



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 114/18

In the matter between:

**ROBINAH SARAH NANDUTU** First Applicant

**JAMES FERRIOR TOMLINSON** Second Applicant

**ILIAS DEMERLIS** Third Applicant

**CHRISTAKIS FOKAS TTOFALLI** Fourth Applicant

and

**MINISTER OF HOME AFFAIRS** First Respondent

**DIRECTOR-GENERAL OF THE DEPARTMENT  
OF HOME AFFAIRS** Second Respondent

**VFS VISA PROCESSING (SA) PTY LIMITED  
t/a VFS GLOBAL** Third Respondent

**Neutral citation:** *Nandutu and Others v Minister of Home Affairs and Others*  
[2019] ZACC 24

**Coram:** Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J,  
Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

**Judgments:** Mhlantla J (majority): [1] to [95]  
Froneman J (dissenting): [96] to [105]

**Heard on:** 21 February 2019

**Decided on:** 28 June 2019

**Summary:**

Immigration Regulations — validity of regulation 9(9)(a) — foreign spouses or children of citizens or permanent residents must leave the country to apply for a change of visa status — inconsistent with Constitution — unjustifiably limits right to dignity and rights of children — constitutionally invalid

Interim relief — order of declaration of invalidity granted and suspended for 24 months — interim reading-in order granted

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**ORDER**

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On direct appeal from the High Court, Western Cape Division, Cape Town (per Thulare AJ):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. Paragraphs 1, 2, 3, 4 and 6 of the Order made by the High Court of South Africa, Western Cape Division, Cape Town are set aside and substituted with the following:
  - “(a) Regulation 9(9)(a) of the Immigration Regulations GNR 413 GG 37679, 22 May 2014 (Immigration Regulations) is declared to be inconsistent with the Constitution and therefore invalid, to the extent that the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act 13 of 2002 are not extended to the foreign spouse or child of a South African citizen or permanent resident.
  - (b) The declaration of invalidity is suspended for 24 months from the date of this order.
  - (c) During the period of suspension, the following is to be read into regulation 9(9)(a) of the Immigration Regulations:
    - ‘(iii) is the spouse or child of a South African citizen or permanent resident.’

- (d) Should the defect not be remedied within the period of suspension, the interim reading-in shall become final.
  - (e) The Minister of Home Affairs and the Director-General of the Department of Home Affairs are to pay the applicants' costs, including the costs of two counsel."
4. Ms Robinah Sarah Nandutu is granted leave to submit an application for a visa pursuant to section 11(6) of the Immigration Act 13 of 2002.
  5. The Minister of Home Affairs and the Director-General of the Department of Home Affairs are to pay the applicants' costs in this Court, including the costs of two counsel.

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## JUDGMENT

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MHLANTLA J (Cameron J, Jafta J, Khampepe J, Madlanga J, Nicholls AJ and Theron J concurring):

### *Introduction*

[1] The right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it. This judgment grapples with the intertwined relationship between human dignity and familial rights and how they function alongside notions of state security and legislative regimes that seek to protect persons within the borders of the Republic.

[2] The applicants have approached this Court to vindicate the rights of foreign spouses and children who are required to leave South Africa in order to lodge applications to change their visa status under the Immigration Act.<sup>1</sup> This is an

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<sup>1</sup> 13 of 2002 (Immigration Act). For the purposes of this judgment, and in line with the current legislative scheme, "spouse" is understood to include persons who are (a) a party to a marriage (being a marriage concluded in terms of the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998, a civil union concluded in terms of the Civil Union Act 17 of 2006 or a marriage concluded in terms of the laws

application for leave to appeal against a decision of the High Court of South Africa, Western Cape Division, Cape Town (High Court) per Thulare AJ.<sup>2</sup> The applicants seek a declaration that regulation 9(9)(a) of the Immigration Regulations is unconstitutional.

### *Background*

[3] This matter involves two family units, both of which comprise foreign spouses who are married to or are in a life partnership with a South African citizen or permanent resident. The first applicant, Ms Robinah Sarah Nandutu, is a Ugandan citizen who resides with and is married to the second applicant, Mr James Ferrior Tomlinson, a British citizen and permanent resident of South Africa. The third applicant, Mr Ilias Demerlis, is a Greek citizen, who resides with and is in a life partnership with the fourth applicant, Mr Christakis Fokas Ttofali, a South African citizen.

[4] The first and second respondents, the Minister of Home Affairs and the Director-General of the Department of Home Affairs, oppose this application. The Minister is empowered under section 7(1) of the Immigration Act to make regulations relating to the requirements for the issuing of visas, and the Director-General is responsible for the implementation of the Immigration Act, including the issuing of visas and permits under the Immigration Act.

[5] The third respondent is VFS Visa Processing (SA) (Pty) Limited t/a VFS (VFS), a company incorporated under South African law. VFS was cited by virtue of the fact that the Minister and the Director-General require persons to submit their visa and permit applications at the VFS offices. VFS did not oppose the application in the High Court or in this Court and no relief is sought against it.

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of a foreign country) or (b) a party to a permanent homosexual or heterosexual relationship as prescribed. See section 1 of the Immigration Act and regulation 3(1) of the Immigration Regulations GNR 413 GG 37679, 22 May 2014 (Immigration Regulations).

<sup>2</sup> *Nandutu v Minister of Home Affairs* [2018] 3 All SA 259 (WCC).

[6] Before turning to the substance of the matter, it is necessary to briefly set out the key facts that led the applicants to bring this matter before the Court.

*The first and second applicants*

[7] The first applicant entered South Africa on 20 February 2015 on a visitor's visa in terms of section 11(1) of the Immigration Act (section 11(1) visitor's visa).<sup>3</sup> That visitor's visa was issued to her in Kampala, Uganda on 19 February 2015 on the conditions that her visit would not exceed 30 days, was for holiday purposes only and that she was obliged to hold an onward return ticket. The first applicant was three

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<sup>3</sup> Section 11, entitled "Visitor's Visa", provides:

- "(1)A visitor's visa may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who complies with section 10A and provides the financial or other guarantees prescribed in respect of his or her departure: Provided that such visa—
- (a) may not exceed three months and upon application may be renewed by the Director-General for a further period which shall not exceed three months; or
  - (b) may be issued by the Director-General upon application for any period which may not exceed three years to a foreigner who has satisfied the Director-General that he or she controls sufficient available financial resources, which may be prescribed, and is engaged in the Republic in—
    - (i) an academic sabbatical;
    - (ii) voluntary or charitable activities;
    - (iii) research; or
    - (iv) any other prescribed activity.
- (2) The holder of a visitor's visa may not conduct work: Provided that the holder of a visitor's visa issued in terms of subsection (1)(a) or (b)(iv) may be authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work.
- (3) . . .
- (4) . . .
- (5) Special financial and other guarantees may be prescribed in respect of the issuance of a visitor's visa to certain prescribed classes of foreigners.
- (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 who 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 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."

months' pregnant at the time. The purpose of her visit was to join the second applicant, who is the father of her child.

