

Immigration Insights

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A victorious battle: Immigration and South Africa's positive obligation to respect the right to family life

Section 32 of the Immigration Act 13 of 2022 (Act) provides that any illegal foreigner shall depart the country unless they are authorised by the Director General of the Department of Home Affairs (DG) to remain in South Africa pending their application for a status. Status for purposes of the Act means the status of the person as determined by the relevant visa or permanent residence permit granted to them in terms of the Act.



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A victorious battle: Immigration and South Africa's positive obligation to respect the right to family life

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The first applicant was declared a prohibited person after she was found in possession of a fraudulent work visa. In the case of *AK and Others v Minister of Home Affairs and Another* [2022] ZAWCC (10 March 2023), the Cape Town High Court (Western Cape Division) found that the reasons advanced by the DG for the impugned decision did not pass muster.

The court consequently ordered the Department of Home Affairs (DHA) to authorise the first applicant, in terms of section 32(1) of the Act, to remain in South Africa pending her application for status. The order was made with costs against the DHA.

Background

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

Prior to the first applicant's work visa expiring, she successfully applied through an immigration consultant at Immigration Campus for a study visa to study business management at the College of Cape Town. The study visa was valid until 30 July 2015.

Prior to the expiry date of her study visa, the first applicant employed the services of an immigration consultant, Umran Aksu Sesli of Sun Consulting (Pty) Ltd, to assist her with obtaining a work visa. The work visa was obtained on 13 August 2015 and endorsed on the first applicant's passport. The work visa was valid until 5 July 2020.

In 2011, the first applicant met J and moved in with him in 2014. Two children, A and R, were subsequently born on 21 November 2016 and 19 November 2018 respectively out of the relationship between the first applicant and J. The first applicant subsequently applied for a visitor's visa together with a request for work authorisation in terms of section 11(6) of the Act through Visa Processing SA (Pty) Ltd (VFS).

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In November 2018, the first applicant's visa application was rejected on the basis that she was in possession of a fraudulent visa. She was consequently declared a prohibited person. In February 2019, she submitted an appeal to the office of the DG against the DHA's rejection of her application, and this appeal was also rejected.

Dissatisfied with the decision of the DG, the first applicant launched an application to review the DG's decision. The application was granted, and the impugned decision was remitted to the DG for reconsideration. Pursuant to the remittal, the DG dismissed the first applicant's representations on the basis that they did not satisfy the good cause requirements set out in section 29(2) of the Act. It is this decision that now forms the subject matter of the application before the High Court.

The issues before the court

The High Court had to determine whether the first applicant had met the requirements of section 29(2) of the Act in respect of the representations made in her appeal application to the DG.

Finding

Fraudulent Visa

The court considered the surrounding circumstances in relation to the first applicant's fraudulent visa as well as the best interest of her and J's minor children, who were cited as the second and third applicants.

The court found that the DG only focused on the alleged transgression of section 29(1) of the Act and ignored all the other pertinent factors put forward by the first applicant in relation to the circumstances

surrounding the acquisition of her visa. The DG was not called upon to consider whether the first applicant obtained a fraudulent visa. Rather, he had to ascertain whether good cause existed as to why the first applicant's prohibition should be uplifted.

The court found that the DG had failed to properly exercise the discretion conferred upon him by the Act, by not addressing this issue squarely.

Best interest of the minor children

In dealing with the best interest of the minor children, the court considered the provisions of the Act, the Constitution of the Republic of South Africa, 1996 (Constitution), the African Charter on Human and People Rights (African Charter) and the Convention on the Rights of the Child (CRC), which recognise children

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as among the most vulnerable members of society. This is, in addition to the fact that children are not to be separated from their parents against their will except when this is necessary, in their best interests, and upon the determination of a competent authority, in accordance with the law.

In considering the best interest of the minor children, the court found that forcing the first applicant to return to Russia without the second and third applicants would carry a real risk that the children could become alienated or estranged from their mother since there is no guarantee when (or indeed if) she would be able to return to South Africa given Russia's current state of war. On the other hand, in light of the war situation that prevails

in Russia, it is doubtful whether it would be in the best interests of the children to emigrate to Russia with the first applicant if she was deported. It would also mean that the minor children would lose contact with J and with their paternal family – as the first applicant's parents are deceased.

Irrespective of whether the children accompanied the first applicant to Russia or remained in South Africa, the effect of deporting the first applicant would result in a disruption to the family unit. The disruption of the family unit does not appear to have featured in the DG's decision-making process at all.

Conclusion

The purpose of the Act is to provide for the regulation of admission of persons to, their residence in, and their departure from South Africa. This judgment should be welcomed in that it recognises the importance attached to the protection afforded in respect of the best interests of children. It goes without saying that the protection of family life under such special and exceptional circumstances seems to outweigh the interest of the state in pursuing a restrictive immigration policy and is, in our view, imperative. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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