THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1383/2016

In the matter between:

THE MINISTER OF HOME AFFAIRS	**FIRST APPELLANT**
THE DIRECTOR-GENERAL, HOME AFFAIRS	**SECOND APPELLANT**

and

TASHRIQ AHMED	**FIRST RESPONDENT**
ARIFA MUSADDIK FAHME	**SECOND RESPONDENT**
KUZIKESA JULES VALERY SWINDA	**THIRD RESPONDENT**
JABBAR AHMED	**FOURTH RESPONDENT**

Neutral citation: *The Minister of Home Affairs v Ahmed* (1383/2016) [2017] ZASCA 123 (26 September 2017)

Bench: Ponnan, Leach and Majiedt JJA and Plasket and Schippers AJJA

Heard: 28 August 2017

Delivered: 26 September 2017

Summary: Asylum seekers in terms of the Refugees Act 130 of 1998 may not, while they are in the country, apply for a visa in terms of s 10(2) of the Immigration Act 13 of 2002, read with regulation 9(2) of the Immigration Regulations.

ORDER

On appeal from: Western Cape Division, Cape Town (Sher AJ sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court below is set aside and replaced by the following order:
'The application is dismissed.'

JUDGMENT

Ponnan JA (Leach and Majiedt JJA and Plasket and Schippers AJJA concurring):

[1] The question raised by this appeal is whether holders of asylum seeker permits in terms of s 22 of the Refugees Act 130 of 1998 (the RA) may, whilst they are within this country, apply for a visa in terms of the Immigration Act 13 of 2002 (the IA). The court a quo (Western Cape Division, Cape Town) (per Sher AJ) held that they are entitled to do so.[1] The appellants – the Minister of Home Affairs (the Minister) and Director General of that Department (the DG) (collectively referred to as the DHA) appeal that decision with the leave of Sher AJ.

[2] The second, third and fourth respondents are in South Africa as asylum seekers. Each applied for a visa in terms of the IA. The DHA rejected those applications ostensibly in line with departmental policy. The policy was set out in Immigration Policy

[1] The judgment of the court a quo is reported sub nom *Ahmed & others v Minister of Home Affairs & another* [2016] ZAWCHC 123; [2016] 4 All SA 864 (WCC).

Directive 21 of 2015 issued by the DG on 3 February 2016 (Directive 21). Aggrieved by that refusal, the three respondents and their attorney (the first respondent) applied on 21 April 2016 to the court a quo for urgent relief. The application succeeded before the court a quo and on 21 September 2016 the following order issued:

'(i) Immigration Directive 21 of 2015, which was issued by the Director-General of the Department of Home Affairs on 3 February 2016, is declared to be inconsistent with the Constitution of the Republic of South Africa 1996 and invalid, and is set aside.

(ii) Second respondent is directed to permit the second applicant to submit an application for a visitor's visa in terms of s 11(b)(iv) of the Immigration Act, no. 13 of 2002, within 15 days from date of this Order.

(iii) Second respondent is directed to consider third applicant's appeal against the refusal of his application for a critical skills visa, as rejected by him on 4 January 2016, in the light of this judgment and to make a decision in the appeal within 15 days of the date of this order.

(iv) Second respondent is directed to consider fourth applicant's appeal against the refusal of his application for a critical skills visa, as rejected by him on 6 October 2015, in the light of this judgment and to make a decision in the appeal within 15 days of the date of this order.

(v) Second respondent shall be liable for applicants' costs of suit, including the costs of two counsel where so employed.'

[3] According to the first respondent, who deposed to the founding affidavit in support of the relief sought in the court a quo, during September 2003 the Cape Town office of the Legal Resources Centre brought an application against the DHA on behalf of thirteen asylum seekers. That matter was settled and an order, which came to be known as the 'Dabone Order',[2] issued by agreement between the parties. Following upon the Dabone Order, the DG issued a directive, namely Circular 10 of 2008. Circular 10 provided that 'asylum seekers in possession of a permit issued in terms of s 22 of the [RA] can apply for one of the temporary residence permits contemplated in the [IA], as well as permanent residence in terms of section 26 or 27 of the [IA].'