[8] Not long after her arrival and on 21 April 2015, the first applicant married the second applicant. The next day and acting on legal advice, the first applicant made an application for a temporary visitor's visa in terms of section 11(6) of the Immigration Act, which at the time she understood was a spousal visa (section 11(6) spousal visa).<sup>4</sup> The first applicant envisaged that this visa would enable her to reside with her husband and child in South Africa.

[9] On 14 August 2015, their son was born. The first and second applicants were not able to register their son's birth due to his mother's lack of a valid temporary residence visa. To date, it is unclear whether their son's birth has been registered.

[10] In September 2015, the first applicant instructed her legal representatives to ascertain the outcome of her visa application as she had not yet received a decision. On 7 October 2015, she was notified that her application had been rejected. The reason for the rejection was as follows:

“No change of status or conditions attached to the temporary visa while in the Republic in terms of section 10(6) of the Immigration Act of 2002.”

[11] She appealed to the Director-General, but the appeal was rejected for the same reason as above. A subsequent administrative review application to the Minister in terms of the Immigration Act was also rejected.

*Third and fourth applicants*

[12] The third applicant entered South Africa on a section 11(1) visitor's visa. He and the fourth applicant have been living together since 2013.

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<sup>4</sup> The current legislative framework does not provide for a “spousal visa”. However, for practical purposes, a visa issued under section 11(6) of the Immigration Act is commonly referred to as a spousal visa.

[13] In March 2015 and before the expiry of his visitor’s visa, the third applicant applied for a section 11(6) spousal visa to enable him to cohabit with the fourth applicant. In May 2015, the third respondent’s application was rejected for the same reasons that were given to the first applicant. In addition, the following reason was given:

“No documentation to prove the financial support to each other and the extent to which the related responsibilities are shared by the applicant and his or her spouse in terms of section 3(2)(d).”

[14] The third applicant appealed to the Director-General and brought a review to the Minister, both of which were also unsuccessful. However, at the hearing in this Court, counsel for the applicants reported that the third applicant had successfully obtained a section 11(6) spousal visa and that specific relief was no longer required in respect of him.

### *Litigation history*

[15] Following their unsuccessful visa applications, the applicants brought an application before the High Court, challenging the constitutional validity of regulation 9(9)(a) of the Immigration Regulations.<sup>5</sup> The applicants challenged the regulation on the basis that the rights accorded by means of the “exceptional circumstances” contemplated in section 10(6)(b) of the Immigration Act are not extended to the foreign spouse or child of a citizen or permanent resident.<sup>6</sup> The

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<sup>5</sup> Regulation 9(9) provides:

“The exceptional circumstances contemplated in section 10(6)(b) of the Act shall—

- (a) in respect of a holder of a visitor’s visa, be that the applicant—
  - (i) is in need of emergency lifesaving medical treatment for longer than three months;
  - (ii) is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa; or
- (b) in respect of a holder of a medical treatment visa, be that the holder’s continued stay in the Republic is required for any purpose related to a criminal trial in the Republic: Provided that such application shall be initiated by the relevant Deputy Director of Public Prosecutions and addressed to the Director-General.”

<sup>6</sup> Section 10(6) provides:

applicants argued that their right to dignity was unjustifiably limited, as the requirement to change visa status from outside of the Republic impairs the ability of spouses to honour their obligations to cohabit and support each other. The applicants sought to have “(iii) is the spouse or child of a citizen or permanent resident” read into regulation 9(9)(a) to remedy the asserted inconsistency and unconstitutionality.

[16] In its judgment, the High Court was critical of the actions of the first applicant. It noted that she and others in her position could have applied for a section 11(6) spousal visa when she first entered the Republic and that the first applicant should be held to her conscious choice of not having done so.

[17] The High Court went on to underscore the importance of differentiating between different visas that attach different requirements, serve different purposes and affect holders differently. Notably, the High Court disagreed with a previous judgment of that Court – *Stewart*<sup>7</sup> – on the nature of the status attached to a visitor’s visa. Thulare AJ diverged from the finding in *Stewart* that no question of a change of status (in terms of section 10(6)(b) of the Immigration Act) arises where a holder of a section 11(1) visitor’s visa seeks to change to a section 11(6) spousal visa. In *Stewart*, Donen AJ had reasoned that the spousal visa is subsumed within the visitor’s visa, and the visa holder would thus not be applying for a change of status attached to the visitor’s visa. Thulare AJ took a different view regarding the meaning of the term “status”.

[18] The High Court in this matter relied on the definition of “status” in section 1(1) of the Immigration Act, being “the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act”. It held

“(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.”

<sup>7</sup> *Stewart v Minister of Home Affairs* 2016 JDR 2125 (WCC) at paras 41-2.



that a visitor is different from a spouse or child in terms of the Immigration Act and that the reasons and requirements for their admission and presence in the Republic are different. The High Court held that status as a spouse in terms of the Immigration Act is not transmissible at marriage and, instead, is acquired when a foreigner is admitted into the Republic. As such, despite the fact that the first applicant's marriage after entering the Republic changed her status to a married person, it did not immediately change her status to a "spouse" in the meaning of section 11(6) of the Immigration Act, and thus she remained a visitor. The High Court reasoned that, by seeking to change from a section 11(1) visitor's visa to a section 11(6) spousal visa, the first applicant was seeking to change her status and was not applying for a renewal or extension of a section 11(1) visitor's visa.

[19] The High Court stressed the importance of the checks and balances created by the legislative framework and the need to guard against those who seek to take advantage of the system. It held that the legislative framework was carefully designed with the aims of mitigating administrative inconvenience and preventing marriage to a foreigner within the Republic from becoming a loophole for criminals to circumvent the immigration restrictions, a health risk or a compromise to the welfare of the people of the Republic.

[20] The High Court held that regulation 9(9)(a), as read with section 10(6)(b) of the Immigration Act, did not constitute an infringement of the right to human dignity, nor offend the right to equal treatment of visa applicants.

[21] Ultimately, the High Court was not persuaded that regulation 9(9)(a) prohibits the foreign spouse of a South African citizen or permanent resident who holds a section 11(1) visitor's visa from remaining in the Republic while his or her section 11(6) spousal visa application is being considered by the Director-General. The High Court held that section 31(2)(c) of the Immigration Act allowed any applicant to apply to have any prescribed requirement (that is, any requirement prescribed by regulation)

waived by the Minister upon showing good cause.<sup>8</sup> Thus, according to the High Court, the first and third applicants would still be able to lodge their applications from within the Republic. The High Court noted that the first applicant did not make such an application to the Minister.

[22] The High Court thus dismissed the application and held that regulation 9(9)(a), read with section 10(6), is capable of passing constitutional muster. It granted the first and third applicants leave to submit applications under section 31(2)(c) to the Minister within 30 days. It further directed the Department of Home Affairs not to refuse applications by section 11(1) visitor's visa holders to change to section 11(6) spousal visas only on the basis that the applicants were in the country, unless the Minister had already dismissed a relevant section 31(2)(c) application or if there was other good cause to refuse the applications. The first and third applicants were granted leave to submit section 11(6) spousal visa applications within 30 days and the Director-General was directed to assist the first and second applicants to have their son's birth registered.

