child has the right to family or parental care or to appropriate alternative care when removed from the family environment¹³, and the best

¹¹ Paragraph o of the preamble to the Immigration Act.

¹² Paragraph l of the preamble to the Immigration Act.

¹³ Section 28(1)(b) of the Constitution.

interest of the child is of “paramount importance”¹⁴ in every matter concerning children.

[40] The Children’s Act 38 of 2005 (“the Children’s Act”) was enacted in order to give effect to the constitutional rights of children¹⁵ and South Africa’s obligations concerning the well-being of children in terms of international instruments which are binding on it¹⁶. All organs of state in any sphere of government and all officials, employees, and representatives of organs of state are obliged to respect, protect, and promote the rights of children contained in the Children’s Act¹⁷.

[41] In terms of section 19 (1) of the Children’s Act, “[t]he biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child”. Section 9 expressly stipulates that in all matters concerning the care, protection, and well-being of a child, the standard of the child’s best interest is of paramount importance and must be applied. On the use of the word “paramount”, the Children’s Act adopts the verbiage of the Constitution, thus emphasising that the well-being of a child is a matter that is to be taken very seriously indeed.

[42] Apart from the Constitution and the Children’s Act, South Africa is also bound by international instruments which recognise and assert parental rights and the right to dignity of children and their parents. These international

¹⁴ Section 28 (2) of the Constitution.

¹⁵ Section 2(b) of the Children’s Act.

¹⁶ Section 2(c) of the Children’s Act.

¹⁷ Section 8(2) of the Children’s Act.

instruments include the African Charter on Human and People Rights (“African Charter”), which the South African government signed and ratified on 9 July 1996, the Convention on the Rights of the Child (“CRC”), which the South African government signed in 1993 and ratified in 1995, and the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”) which the South African Government signed on 10 October 1997 and ratified on 7 January 2000. They all require that in actions undertaken by persons with authority concerning children, the best interest of the child is a primary consideration.

[43] The African Charter provides that every child shall be entitled to the enjoyment of parental care and protection and shall (where possible) have the right to reside with their parents¹⁸. The CRC, in turn, provides that the state must take all appropriate legal and administrative measures to ensure that children receive such protection and care as is necessary for their well-being, having regard for the rights and duties of their parents, legal guardians or other persons who are legally responsible for them¹⁹. Both these instruments contain an injunction that children are not to be separated from their parents against their will except when this is necessary, in their best interests, and upon the determination of a competent authority, in accordance with the law²⁰. Article 3 of the African Children’s Charter provides that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter “...*irrespective of the child’s or his or parents or legal guardians ... national or social origin ... birth or other status.*”

¹⁸ Article 19.1.

¹⁹ Article 3.2.

²⁰ Article 9.1 of the CRC and Article 19.2 of the African Charter.

[44] The Constitution, the Children’s Act, and the international instruments cited all recognise children as independent human beings who are inherently entitled to the enjoyment of human rights, regardless of their origin or the status of their parents. When decisions are made by state functionaries – including the DG – they are obliged to consider the best interest of the child and have regard to applicable foreign and domestic law.

[45] Whilst the current jurisprudence in South Africa emphasises the paramount importance of the well-being of the child²¹, this does not necessarily mean that the child’s best interest can never be limited by other rights²². In *Nandutu and Others*²³, for example, the Constitutional Court held that the words “paramount importance” do not automatically override other rights, as every right is capable of being limited. However, this is not to say that the word “paramount” can simply be disregarded; it is, perhaps, significant that the word “paramount” appears once and once only in the Constitution, and this is in relation to the rights of children. It is clear, without seeking to create a hierarchy of rights, that the well-being of child is a matter of great consequence.

[46] There is no “right” for a non-South African to be given a permit to enter or to be issued with a visa for South Africa, or to live and work in this country;

²¹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC), *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC); *M v S* above n.4, and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (2) SACR 130 (CC).

²² *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC).

²³ *Nandutu and Others v Minister of Home Affairs* 2019 (5) SA 325 (CC) at para [60].

approval is required and – in appropriate circumstances – it may be granted or refused. Nonetheless, in line with existing jurisprudence and international law, the DG was obliged to consider the rights of A and R and their best interests when adjudicating the first applicant's application.

[47] The first applicant's home country (Russia) is currently in a state of war. Although this case does not concern rights under the Refugees Act No 130 of 1998 ("the Refugees Act"), the deportation of the first applicant to a country at war remains a relevant factor in determining the best interests of the minor children. In this regard, section 2 of the Refugees Act declares that South Africa cannot refuse to allow a foreigner into the country or force them to return to their country if in their own country their life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other event seriously disturbing or disrupting public order in either part or the whole of that country. The DG does not appear to have considered this at all.

[48] If the first applicant is forced to return to Russia without A and R, a real risk exists that the minor children may become alienated or estranged from her since there is no guarantee when (or indeed if) she will be able to return to South Africa given Russia's current state of war. On the other hand, in light of the war situation that prevails in Russia, it is doubtful whether it will be in the best interests of the children to emigrate to Russia with the first applicant if she is deported. It would also mean that the minor children will lose contact with J and with their paternal family – it is common cause that the first

applicant's parents are deceased. Irrespective of whether the children accompany the first applicant to Russia or remain in South Africa, the effect of deporting the first applicant will be to disrupt the family unit²⁴. The disruption of the family unit does not appear to have featured in the DG's decision-making process at all.