[2] The first applicant in that matter was Mr Moustafa Dabone.

[4] On 3 February 2016 the DG issued a new directive – Directive 21 – which is headed: 'Withdrawal of Circular 10 of 2008 confirming the 11 November 2003 Dabone Court Order' and provides in material 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].'

The Directive concluded with these words:

'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.'

[5] Such details as can be gleaned from the papers pertaining to each of the second, third and fourth respondents are somewhat sketchy. The second respondent, Ms Arifa Fahme, is married to Mohamed Fahme. Both are Indian citizens. Mr Fahme is the holder of a work permit pursuant to which he is employed as the manager of a supermarket. Ms Fahme is the holder of an asylum seeker permit in terms of s 22 of the RA. She first entered the country on 3 June 2009. Her permit was extended on 12 occasions and eventually expired in 2016. Mr Fahme entered the Republic of South Africa in 2015. Ms Fahme applied for a visitor's visa in terms of s 11 of the IA. The DHA's agent, VFS Global, refused to accept the application. It apparently did so on the strength of Directive 21. The third respondent, Mr Kuzikesa Swinda, is a citizen of the Democratic Republic of Congo. His details were first captured on 19 April 2010 by an Refugee Reception Officer (RRO). His permit was extended on 13 occasions and eventually expired on 1 August 2016. In the interim, Mr Swinda applied for a critical skills visa in terms of s 19 of the IA. The critical skill he is said to possess is that of an IT Security Specialist. On 4 January 2016 his application for a critical skills visa was rejected. The fourth respondent, Mr Jabbar Ahmed, is a Pakistani national. His details were first captured by an RRO on 26 September 2014. His permit was extended twice and expired on 26 October 2015. Like the third respondent, he too made an application

for a critical skills visa - in his case as a sheep shearer. On 6 October 2015 his application was also rejected.

[6] The written reasons given by the DHA for rejecting the applications of the third and fourth respondents for critical skills visas were in identical terms, namely:

'The applicant cannot be granted a temporary residence visa (trv) 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 rab [note: 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(2) 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 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.'

Both Mr Swinda and Mr Ahmed lodged internal appeals with the DHA against those decisions. Those appeals have been held in abeyance because, so the contention goes, if the argument advanced on behalf of the DHA carries the day, then all three respondents could not even have applied for the visas in question whilst in this country, much less require the DHA to consider and determine them.

[7] In my view, the court a quo's conclusions appear to rest on an erroneous interpretation of the IA. Accordingly, the IA is where one must start. Section 10 of that Act, headed 'Visas to temporarily sojourn in Republic', provides:

'(1) Upon admission, a foreigner,[3] 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.

(2) Subject to this Act, upon application in person and in the prescribed manner, a foreigner may be issued one of the following visas for purposes of –

. . .

(*l*) applying for asylum as contemplated in section 23.'[4]

[3] A foreigner is defined as an individual who is not a citizen.

Thus, the regulation of refugees starts, ironically, with s 23 of the IA, which provides:

'(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 s 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.'

[8] Refugees entering the Republic of South Africa are not automatically recognized as such. In order to have their status recognized they must fulfil the requirements for asylum in terms of the RA. The RA distinguishes between asylum seekers and refugees.[5] As *Minister of Home Affairs v Somali Association of SA Eastern Cape & another* [2015] ZASCA 35; 2015 (3) SA 545 para 3 observed:

'It is thus important to understand how asylum is sought and conferred in terms of our law. According to s 21 of the [RA],[6] every person who wishes to obtain asylum must apply in person to a Refugee Reception Officer (the Officer) at any Refugee Reception Office (RRO). To that end, the Officer must ensure that the application form is properly completed and where necessary assist the applicant in that regard. The Officer may conduct such enquiry as is deemed necessary in order to verify the information furnished by the applicant and, thereafter submit the application together with such information as may have been obtained to a Refugee