*In this Court*

[23] Aggrieved by this decision, the applicants applied directly to this Court for relief. The issues for determination are:

- (a) Should leave to appeal directly to this Court be granted?
- (b) Is regulation 9(9)(a) of the Immigration Regulations constitutionally invalid to the extent that it does not extend "exceptional circumstances" to include where an applicant is the spouse or child of a citizen or permanent resident?
- (c) What is the appropriate remedy in this case?

[24] In answering the second question, this Court is required to delve into whether it is constitutionally permissible to compel all foreign spouses and children of citizens

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<sup>8</sup> Section 31 of the Immigration Act provides for exemptions, and section 31(2)(c) in particular provides that "[u]pon application, the Minister may under terms and conditions determined by him or her...for good cause, waive any prescribed requirement or form".

holding visitor’s visas to leave South Africa in order to lodge applications to change their visa status. However, before addressing this question, I proceed to consider whether the jurisdiction of this Court is engaged and if leave to appeal should be granted.

*Jurisdiction and leave to appeal*

[25] The applicants assert that the requirement that holders of visitor’s visas leave the Republic to change their visa status engages the jurisdiction of this Court as it infringes the right to dignity and the rights of children enshrined in the Constitution.<sup>9</sup>

[26] Indeed, the applicants correctly point out that this Court has previously, in *Dawood*, confirmed that such a requirement (albeit arising under a different statutory regime) implicates and infringes the right to dignity.<sup>10</sup> As this matter concerns the constitutional validity of a regulation, the constitutional jurisdiction of this Court under section 167(3)(b) of the Constitution is indeed engaged.<sup>11</sup>

[27] The applicants seek leave to appeal directly to this Court, bypassing the Supreme Court of Appeal. The respondents assert that the matter does not warrant granting direct leave to appeal and, instead, warrants adjudication by the Supreme Court of Appeal. It would certainly be beneficial to digest the considerations

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<sup>9</sup> Section 10 of the Constitution states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. Section 28(1)(b) of the Constitution states that “[e]very child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment” and section 28(2) goes on to provide that “[a] child’s best interests are of paramount importance in every matter concerning the child”.

<sup>10</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*).

<sup>11</sup> Section 167 states that:

- “(3) The Constitutional Court—  
...  
(b) may decide—
  - (i) constitutional matters; and
  - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

of the Supreme Court of Appeal and, ordinarily, it would be preferable to do so.<sup>12</sup> However, this Court can be persuaded by compelling reasons that it is in the interests of justice to deviate from the normal appeal procedure and grant direct appeal.<sup>13</sup> This Court, in *Union of Refugee Women*, provided some guidance on relevant factors to consider when granting leave to appeal directly:

“The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the disadvantages to the management of the Court’s roll and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed.”<sup>14</sup> (Footnote omitted.)

[28] Upon application of the above factors, it is clear that it is in the interests of justice to grant the application for leave to appeal directly to this Court. This is because there is an important constitutional issue to be considered here: whether it is constitutionally permissible to compel all foreign spouses and children of South African citizens or permanent residents holding visitor’s visas to leave South Africa in order to lodge applications to change their visa status. The resolution and outcome of the matter will have a wide impact on other families in similar situations to the applicants, which speaks to the importance of the constitutional issues raised. Given the nature of the issues in contention, it is also likely that this matter would have ended up in this Court. In the interests of expediency and efficiency, it would be best if this matter were dealt with here. There is reasonable urgency in having a final determination of the issues, given the extensive period of time in which the first applicant and her child have been living in a state of uncertainty regarding their documentation status in South Africa. Finally, given the relevance of this Court’s previous findings in *Dawood*, there are reasonable prospects of success.

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<sup>12</sup> *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8.

<sup>13</sup> *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 21; and *Bruce* id at para 9.

<sup>14</sup> *Union of Refugee Women* id.

[29] Therefore, it is in the interests of justice for this matter to be decided by this Court. It follows that leave to appeal directly to this Court should be granted.

### *Merits*

[30] The main issue for consideration is whether regulation 9(9)(a) of the Immigration Regulations is constitutionally invalid to the extent that it does not extend “exceptional circumstances” to include where an applicant is the spouse or child of a South African citizen or permanent resident. This gives rise to a number of sub-issues:

- (a) the applicability of *Dawood* to the present matter;
- (b) the appropriate resolution of the inconsistency between the *Stewart* decision and the decision of the High Court in this matter on whether a change from a section 11(1) visitor’s visa to a section 11(6) spousal visa constitutes a change of visa status;
- (c) whether either the right to dignity or the rights of children are infringed by regulation 9(9)(a), including whether section 31(2)(c) of the Immigration Act prevents any infringement of those rights by enabling persons to apply to the Minister for a waiver of the requirement to apply for a change of status from outside South Africa; and
- (d) whether, if those rights are limited by regulation 9(9)(a), those rights are reasonably and justifiably limited in terms of section 36 of the Constitution.

After consideration of the parties’ submissions, each of these sub-issues will be considered in turn.

### *Applicants’ submissions*

[31] The applicants’ key argument is that regulation 9(9)(a) prevents a couple from enjoying the ordinary incidents of marriage and partnership, including the rights and

obligations of cohabitation. This, they argue, impermissibly limits the right to dignity and the rights of children. The applicants place significant reliance on this Court's reasoning in *Dawood* to support the proposition that provisions which require all spouses and children to leave the Republic in order to apply for a change of visa status limit their right to dignity. The applicants also advance a section 36 limitation analysis of the right to dignity and the rights of children, in which they reach the conclusion that regulation 9(9)(a) cannot be saved.

[32] The applicants highlight that the "exceptional circumstances" in regulation 9(9)(a) do not extend to the spouse or child of a South African citizen or permanent resident. As such, those spouses or children who hold visitor's visas are required to leave the Republic to lodge their applications for a change of visa status. The result is that section 10(6)(b), when read with regulation 9(9)(a), limits the right to dignity and the rights of children.

#### *Respondents' submissions*

[33] The respondents contend that the central issues to be determined are whether regulation 9(9)(a) is invalid to the extent that "exceptional circumstances" do not include a foreign spouse of a citizen or permanent resident, and whether, if the regulation is unconstitutional, it would be just and equitable and/or appropriate for this Court to read in the proposed words. The respondents submit that the relief sought by the applicants must fail on all bases.

[34] The respondents submit that there is a reasonable and rational government purpose sought to be achieved by the implementation and maintenance of the general rule and that this purpose would be undermined if the applicant's primary relief is granted. The respondents argue that the applicants either overlooked, misunderstood or refused to avail themselves of section 31(2)(c) of the Immigration Act, which gives the Minister the discretion to waive a requirement prescribed by regulation where good cause is shown.

## *Assessment of the issues*

### *Dawood*

[35] This is not the first time that the intersection between family, dignity and immigration status has been before this Court. This Court in *Dawood* declared section 25(9)(b) of the Aliens Control Act<sup>15</sup> (read with sections 26(3) and (6)) to be constitutionally invalid in that it limited the right to dignity of spouses. The legislative regime, which effectively left family members at the mercy of immigration authorities, was found to be constitutionally invalid on account of the impact that it could have on married couples where one spouse may be required to leave South Africa pending an application for an immigration permit.

