



**Briefing Paper 551**

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## **The Rights of Foreign Spouses**

### **1. Introduction**

Recently the Western Cape High Court handed down what could well turn out to be a landmark decision in refugee jurisprudence. Judge Mark Sher ruled that “parents and care givers of South African children will be allowed to remain in South Africa after their relationships with their South African spouses have expired.” Judge Sher also ruled that certain provisions of the Immigration Act and its regulations were unconstitutional.<sup>1</sup>

The judge declared as unconstitutional sections of the Act that a) require a foreigner who holds a spousal visa, and who has parental responsibilities and rights, to leave South Africa on the termination of the relationship; b) require such a person to make an application for change of status from outside the country; and c) do not allow a foreigner who may be eligible for a relative’s or visitor’s visa to work in South Africa in order to discharge their parental rights and responsibilities. Judge Sher suspended the declaration of invalidity for 24 months to enable Parliament to remedy the inconsistencies, but ordered a ‘reading in’ of the permissions in the interim.<sup>2</sup>

The judgement not only cements the democratic and constitutional rights of parents of South African children in a way that allows them to live their parenthood responsibly, but it also accords with two core concepts in Catholic Social Teaching, the protection and unity of the family and the principle of the best interests of the child, both based as they are on the

fundamental concept of human dignity. The judgement draws heavily on these principles, especially as they are understood in the South African Constitution.

Issues around spousal visas will be watched with interest, since it is one of the categories of visas that Home Affairs Minister Aaron Motsoaledi has punted as an option for Zimbabweans who will be negatively impacted by the cessation of the Zimbabwean Exemption Permits.<sup>3</sup>

### **2. The Judgement and Its Legal Background**

The crux of the case was that all of the applicants had resided in South Africa and worked in the country on spousal visas which had been extended periodically, but which were no longer deemed valid because the spousal relationships no longer existed. In each of the cases the applicants had children who were South African citizens.<sup>4</sup>

It is worth noting, as background to this decision, that spousal visas are available for spouses of South African citizens or permanent residents. To apply for a temporary spousal visa, you do not need any qualifying marriage period, but in cases of applications for permanent residence you need to have been married for five years. The visa is available for both same-sex and heterosexual couples. It is also worth noting – and it was critical in the case under consideration – that spousal visas allow the spouse to live, study, work and start a

business in South Africa. Interestingly, especially in terms of proposed new legislation dealing with international labour migration, applicants who intend to work do not have to show that their prospective employers have done a search to recruit a South African to fill the position. In a similar vein, if the spouse intends to set up a business there is no requirement for a minimum investment, nor is evidence required to prove that a certain number of South Africans will be employed. The thinking behind the Draft National Labour Migration Policy<sup>5</sup> differs considerably from, and is far more restrictive than, these provisions. The Draft Policy allows foreign employment only if no South African candidate is available, and it proposes a quota system in particular business domains.<sup>6</sup>

In his judgement Judge Sher also noted that because their relationships had ended, foreign spouses' residence rights had also expired and, in the event of their not leaving the country, they could be deported and run the risk of being declared *persona non grata*. Should they wish to apply for another form of visa, such as the visitor's visa or the relative's visa, they would have to do so from outside of the country. Moreover, neither of these visas would allow them to work, thereby rendering them unable to support their children. They would also be unable to ensure that their children lived with dignity and with access to the benefits children are entitled to in terms of the numerous pieces of domestic legislation that exist to protect them, and in terms of South Africa's many responsibilities under international protocols. As the judge observed, were parents not allowed to work and support their children responsibly, the children would end up needing the support of the State, thus adding to the State's financial and social burdens. The applicants made the crucial point that, should they be deprived from raising and providing for their children, it would "offend the best interest of the child principle". Judge Sher put it succinctly: "While the spousal relationship might have come to an end, their parental relationships have not."

