CONSTITUTIONAL COURT OF SOUTH AFRICA

Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others

CCT 51/23
Date of judgment: 12 December 2023

MEDIA SUMMARY

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

On Tuesday, 12 December 2023 at 10h00, the Constitutional Court handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court of South Africa, Western Cape Division, Cape Town (High Court) on 13 February 2023. The High Court declared sections 22(12) and 22(13) of the Refugees Act 130 of 1998 (Refugees Act) unconstitutional and invalid.

The applicants are Scalabrini Centre of Cape Town (Scalabrini) and its trustees. Scalabrini is a non-profit trust mandated to assist refugees and asylum seekers. The respondents are the Minister of Home Affairs, the Director-General of the Department of Home Affairs (DHA) and the Chairperson of the Standing Committee for Refugee Affairs (Standing Committee). The amicus curiae is the Consortium for Refugees and Migrants in South Africa (CoRMSA). CoRMSA is a non-profit organisation that advances the rights of refugees and asylum seekers.

To obtain refugee status, the Refugees Act requires an asylum seeker to apply for asylum. The DHA has a severe backlog in asylum applications. It takes approximately five years for an asylum application to be decided. While their asylum application is pending, asylum seekers are issued with visas, which entitle them to stay and work in South Africa. These visas are usually issued for three or six months and must be renewed numerous times.

The respondents initially attributed the backlog to the failure of asylum seekers to renew their visas. On 1 January 2020, in an attempt to remedy the backlog, the Refugees Act was amended to introduce sections 22(12) and 22(13) (the impugned provisions). The impugned provisions require an asylum seeker to attend a Refugee Reception Office to renew their visa within one month of its expiry. If they fail to do so, their asylum application is deemed to have been abandoned and they must either leave South Africa or be deported, unless they provide satisfactory reasons to the Standing Committee for the failure to renew their visa.

Scalabrini submitted that the impugned provisions have severe consequences for asylum seekers. Where an asylum seeker fails to renew their visa in time, their asylum application, in which they may have a valid refugee claim, is automatically deemed to have been abandoned, regardless of its merits. Therefore, an asylum seeker could be deported to the country from which they fled without their asylum

application being considered on its merits as required by the Refugees Act. For these reasons, Scalabrini submits that the impugned provisions infringe fundamental rights and that such infringement is unjustifiable and thus constitutionally invalid.

It argued that the impugned provisions violate the principle of *non-refoulement* (prohibiting the return of refugees to a territory where they may face persecution, torture, inhumane or degrading treatment) in both international and South African law. Scalabrini further submitted that the impugned provisions also violate constitutional rights, including the rights to life, dignity, and freedom and security of the person. CoRMSA submits that children's rights are also violated by the impugned provisions. The Respondents did not dispute that the impugned provisions violate these rights.

Scalabrini argued further that the violation of rights by the impugned provisions is not justifiable under section 36 of the Constitution and is therefore constitutionally invalid. Scalabrini's main argument was that the impugned provisions are not rationally connected to the alleged purpose of clearing the DHA's backlog and there are less restrictive means to achieve this purpose. CoRMSA argued that the impugned provisions are incompatible with the best interests of the child. While the respondents initially opposed the proceedings in the High Court on the basis that the impugned provisions serve a lawful government purpose (to reduce the DHA's backlog) and were therefore rational, the respondents did not oppose the confirmation of constitutional invalidity of the impugned provisions. They conceded that there was a need to do away with the impugned provisions as a whole.

The High Court declared the impugned provisions constitutionally invalid to the extent that they provide that asylum seekers who have not renewed their visas within one month of the date of its expiry, are considered to have abandoned their applications.

In a unanimous judgment by Schippers AJ, the Court found that the impugned provisions were directly at odds with the principle of *non-refoulement*. Further, the impugned provisions violated a number of constitutional rights. They violated the right to dignity by cutting asylum seekers off from essential services needed for a dignified life: banking, education, and healthcare. They also exposed asylum seekers – and their children – to the constant risk of arrest, detention, and deportation, in contravention of the rights to life and personal liberty. All this, simply because a visa has not been renewed.

Children bear the brunt of the impugned provisions' adverse effects. Ordinarily, a child's asylum application is closely linked to that of their parents. When a parent's asylum application is abandoned, it frequently results in a similar fate for the child's application. Consequently, due to bureaucratic processes beyond their control, children are rendered vulnerable to arrest and detention, and are stripped of the protections they might otherwise have rightfully received. Even more troubling, they are exposed to the peril of deportation to the very country from which they sought refuge. This cannot be in their best interests.

Apart from the infringement of fundamental rights, the Court determined that the impugned provisions are arbitrary and irrational, lacking a connection to a legitimate government purpose. The evidence indicated that the failure to renew visas, often resulting from prolonged queues, financial constraints associated with reaching refugee reception offices, and the necessity to take time off from work, has not contributed to the backlog of asylum applications. Furthermore, it has not imposed a substantial burden on the Department. Therefore, the Court found that these provisions lack a reasonable basis and fail to serve a legitimate government purpose.

Consequently, the Court confirmed the High Court's declaration of constitutional invalidity, as the impugned provisions violate the principle of *non-refoulement*, infringe the right to dignity, unjustifiably limit the rights of children, and are arbitrary and irrational. The declaration of invalidity is retrospective to 1 January 2020, the date on which subsections 22(12) and 22(13) of the Refugees Act came into operation. The first respondent was ordered to pay the applicants' costs, including the costs of two counsel.