[36] In *Dawood*, there were three couples, with each couple consisting of a South African citizen and a foreign spouse. While the country of origin and specifics of the relationships differed from couple to couple, all three foreign spouses were seeking to obtain a permanent visa status in South Africa, and all three were unsuccessful. Given the similarities of the challenges faced by the *Dawood* applicants, their applications before the High Court were heard together. They raised two challenges: first, against a non-refundable fee payable by visa applicants for immigration permits, and, second (and of more relevance to this matter), against the Aliens Control Act for requiring that an immigration permit could be granted to the spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary residence permit. This meant that spouses applying for an immigration permit could only stay in the country if they had valid temporary residence permits, and if they did not, they were ordered to leave the country and make an application from “outside”. Immigration officials and the Director-General had the discretion to refuse to issue or extend a temporary residence permit. A refusal would mean that a couple would be forced to choose between leaving the country together or living separately while the foreign spouse’s application was considered.<sup>16</sup>

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<sup>15</sup> 96 of 1991 (Aliens Control Act).

<sup>16</sup> *Dawood* above n 10 at paras 1-8.

[37] The High Court, finding in favour of the *Dawood* applicants, declared the relevant fee regulations and section 25(9)(b) of the Aliens Control Act to be constitutionally invalid. The *Dawood* applicants then approached this Court for confirmation of the declaration of constitutional invalidity.

[38] This Court held that the legislative regime unjustifiably limited the constitutional right to dignity by infringing the rights of persons to marry and cohabit. Specifically, the Court held that the effect of the impugned provisions was that foreign spouses were able to reside in South Africa only while their immigration permits were being considered if they were in possession of valid temporary residence permits. This, the Court found, created an onerous burden on families that directly encroached on their right to dignity. The Court said that in many cases, the choice facing a couple to either live together outside South Africa or live apart while an application for an immigration permit was adjudicated was not really a choice, as poverty or other circumstances could dictate that the South African spouse would have to remain in the country. The Court went on to find that not only does this burden create practical and physical barriers to enjoying one's familial rights (and, by extension, one's human dignity), it also obstructs a spouse's ability to carry out fundamental aspects of their spousal obligations and the ability to live together.<sup>17</sup> The Court further emphasised the significance of the family unit in society, stating that spousal and family relationships "are social institutions of vital importance".<sup>18</sup>

[39] The Court concluded that the discretion to grant or refuse that permit lay with immigration officials or the Director-General. It was further held that the lack of guidance as to the exercise of this discretion unjustifiably limited the right of cohabitation of spouses, and the cognate right to dignity.<sup>19</sup>

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<sup>17</sup> Id at paras 38-9.

<sup>18</sup> Id at para 30.

<sup>19</sup> Id at para 58.



[40] Regarding remedy, the Court in *Dawood* made a declaration of invalidity and granted two of the applicants leave to submit an application for an immigration permit. Further, it issued directions as to the exercise of the discretion concerned, and granted leave to any interested person or organisation to apply for a further suspension of the declaration of invalidity and/or any appropriate further relief in the event that Parliament did not remedy the constitutional defect within 24 months from the date of the order.<sup>20</sup> The effect of this meant that foreign spouses would be entitled to remain in South Africa pending the finalisation of their applications for immigration permits.

#### *Applicability of Dawood*

[41] The respondents contend that the applicants' reliance on *Dawood* is misplaced. While they concede that *Dawood* establishes that foreigners inside South Africa are the beneficiaries of the right to dignity, they submit that *Dawood* applied to a different factual matrix. They contend that in *Dawood*, the relevant statute provided no mechanism to apply for an exemption from the requirement to leave the country, and no guidance as to how immigration officials were to exercise their open-ended discretion to extend temporary residence permits. By contrast, in this matter, they contend that the discretion of immigration officials does not arise at all, and section 31(2)(c) of the Immigration Act provides an exemption mechanism to apply for a change of visa status from within South Africa.

[42] The respondents further note that, in any event, this Court in *Dawood* ordered that immigration officials and the Director-General, when exercising the relevant discretion, take into account the constitutional rights of applicants, and issue or extend temporary permits to applicants unless good cause exists not to do so.

[43] I disagree with the respondents' contentions. Despite its different factual matrix and legislative scheme and despite its focus on discretionary powers, *Dawood* is applicable for two reasons. First, similar to *Dawood*, the applicants before us seek to protect the right to dignity of those who become eligible for permanent status. This

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<sup>20</sup> Id at para 70.

application, as in *Dawood*, seeks to ensure that the right to enter into and maintain familial relations is not violated by requiring spouses to leave the Republic for immigration administration purposes. Second, the nature of the relief granted in *Dawood* is akin to the relief sought in this application. In *Dawood*, it was stated that in determining whether to read in a provision, a Court must be guided by two considerations:

“the need to afford appropriate relief to successful litigants on the one hand, and the need to respect the separation of powers and, in particular, the role of the Legislature as the institution constitutionally entrusted with the task of enacting legislation, on the other”.<sup>21</sup>

Although the Court in *Dawood* did not grant a remedy of reading-in, it supported it as one of many potential forms of just and equitable relief and ultimately decided to leave it to the Legislature to cure the defect. The applicants here place much reliance on this.

#### *Subsequent legislative developments*

[44] Since *Dawood*, Parliament has made two relevant amendments to the general legislative scheme in respect of immigration.

[45] The first was the enactment of the Immigration Act, which replaced the Aliens Control Act. The Immigration Act was enacted to regulate the admission of persons to, their residence in and their departure from the Republic, and matters connected therewith. The Immigration Act envisages, amongst other things, expeditious and simplified procedures that would ensure that security considerations are fully satisfied, whilst being mindful that immigration control is to be performed within the highest applicable standards of human rights protection.<sup>22</sup>

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<sup>21</sup> Id at para 62 relying on *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at paras 65-66.

<sup>22</sup> Preamble to the Immigration Act.

[46] Notably, section 10 of the Immigration Act initially provided for temporary residence permits and allowed a foreigner to change his or her status from within the Republic. Section 26(b) allowed the Department of Home Affairs to issue a permanent residence permit to a foreigner who is the spouse of a citizen or resident. Section 26(c) allowed the Department of Home Affairs to issue a permanent residence permit to a foreigner who was a child of a citizen or resident under the age of 21, and section 26(d) allowed children of citizens to become eligible for a permanent residence permit.

[47] The second relevant amendment was the 2014 amendment to the Immigration Act and Immigration Regulations. The key amendment was that applications for changes to visitor's visa conditions were required to be made from outside of South Africa.

[48] Section 10(6) was amended to read:

- “(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.”

[49] The term “prescribed” is defined in section 1 of the Immigration Act to mean “prescribed by regulation”. Regulation 9(9)(a) reads as follows:

- “The exceptional circumstances contemplated in section 10(6)(b) of the Act shall—
  - (a) in respect of a holder of a visitor's visa, be that the applicant—
    - (i) is in need of emergency lifesaving medical treatment for longer than three months;

- (ii) is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa”.

[50] It is clear from the above provisions that there has been a departure from the 2002 framework. While section 10(6) – which appears to be a *Dawood*-based inclusion – allows a certain category of foreigners to change their visa status from within the country, regulation 9(9)(a) does not provide foreign spouses and children with this option. While there are exceptions, it appears that the Legislature may have taken one step forward and two steps back.