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[4] The other types of visas contemplated by s 10(2) of the IA are:
(*a*) transit through the Republic as contemplated in section 10B;
(*b*) a visit as contemplated in section 11;
(*c*) study as contemplated in section 13;
(*d*) conducting activities in the Republic in terms of an international agreement to which the Republic is a party as contemplated in section 14;
(*e*) establishing or investing in a business as contemplated in section 15;
(*f*) working as a crew member of a conveyance in the Republic as contemplated in section 16;
(*g*) obtaining medical treatment as contemplated in section 17;
(*h*) staying with a relative as contemplated in section 18;
(*i*) working as contemplated in section 19 or 21;
(*j*) retirement as contemplated in section 20;
(*k*) an exchange program as contemplated in section 22.

[5] The RA defines an 'asylum seeker' as 'a person who is seeking recognition as a refugee in the Republic' and a 'refugee' as 'a person who has been granted asylum in terms of this Act'.

[6] Section 21 of the RA, headed 'Application for asylum', 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.'

Status Determination Officer (RSDO). Pending the outcome of that application the Officer must, in terms of s 22 of the [RA],[7] issue such applicant with an asylum seeker permit allowing him or her to sojourn in the Republic temporarily. Until the issuance of a s 22 permit (also described as an asylum seeker permit), such person is considered an illegal foreigner and subject to apprehension, detention and deportation in terms of the [IA]. . . . An asylum seeker permit is thus essential to enable an asylum seeker to live, work and function in South Africa prior to the determination of his or her status.'

Once asylum is granted, a refugee has a range of rights including the entitlement to apply in terms of s 27(c) of the RA for an immigration permit.[8]

[9] Section 10(2) of the IA expressly envisages an 'application in person and in the prescribed manner'. As to the prescribed manner: it is to the Immigration Regulations[9] that one must look. Regulations 9(1) and 9(2) prescribe the manner in which most visa applications must be made. They read:

'(1) An application for any visa referred to in section 11 up to and including sections 20 and 22 of the Act shall be made on Form 8 illustrated in Annexure A together with all supporting documents and accompanied by . . . [10]

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[7] Section 22 of the RA, headed 'Asylum seeker permit', reads:
'(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.
(2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991 [Immigration Act], become null and void, and must forthwith be returned to the Director-General for cancellation.'

[8] Section 27(c) provides: 'A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991,[8] 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.'

[9] GN R413, *GG* 37679, 22 May 2014.

[10] The documents envisaged by Regulation 9(1) are:
'(*a*) a valid passport in respect of each applicant;
(*b*) a yellow fever vaccination certificate if that person travelled or intends travelling from or transiting through a yellow fever endemic area: Provided that the certificate shall not be required where that person travelled or intends travelling in direct transit through such area;
(*c*) a medical and radiological report in respect of each applicant, excluding applicants for the visa contemplated in s 11(1)(*a*) of the Act: Provided that a radiological report shall not be required in respect of children under the age of 12 years or pregnant women;
(*d*) in respect of dependent children accompanying the applicant or joining the applicant in the Republic, proof of parental responsibilities and rights or written consent in the form of an affidavit from the other parent or legal guardian, as the case may be;
(*e*) in respect of a spouse accompanying the applicant or joining the applicant in the Republic, a copy of a

(2) Any applicant for any visa referred to in subregulation (1) must submit his or her application in person to –

(*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.'

Importantly, in terms of s 10(8) of the IA, an application for a change in status does not provide a status and does not entitle the applicant to any benefit under the Act, except for those explicitly set out in the Act, or to sojourn in the Republic pending the decision in respect of that application.

[10] The general rule therefore is that an application for a visas by a foreigner must be made abroad and not in South Africa. That general rule applies to the respondents' visa applications for a visitor's visa (in the case of the second respondent) in terms of s 11 and a work visa (in the case of each of the third and fourth respondents) in terms of s 19 of the IA. It follows that the respondents could not lawfully apply for either a visitor's or work visa in South Africa. Applications for visas of that kind could only have been made abroad.