[49] The DG appears to have been fixated by the undisputed fact that the first applicant was found in possession of a fraudulent passport, and he used this to conclude that the first applicant was not of a "good sound character". As indicated, there was no basis for the DG to draw this conclusion. However, even if the DG was correct, he was still under a duty to consider what was in the best interest of the minor children. In this regard, the decision of the Supreme Court of Appeal in **LD**²⁵ is apposite. In **LD**, a mother took the law into her own hands and abducted her child from Luxembourg, which was the mother's habitual residence, and settled in South Africa. Although the majority of the court described her behaviour as "deplorable", they were more concerned with not disrupting a functioning family unit and held that:

*"If giving effect to the paramountcy of (the child's) best interests has the effect of 'rewarding' the mother for her bad behaviour, that is an unfortunate but unavoidable result."*²⁶

²⁴ In this regard, see *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) and *Rayment and Others v Minister of Home Affairs and Others* 2022 (5) SA 534 (WCC).

²⁵ *LD v Central Authority (RSA) and Another* 2022 (3) SA 96 (SCA).

²⁶ *Id.* at para [30].

[50] Having regard to the DG's explanation on what factors he considered on the issue of the minor children and the arguments proffered during this hearing by the respondents' counsel, I have no hesitation in concluding that the DG failed to properly apply his mind to what was in the best interest of the children when adjudicating the first applicant's application. He took irrelevant considerations into account and relevant considerations were not considered.

[51] The reasons advanced by the DG for the impugned decision do not pass muster. Indeed, from the foregoing discussion, it is difficult not to conclude that the impugned decision was irrational and so unreasonable that no reasonable person could have made it.

[52] The applicants submitted that the impugned decision must be set aside and that it should not be remitted to the respondent for further consideration. Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 provides that a court may grant an order setting aside administrative action and in exceptional cases substitute or vary the administrative action. Generally, courts are inclined to consider remittal as a prudent cause and will not lightly step into the shoes of the administrator and substitute the latter's decision. In ***Trencon Construction (Pty) Ltd***²⁷, Khampepe J, speaking for a unanimous Constitutional Court, set out the factors that ought to be considered when deciding on a substitution order:

²⁷ ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*** 2015 (5) SA 245 (CC) at para 47.

“To my mind given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties.”

[53] I agree with the applicants, and, in my view, the impugned decision should be substituted by this Court for the following reasons:

[53.1] The refusal of the application for a declaration of non-prohibition has already been remitted back to the DG on more than one occasion. He appears to have consistently laboured under a misapprehension regarding the scheme of section 29 of the Act. In addition, the suspicion he harbours regarding the manner in which the first applicant acquired the impugned visa suggests that he would be incapable of bringing an independent mind to bear on this issue if the matter is to be referred back to him for reconsideration.

[53.2] The DG appears not to have applied his mind at all to the interests of the minor children. Indeed, his claim that the Department processes

“hundreds of thousands of applications” similar to that of the first applicant, is telling. If this is indeed so, it means that the Department and the DG are so inundated with applications that they cannot properly apply their minds to this matter as they do not have the time to perform their functions and fulfil their statutory obligations. It would then be a futile exercise to refer this matter back to the DG.

[53.3] This court is in as good a position as the DG to make the decision on whether or not to uplift the prohibition placed on the first applicant. The court has all the information before it that served before the DG, and more. It has the report of the Family Advocate and the benefit of the input from the *amici curiae*.

[53.4] The DG was not called upon to exercise unique expertise in considering the application for the upliftment of the prohibition; he certainly seems to think so and expressed the view that there is nothing “extraordinary or unique” about the applicants’ case.

[53.5] The Department’s processes have already taken a substantial period of time and a further delay will no doubt cause additional, unjustifiable prejudice to the applicants.

[54] Having regard to the evidence before this court, I am of the view that the first applicant has demonstrated good cause why her status as a prohibited person should be uplifted in terms of section 29(2) of the Act; this view is shared by

the *amici curiae* and the Family Advocate. On the undisputed facts before this court, the applicant is an innocent party and the fact that she was in possession of a fraudulent passport, should not be held against her. The effect of the order will merely be to uplift the declaration of prohibition to enable the first applicant to apply for a permanent residence visa. Nothing more.

[55] The first applicant has sought an order directing the DG to authorise her to remain in South Africa pending her application for an appropriate status. Section 32(1) of the Act provides that any illegal foreigner must depart from the country unless authorised by the DG to remain in South Africa pending his/her application for a status. The respondents did not oppose this part of the relief. In any event, given that this Court is of the view that the first applicant should be declared not to be a prohibited person, it is appropriate that the DG authorise the first applicant to remain in South Africa pending her application for a new status in terms of the Immigration Act. This will enable her to remain in South Africa with her minor children whilst her permanent residence visa application is being processed. In the interim, as the primary caregiver of A and R, she will be able to retain, and maintain, some semblance of a functioning family unit. There is, of course, no suggestion that the applicants are a security risk to the Republic. In the circumstances, a substitution order would be just and equitable.

[56] In so far as the issue of costs is concerned, there is no reason not to apply the ordinary rule that costs follow the result.

ORDER

[57] In the circumstances, the following order is made:

[57.1] The decision taken by the second respondent on 31 December 2021 dismissing the first applicant's application in terms of section 29 (2) of the Immigration Act 13 of 2000 ("the Act") to be declared not to be a prohibited person, is set aside.

[57.2] The first applicant is declared not to be a prohibited person.

[57.3] The second respondent is directed to authorise the first applicant, in terms of section 32(1) of the Act, to remain in the Republic pending her application for a status, and such authority shall be given within 10 days of being served with this order. Pending the second respondent's authorisation, the first applicant shall not be deported from the Republic.

[57.4] The respondents are directed to pay the costs of this application.

FRANCIS, J

Judge of the High Court, Cape Town