[51] The issue raised in this matter arises from reading section 10(6)(b) and regulation 9(9)(a) together, in that there is no exceptional circumstance listed under regulation 9(9)(a) that covers a foreign spouse or child of a South African citizen or permanent resident. Accordingly, persons falling into that category who are holders of a visitor’s visa do not receive the benefit under section 10(6)(b) to apply for a change of status or terms and conditions attached to that visa from within South Africa. Before considering whether this constitutes a limitation of either the right to dignity or the best interests of the child and, if it does, the nature of the limitation, it is important to first consider whether a change from a section (11)(1) visitor’s visa to a section 11(6) spousal visa actually constitutes a change of visa status. It is only if this is answered in the affirmative that the applicability of section 10(6)(b) arises and the constitutional validity of regulation 9(9)(a) is called into question.

#### *Change of visa status*

[52] As detailed above, the High Court conducted an extensive analysis as to whether a change from a section 11(1) visitor’s visa to a section 11(6) spousal visa constitutes a change of visa status, so as to trigger the applicability of the restrictions in section 10(6)(b). In doing so, it diverged from the earlier High Court judgment in

*Stewart*,<sup>23</sup> creating a conflict in respect of the meaning of a change of visa status in terms of the Immigration Act. Given the foundational nature of a change of visa status to a number of the provisions in the Immigration Act, including those under challenge in these proceedings, it is expedient to provide clarity on the issue.

[53] Section 11 of the Immigration Act is the source of the issuance of visitor's visas. Section 11(1)-(6) details a number of circumstances in which a visitor's visa may be issued. These vary from a section 11(1) visitor's visa to the permanent visitor's visa that is the subject of this application, the section 11(6) spousal visa. A conflict thus arises: according to the *Stewart* interpretation of section 11, all section 11 visas fall under one visa category, and moving between a section 11(1) visitor's visa and a section 11(6) spousal visa thus creates no effective change of visa status. The *Stewart* interpretation approaches the language of section 11, including the very fact of section 11(1)-(6) falling under the same heading, as a sign that the visitor's visa is one indivisible visa category. The upshot of the *Stewart* approach is that, because there is no change of status, the holder of a section 11(1) visitor's visa is not required to leave South Africa before applying for a section 11(6) spousal visa. On the other hand, according to the High Court's interpretation in the present matter, the provisions within section 11 are separate visa categories. This interpretation concludes that section 11(6) spousal visas are distinguishable from visas issued under section 11(1)-(5), in that they create a different set of rights, conditions and obligations that mean that a change of visa status is effectively taking place.

[54] In my view, the interpretation by the High Court in the present matter is correct. This is because the language of section 11, particularly between section 11(1) and 11(6), creates different obligations for visa holders under each sub-section. The nature of the rights, conditions and obligations attached to a visa directly affects the status of a visa holder. It is the change of rights, conditions and obligations that creates a change of status. The section 11(6) spousal visa is clearly intended to offer a permanent route to residency. In doing so, section 11(6) places different demands

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<sup>23</sup> *Stewart* above n 7.

upon a visa holder than the temporary section 11(1) visitor's visa. These include proof of a good faith spousal relationship and authorisation to perform activities which holders of section 11(1) visitor's visas are otherwise precluded from. Furthermore, the obtaining of a section 11(6) spousal visa requires substantively different measures than those applicable to a section 11(1) visitor's visa, hence the origins of this application.

[55] In seeking to move from a section 11(1) visitor's visa to a section 11(6) spousal visa, a person is inevitably seeking to change status by moving between two substantively different visas, notwithstanding that they fall under the same broad category within the Immigration Act. The *Stewart* interpretation does not accurately reflect the underlying nature of the rights and obligations attached to a visa status. It unduly strains and distorts the text of section 11 by holding that the substantively different sub-sections fall within one indivisible visa category. I accordingly endorse the interpretation of the High Court in this matter that there is a change of visa status from a section 11(1) visitor's visa to a section 11(6) spousal visa.

[56] It is now apposite to consider whether regulation 9(9)(a) limits either the constitutional right to dignity or the best interests of children and, if so, whether that limitation is reasonable and justifiable in terms of section 36 of the Constitution.

*Is there a limitation of the applicants' rights?*

[57] The scheme of section 10(6)(b) read with regulation 9(9)(a) is that persons who enter the country on a visitor's visa cannot apply for a change of visa status while inside the country regardless of becoming spouses of South African citizens or permanent residents. The Immigration Act requires them to make that application while they are out of the country. This is the position even where the visitor's visa is still valid. They would be required to submit their passports as part of the application for a change of status, thus preventing them from being able to return to South Africa until a decision is taken on the application. The effect of this is that the affected spouse of a South African citizen or permanent resident is required to remain outside

of South Africa. A direct consequence of this is that the first and third applicants and all similarly placed persons are forced to leave and remain outside of the country.

[58] In circumstances where their South African spouses are not able to leave the country with them, a separation of families is inevitable. And it was this kind of separation which was found to have limited the right to dignity in *Dawood*. In that case, this Court held:

“The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.”<sup>24</sup> (Footnotes omitted.)

[59] As the relevant provisions of the Aliens Control Act did in *Dawood*, here section 10(6)(b) of the Immigration Act read with regulation 9(9)(a) imposes a limitation on the right to dignity. This occurs when families are forced to live apart whilst waiting for a decision on the application for a change of visa status. Section 10(6)(b) singles out holders of a visitor’s or medical treatment visa and obliges them, regardless of a change of their status or circumstances, to make their application while they are out of South Africa. This limitation strikes at the core of marital rights and their reciprocal obligations. It interferes with the fulfilment of cohabitation, a central feature of marriage. And as observed in *Dawood*, this impairment of familial rights constitutes a limitation of the right to dignity.<sup>25</sup>

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<sup>24</sup> *Dawood* above n 10 at para 37.

<sup>25</sup> *Id* at paras 37 and 51.

[60] In my view, *Dawood* thus makes it clear that there is a limitation of the right to dignity in this instance. That limitation extends to the right to dignity of the South African citizen or permanent resident who is forced to be separated from their spouse, in addition to the foreign spouse. Further, given that the right to dignity is extended to include the right to family life,<sup>26</sup> it is clear that the rights of children protected by section 28(1)(b) and (2) are limited, in that where a parent is required to leave the Republic in order to apply for a change of visa status, this may result in the child's family being separated. Section 28(2) of our Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Although the words "paramount importance" appear in section 28(2), our jurisprudence holds that they do not automatically override other rights as every right is itself capable of being limited. In *De Reuck v Director of Public Prosecutions*, this Court made it clear that the word "paramount" in section 28(2) does not automatically mean that a child's best interests can never be limited by other rights, and that therefore, in certain instances, section 28(2) may be subjected to limitations that are reasonable and justifiable in terms of section 36.<sup>27</sup>

[61] It is apposite at this stage to deal with the respondents' contention that section 31(2)(c) of the Immigration Act prevents any infringement of the right to dignity and the rights of children before determining whether any limitation is justified.