[11] The main exception to that general rule is to be found in s 10(6) of the IA, which allows certain foreigners, who are in South Africa, to apply for a change in their status. In that regard s 10(6) provides:

'(*a*) 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.

(*b*) An application for a change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances as prescribed.'

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marriage certificate or proof of a relationship as contemplated in regulation 3; and
(*f*) payment of the applicable application fee.'

‘Status’, according to s 1(1) of the IA, means ‘the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act’. And that section defines a ‘visa’ to mean visas issued in terms of the IA.

Regulation 9(5) elaborates:

‘(5) 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, no 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 subregulation (9) exist.’

[12] These provisions create an exception to the general rule that visa applications must be made abroad. They also make clear that the exception only applies to the holders of certain categories of visa issued in terms of the IA. Section 10(6)(a) provides in the first place for an application for a change in ‘status’ and in the second for a change in the ‘terms and conditions attached to his or her visa’. By definition both are confined to those who are here under visas issued in terms of the IA. The definition of ‘status’ makes it clear that it relates to a person’s status under a visa or permanent residence permit issued in terms of the IA. They do not apply to asylum seekers, who do not have any status under the IA and are in the country pursuant to asylum seeker permits issued in terms of the RA. Both s 10(6)(a) and regulation 9(5) exclude the holders of visitor’s and medical treatment visas from this exemption. Holders of those visas ordinarily may not apply for a change of status in South Africa. The general rule, that applications for visas must be made abroad, prevails in their case. It would thus be most anomalous not to allow them the benefit of the exemption but to extend it to asylum seekers who enjoy no status under the IA at all.

[13] When asylum seekers arrive at a South African border post, they are given an asylum transit visa for only five days to allow them to apply for asylum at the nearest RRO. They thereafter become subject to the RA and do not enjoy any status under the

IA. Section 22(2) of the RA puts this beyond doubt. It states that, upon the issue of any asylum seeker permit to an applicant, 'any permit issued to the applicant in terms of the [IA], becomes null and void, and must forthwith be returned to the Director-General for cancellation.' This provision militates against any suggestion that an asylum seeker enjoys any status under the IA.

[14] Asylum seekers are thus bound by the general rule laid down by s 10(2) of the IA read with regulation 9(2) of the Immigration Regulations that applications for visas must be made abroad. The respondents could not lawfully apply for visitor's and work visas within South Africa. The DHA therefore correctly declined their applications. The court a quo found that nothing prevented the two Acts being read together such that an asylum seeker or refugee could make application for the full range of visas and permits provided for by the Immigration Act. In that, the court overlooked this general rule.

[15] One final aspect remains: The court a quo took the view that the Minister may, in terms of s 31(2)(*c*) of the IA, for good cause waive any prescribed requirement. It opined 'there was no suggestion by the [DHA] that any of the requirements necessary to obtain either a visitor's visa . . . or a so-called critical skills visa . . . could not be so waived by the Minister if he or she deemed it appropriate'. In terms of s 31(2)(*c*) 'upon application, the Minister may under terms and conditions determined by him or her for good cause, waive any prescribed requirement or form. This provision does not avail the respondents because they did not apply to the Minister to waive the requirement that applications for visas be made abroad. If they had made such an application, and the Minister had refused it, their remedy would have been an application for review. The Minister's power to waive is thus of no assistance to them in this case.

[16] It follows that the appeal must succeed. The appellants did not seek costs either in this court or the one below.

[17] In the result:

1. The appeal is upheld.

2. The order of the court below is set aside and replaced by the following order:

‘The application is dismissed.’

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V M Ponnan

Judge of Appeal

APPEARANCES:

For the Appellants:	W H Trengrove SC (with him K Pillay and A Nacerodien)
	Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein
For the Respondents:	A Katz SC (with him A Brink)
	Instructed by: Kassell Sklaar Cohen Attorneys, Cape Town Symington & De Kok Attorneys, Bloemfontein