*Does section 31(2)(c) of the Immigration Act prevent the limitation?*

[62] The respondents submit that section 31(2)(c) of the Immigration Act averts any limitation of the right to dignity or the rights of children as it empowers the Minister to waive procedural requirements. In so doing, it offers an avenue for persons to

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<sup>26</sup> *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC) at para 49.

<sup>27</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 55. See also *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 29; and *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at paras 25-6.



apply to the Minister to have the requirement to apply for a change of visa status or conditions from outside of South Africa waived upon good cause being shown.<sup>28</sup>

[63] Section 31(2)(c) allows the Minister to “waive any prescribed requirement or form”. As aforementioned, the word “prescribed” is defined in the Immigration Act as meaning “prescribed by regulation”.

[64] The applicants submit that given that the requirement imposed upon spouses or children of citizens or permanent residents to leave is imposed by section 10(6)(b) of the Immigration Act (with the Immigration Regulations only bearing the exceptional circumstances thereto), the Minister cannot waive a requirement imposed by statute as he does not have the requisite power to grant that waiver at all. They submit that the Minister cannot grant a waiver to persons in the circumstances of the applicants. The respondents rebut this by submitting that this Court has previously endorsed the applicability of section 31(2)(c) to exemptions of this nature in *Ahmed*.<sup>29</sup>

[65] The respondents’ arguments are without substance and the reliance on *Ahmed* is misplaced.

[66] In *Ahmed*, this Court considered whether asylum seekers (rather than holders of visitor’s visas) could apply for a visa under the Immigration Act from within South Africa, despite a directive banning them from doing so.<sup>30</sup> This Court held that it was open to the second to fourth applicants in that instance to apply for an exemption from the applicable regulation – regulation 9(2) – under section 31(2)(c) of the Immigration Act in order to allow them to apply for a temporary residence visa from within South Africa.<sup>31</sup> The Court did not hear argument in *Ahmed* on the scope of the Minister’s discretion under section 31(2)(c), and noted the following:

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<sup>28</sup> Section 31(2)(c) deals with “Exemptions” and provides that “[u]pon application, the Minister may under terms and conditions determined by him or her . . . for good cause, waive any prescribed requirement or form”. See n 8 above.

<sup>29</sup> *Ahmed v Minister of Home Affairs* [2018] ZACC 39; 2019 (1) SA 1 (CC); 2018 (12) BCLR 1451 (CC).

<sup>30</sup> *Id* at para 1.

<sup>31</sup> *Id* at para 65.

“It was accepted by the parties that there is no reason why the second to fourth applicants, and persons similarly placed, may not apply for an exemption and request that the Minister waive the requirement that an application for a visa be made from outside the borders of the country.”<sup>32</sup>

[67] *Ahmed* dealt with the Minister’s ability to waive the requirements and forms within regulation 9(2), which stipulates the following:

- “(2) Any applicant for any visa referred to in sub-regulation (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.”

[68] *Ahmed* was thus concerned with the waiver of a requirement imposed by regulation 9(2), hence it was held that the Minister could waive the requirement. Here, however, the requirement that the applicants must be outside of the country to apply for a change of status flows from section 10(6)(b) of the Immigration Act, which permits exceptions that are specified in the Immigration Regulations. Regulation 9(9)(a) stipulates those exceptions. It does not impose requirements. The power to waive regulatory requirements does not include authority to waive statutory requirements. This means that the Minister is empowered to waive a requirement or form in the Immigration Regulations and not in the Immigration Act itself. Accordingly, in light of the interaction between section 10(6)(b) and regulation 9(9)(a), the “exceptional circumstances” listed in regulation 9(9)(a) are not capable of being waived in terms of section 31(2)(c). The Minister does not have the requisite power to grant such a waiver. Section 31(2)(c) therefore does not avert the limitation

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<sup>32</sup> Id at para 60.

of the right to dignity or the rights of children. In the result, the limitation of those rights has been established.

[69] It is now convenient to proceed to the justification analysis.

*Is the limitation justified?*

[70] Having established that the applicants' rights have been limited, it is now necessary to apply section 36 of the Constitution to assess whether the limitation of these rights is justified.<sup>33</sup>

[71] The starting point is whether the limitation is authorised by a "law of general application". This is easily disposed of, as the Immigration Act and the Immigration Regulations are accepted law. Beyond this, the inquiry into the extent to which the limitation is reasonable and justifiable requires the Court to consider the five non-exclusive factors listed in section 36: the nature of the rights limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.

[72] The nature of the right to dignity has been considered above, with reference to this Court's strong pronouncements in *Dawood* on the right to dignity through the right to marry and cohabit, and its applicability to all groups in society.<sup>34</sup> The nature

<sup>33</sup> Section 36 of the Constitution reads:

"(1)The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

<sup>34</sup> See [39] and [58]. See also *Dladla* above n 26.

and extent of the limitation was also addressed in *Dawood* in relation to the infringement of the right to dignity, where this Court held that the “exact nature and effect of the deprivation of rights will depend on the circumstances of each case in which the grant or extension of a temporary residence permit is refused”.<sup>35</sup> The Court went on to find that the “limitation is even more substantial where the refusal of the permit results in the spouses being separated”.<sup>36</sup> I adopt those findings as relevant to this limitation analysis.

[73] The purpose of the limitation and its importance have been addressed by the respondents by arguing that foreign spouses and children of South African citizens and permanent residents are an excluded category from regulation 9(9)(a) for two main reasons. First, the respondents argue that the purpose of such a limitation is premised on the notion that South Africa, as a sovereign state, is entitled to determine who enters its borders and what requirements they must meet in order to do so. The respondents submit that in terms of this entitlement, South Africa has adopted a risk-based approach of externalising borders, or “off-shore border management”, which prevents undesirable individuals from establishing themselves within South Africa.

[74] Second, the respondents submit that the exclusion of foreign spouses of South African citizens and permanent residents from regulation 9(9)(a) prevents persons from fraudulently overstaying in South Africa. This is because, if the exclusion did not exist, those persons would otherwise be able to enter South Africa on a visitor’s visa and easily remain on a permanent basis, provided that they marry a citizen or permanent resident.

[75] I accept that it is an important aspect of government to be able to regulate which individuals enter the borders of the country and, further, that border management has a protective effect in respect of national security and the interests of

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<sup>35</sup> *Dawood* above n 10 at para 51.

<sup>36</sup> *Id.*

South Africa. Those factors speak to the importance of the purpose advanced by the respondents. However, in my view, the respondents have not sufficiently addressed the relationship between the purpose and the limitation itself. The respondents have not established that the limitation (by way of the applicants and similarly placed persons being excluded from regulation 9(9)(a)) is a proportionate restriction and means to achieve the purpose of either preventing fraudulent marriages or protecting the interests of South Africa.

[76] The respondents attempted to justify the rationale for the limitation. They advanced arguments of sovereignty, international best practice, the cost effectiveness of externalising borders, the need for effective administration and comparisons with other visa schemes. They also relied on the better familiarity of foreign missions with the circumstances of their own nationals. Despite these arguments, the respondents have still not shown why the limitation is a proportionate means of achieving those objectives.

[77] In relation to the arguments of sovereignty and the benefits of externalising borders for effective administration, the respondents have not shown why the requisite range of security checks and enquiries for section 11(6) visa applications could not be performed by South African authorities to a suitable standard where visa applicants who are already legally within the country apply for a change of status from within South Africa's borders. Indeed, those visa applicants will still be required to comply with the full range of security checks and enquiries, albeit from within the country. In this sense, it has not been shown that the exclusion of such applicants from regulation 9(9)(a) truly serves the purpose of effectively managing borders.

[78] In relation to the prevention of fraudulent marriages, the respondents have also not made out a sufficient case for how the requirement imposed upon spouses and children of citizens or permanent residents is linked to that purpose in any proportionate sense. That is particularly so given that the respondents advanced evidence that was limited in both scale and explanatory value on the challenges posed

by fraudulent marriages in South Africa. In any event, on the respondents' own evidence, they are clearly quite capable of conducting proper investigations to detect fraudulent marriages when visa applicants are within the country, having done so effectively before the introduction of the second legislative amendment following *Dawood*. There appears to be a less restrictive means of achieving the same purpose.

[79] Further on the issue of less restrictive means, the respondents argued that the availability of the waiver route under section 31(2)(c) of the Immigration Act provides a less restrictive means that is relevant to the section 36 analysis. I have already concluded above that the waiver route provided by section 31(2)(c) is not available to persons in the circumstances of the applicants, and thus cannot aid the respondents on justification. In this instance, the respondents have not shown that the limitation of the right to dignity is reasonable and justifiable.

### *Conclusion*

[80] The respondents have not made out a case for why the requirement that spouses and children of South African citizens or permanent residents must leave the country to apply for a change of visitor's visa status does not constitute a limitation of at least the right to dignity, in light of *Dawood*. The respondents have also failed to prove that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by section 36(1). In effect, the respondents have not advanced a sufficient justification as to why spouses or children of citizens or permanent residents should be excluded from the categories of persons covered by the "exceptional circumstances" in regulation 9(9)(a).

[81] For these reasons and in light of *Dawood*, the impugned provision should be declared invalid as it is inconsistent with the Constitution, in that it gives rise to a limitation that is neither reasonable nor justifiable.

[82] What is left now is the consideration of an appropriate remedy.

## *Remedy*

[83] The applicants principally seek a reading-in remedy. The applicants submit that a just and equitable remedy would be to read into regulation 9(9)(a) “(iii) is the spouse or child of a South African citizen or permanent resident”. The applicants submit that such a reading-in would vindicate the rights of those affected by the constitutional invalidity. However, it would also have no discernible impact on the rest of the Immigration Regulations or the Immigration Act and would thus minimise any intrusion on the separation of powers. They also contend that the reading-in would not cause significant disruption or prejudice to the respondents. The applicants submit that reading-in is a better remedy than allowing the Minister a period of time to correct regulation 9(9)(a), due to the respondents’ “*lamentable*” treatment of this Court’s decision in *Dawood*.

[84] The respondents, however, argue that the reading-in sought by the applicants is not actually a reading-in, but rather, the addition of an entirely new sub-regulation that amounts to a substantive legislative amendment. This, they contend, would be a fundamental breach of the separation of powers doctrine.

[85] Should statutory provisions be found to be constitutionally invalid, it is within this Court’s remedial powers to read in provisions so as to render those provisions constitutionally compliant.<sup>37</sup> However, this must be tempered by a consideration of whether the remedy is appropriate or breaches the separation of powers doctrine.

[86] This Court in *National Coalition* held that it could introduce words into a legislative provision if that were appropriate. The Court further held that in considering the appropriateness of such relief, it must have regard to two primary

<sup>37</sup> *National Coalition* above n 21 at para 24:

“There is a clear distinction between interpreting legislation in a way which ‘promote[s] the spirit, purport and objects of the Bill of Rights’ as required by section 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under section 172(1)(b), following upon a declaration of constitutional invalidity under section 172(1)(a) . . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.”

considerations: the need to afford appropriate relief to successful litigants and the need to respect the separation of powers.<sup>38</sup> It also held:

“In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading-in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading-in would add to the group already enjoying the benefits. Where reading-in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.”<sup>39</sup> (Footnotes omitted.)

[87] In that case, this Court held that section 25(5) of the Aliens Control Act was constitutionally invalid in that it omitted to confer on partners in permanent same-sex relationships the benefits which it extended to spouses, and in this way unfairly discriminated against partners in such same-sex relationships who are permanently and lawfully resident in South Africa.<sup>40</sup> It further held (and so ordered) that it would not be appropriate to declare the entire section to be unconstitutional, and that such invalidity could be remedied by reading-in, after the word “spouse” in the section, the words “or partner, in a permanent same-sex life partnership”.<sup>41</sup>

[88] Since then, this Court has employed reading-in as a remedy in a number of instances and often in sophisticated ways, especially in cases involving statutes that confer benefits on particular types of familial units.<sup>42</sup> For example, in *Hassam*, this

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<sup>38</sup> Id at paras 65-6.

<sup>39</sup> Id at para 75.

<sup>40</sup> Id at para 97.

<sup>41</sup> Id at paras 97-8.

<sup>42</sup> Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 188 note that reading-in “has been consistently employed to remedy statutes that confer benefits on the ‘spouse’ of a married



Court held that the exclusion of widows in polygynous Muslim marriages from the

protection of section 1 of the Intestate Succession Act<sup>43</sup> was constitutionally unacceptable because it excluded them simply on the prohibited grounds of religion,

gender and marital status.<sup>44</sup> The Court remedied this by reading-in a mechanism that

allows more than one spouse in a polygynous Muslim marriage to inherit intestate.<sup>45</sup>

[89] The Court in *Dawood*, however, declined to invoke the reading-in, holding that since there is a range of legislative possibilities that could be realised to cure the

unconstitutionality, it would be appropriate to leave that curative task to the

Legislature.<sup>46</sup>

[90] In my view, the need to provide appropriate relief to the successful applicants in this instance speaks strongly towards granting the reading-in remedy sought by the applicants. However, when balanced against the need to respect the separation of powers, the respondents' argument that the reading-in sought amounts to a substantive legislative amendment should be given due consideration.

[91] In this instance, I am of the view that a "proper balance can be struck" by suspending the order of constitutional invalidity and ordering the relief that the applicants seek as an interim reading-in. The Court in *NL* stated:

"It seems to me that a proper balance can be struck by suspending a declaration of invalidity and ordering an interim reading-in. Suspension coupled with an interim reading-in is a remedy that does not intrude unduly into the domain of Parliament. It is a remedy that gives recognition to the need to respect the separation of powers and in particular the role of Parliament as the institution constitutionally entrusted with the task of enacting legislation. Such a remedy will prevent uncertainty by avoiding the piecemeal judicial amendment of legislation. It is a remedy that will allow Parliament to conduct the thorough process of consideration and constitutionally

required consultation to properly cure the constitutional defect. This is the remedy

which in my view is just and equitable.”<sup>47</sup> (Footnotes omitted.)

[92] Suspending the order of constitutional invalidity and granting the interim reading-in provides immediate relief for the applicants, and those in similar positions,



in that a constitutionally compliant regime will be implemented with immediate effect. It also gives appropriate regard to the separation of powers, in that the Legislature

maintains the opportunity to cure the invalidity.<sup>48</sup>

[93] Should the Legislature fail to enact appropriate legislation within 24 months from the date of this order, the interim reading-in remedy will become final. In any event, the reading-in is of a restricted nature that would not substantially alter the rest of the legislative regime beyond curing the constitutional inconsistency that has been exposed in this application. It also does not unduly infringe the separation of powers

principle, in that this regime can be amended by the Legislature at any time after this

judgment.<sup>49</sup>

### *Costs*

[94] There is no reason to deviate from the general rule that costs should follow the result.

### *Order*

[95] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. Paragraphs 1, 2, 3, 4 and 6 of the Order made by the High Court of South Africa, Western Cape Division, Cape Town are set aside and substituted with the following:
  - “(a) Regulation 9(9)(a) of the Immigration Regulations GNR 413 GG 37679, 22 May 2014 (Immigration Regulations) is declared to be inconsistent with the Constitution and therefore invalid, to the extent that the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act 13 of 2002 are not extended to the foreign spouse or child of a South African citizen or permanent resident.
  - (b) The declaration of invalidity is suspended for 24 months from the date of this order.
  - (c) During the period of suspension, the following is to be read into regulation 9(9)(a) of the Immigration Regulations:
    - ‘(iii) is the spouse or child of a South African citizen or permanent resident.’
  - (d) Should the defect not be remedied within the period of suspension, the interim reading-in shall become final.

- (e) The Minister of Home Affairs and the Director-General of the Department of Home Affairs are to pay the applicants' costs, including the costs of two counsel."
- 4. Ms Robinah Sarah Nandutu is granted leave to submit an application for a visa pursuant to section 11(6) of the Immigration Act 13 of 2002.
- 5. The Minister of Home Affairs and the Director-General of the Department of Home Affairs are to pay the applicants' costs in this Court, including the costs of two counsel.

FRONEMAN J (Mogoeng CJ and Ledwaba AJ concurring):

[96] It does not sit comfortably to dissent from a judgment that seeks to protect the dignity of resident and non-resident spouses and their children and does so in as elegant a manner as done by my sister, Mhlantla J. But I do believe some caution is necessary.

[97] My caution relates to three interrelated aspects:

- (a) The constitutional right to enter, to remain in and to reside in the country;

- (b) The true reach of *Dawood*;<sup>50</sup> and
- (c) The justification for the current legislation.

As this is a minority judgment, I will be brief.

*The constitutional right to enter, remain and reside in the country*

[98] Section 21(3) of the Constitution provides that “[e]very citizen has the right to enter, to remain in and to reside anywhere in the Republic”. Non-citizens do not have a constitutional claim to enter, remain and reside in South Africa and, when they visit the country, they cannot legitimately expect to be granted those rights. This is unexceptional. All countries regulate, in one way or another, the entry into and exit from the country of visitors.

[99] We should have, because of our history, an acute awareness of the plight of refugees and other marginalised people in foreign countries that seek refuge in our

country.<sup>51</sup> But there is no evidence before us that the individual applicants in this case, or the kind of people who visit our country as ordinary visitors, fall into this category. It may be that there are valid concerns that these difficulties could or do exist, but they have not been evidenced or presented in this case. So my first caution is that there is insufficient recognition of the proper constitutional context regulating entrance and residence of non-citizens in the main judgment.

*The true reach of Dawood*

[100] The applicants' argument is grounded in *Dawood*. Strictly, the principle from that case is about prohibitions, and how such prohibitions must be tempered with flexibility in order to give effect to rights. When there is a discretion to lift a prohibition, that discretion must be guided. In this case, there is no discretion. *Dawood* does not state that these types of laws without discretions are not allowed. It simply explains that if discretions are legislated, then they must be done in a certain way, as otherwise the discretion to exclude people using an unfettered discretion can breach rights. *Dawood* anticipates situations where the right to cohabitation may justifiably be limited. It is not authority for the principle that all laws must be discretionary for this category of people. It does not apply directly to these specific facts.

[101] The true infringement to the dignity of the applicants in *Dawood* lay in the lack of a guided discretion in deciding when to grant temporary visas. The case cannot be used to ground an argument that every affront to the dignity of a non-citizen in a familial relationship entitles her to enter, remain and reside in the country. So, although the underlying principle of *Dawood* may be legitimately extended by analogy, that case does not without some more work determine this matter. That is my second caution.

[102] The "more" work lies in paying closer attention to the legitimate general competence of governments to decide who may enter a country. Governments can and must exercise their power to manage who comes into their country, and this is

especially so for longer-term visas. The visitor visa provides the least amount of information to the state of all visa types. Information is key from a control point of view. Visitor's visas are a catch-all visa category which requires no declarations or duties of disclosure. It is essential that they are managed separately from other visas. Processing visas in home countries streamlines applications by ensuring they are managed through the high commissions and embassies in those countries. Proper time and consideration can be taken to evaluate the application, in the context of documents and evidence within the home country. At the same time, this discourages abuse of the visitor's visa and delineates it from other visas.

[103] Why should visitors who have no expectation or right to enter, remain or live in this country be entitled to expect that the conditions on which they came here as visitors must be abandoned once they change their minds on staying longer? In the absence of any cogent reason that they may be endangered or prejudiced in any serious way by returning to their home country, it seems quite reasonable to expect them to do that. And unless evidence on this score is put forward, it is difficult for me to see where the intrusion into their dignity lies. Merely in the possible inconvenience of returning home for a temporary period for the non-residents, and that temporary absence from them for the residents? I think perhaps not.

### *Justification*

[104] If I am wrong that the limitation of the right to dignity may not have been established, my third caution shifts to the assessment of the government's justification for the limitation. Its substance, however, remains the same: in the absence of cogent information that visitors may be endangered or prejudiced by a policy requiring them to return home, we should not easily conclude that lesser means to regulate more permanent entry and residence into the country was available.

### *Conclusion*

[105] Hesitantly and diffidently, then, I conclude that the appeal should fail.



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person but exclude permanent same-sex life partners from the benefits”. See for example *Satchwell v President of the Republic of South Africa* [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at paras 9 and 14; *J v Director-General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at paras 22 and 28; and *Gory v Kolver N.O. (Starke Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at paras 28, 31 and 66.

<sup>43</sup> 81 of 1987.

<sup>44</sup> *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC) at para 39.

<sup>45</sup> *Id* at para 53.

<sup>46</sup> *Dawood* above n 10 at paras 63-4.

<sup>47</sup> *NL v Estate of the Late Sidney Lewis Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) at para 73. See also *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 214.

<sup>48</sup> See *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at para 84.

<sup>49</sup> *National Coalition* above n 21 at para 76. See also *C v Department of Health and Social Development, Gauteng* [2012] ZACC 1; 2012 (2) SA 208; 2012 BCLR 329 (CC) at para 89.

<sup>50</sup> *Dawood* above n 10.

<sup>51</sup> *Ahmed*, above n 29 at para 22; *Union of Refugee Women*, above n 13 at paras 28-9.