Judge Sher ruled that the sections of the Act and the regulations which, on termination of the

spousal relationship, no longer apply – such as the right to work – must be viewed through the values contained in the preamble to the Act. The preamble commits South Africa to facilitating the entry and departure of foreigners according to the highest applicable standards of human rights protection, and in a manner which promotes a human rights-based culture of enforcement, and ensures that the Republic's international obligations are complied with.<sup>7</sup>

### **3. The Best Interests of the Child**

The 'best interests of the child' principle has been deeply enshrined in South African law since the early 19<sup>th</sup> century.<sup>8</sup> It finds expression in family law along the lines that, particularly in custody cases, the focus must be on the best interests of the child, especially with regard visitation, child support and other matters, with the ultimate goal of ensuring and encouraging the child's happiness, security and mental wellbeing.

It finds expression in the South African Constitution in section 28 of the Bill of Rights, which states: "Every child has the right to basic nutrition, shelter, health care... It is the expression of human dignity, equality and freedom."<sup>9</sup>

The International Catholic Migration Commission also underlines the principle of the child's best interests. It says: "A child's best interests must always be a primary consideration, taking priority over migration policies such as border control or enforcement. Existing mechanisms that need more consistent implementation include operationalizing the universal right of all children to best interest determinations in procedures that affect their rights. Recognizing that they are not criminals but victims and vulnerable, we need to implement more consistently existing mechanisms that facilitate careful identification, differentiation and referral of such children for the assistance and specific protection to which they have rights."<sup>10</sup> The latter part, the 'specific protection' has a particular application to the case under discussion, as it refers quite unambiguously to the protection offered by

parents and care givers and to their ability to support their children. Both local law and Catholic Social Teaching find congruence on this point.

The Bishops of the USA have said: “Rupturing the bond between parent and child causes scientifically-proven trauma that often leads to irreparable emotional scarring. Accordingly, children should always be placed in the least restrictive setting: a safe, family environment, ideally with their own families.”<sup>11</sup>

It is interesting that the DHA in this case has argued that the restrictions are meant to serve as a deterrent to ‘sham marriages’, which are entered into for the purpose of obtaining various benefits available to spouses in South Africa.

#### **4. The Preservation of Family Unity**

The judge went on to say: “I am of the view that the effect of the provisions in issue results in a violation of both their [the parents’] rights to dignity as well as those of their children and the children’s constitutional and parental rights.” In saying this he underlines strongly the principle of retaining family unity or, put negatively, the presumption against family separation.

To maintain the family bond is a critical requirement for the child, and any separation is bound to have a negative effect. Laura Wood, in an article researching the negative impact of parent-child separation in what she calls punitive immigration policies, says “the review explores and contextualises the key potential impacts of family separation... including damaged attachment relationships, traumatisation, toxic stress and wider detrimental impacts on immigrant communities.”<sup>12</sup> She continues, “As such, it is critical for the host nations’ governments to cease the practice of family separation and child detention for immigration control, and to promote post-migration policies that protect from further harm, promote resilience and enable recovery.”<sup>13</sup> It is estimated that about 100 countries practice child detention, and thus family separation, for immigration purposes.<sup>14</sup>

It should be noted that the critical point is not the circumstances but the principle of the best interests of the child in all circumstances. Therefore, it should not be thought to apply only to cases of child detention such as we saw recently on the border of Mexico and the USA, and to the depravity of that situation,<sup>15</sup> but to any situation where a child is separated from its parent(s) or primary care givers.

A close reading of the judgement also underlines that Judge Sher is aware of the fact that there is an obligation to “abrogate any statutory provisions and any administrative instructions, and to discontinue any administrative practices, which involve discrimination.”<sup>16</sup> Having ascertained that the separation from a parent on the ground of immigration status constitutes discrimination, the court must needs take steps to eliminate the source of discrimination. The judgement seeks to do so.

The importance of keeping the family united is also expressed by the International Catholic Migration Commission, which says with regard to facilitating policies and practices that keep families together: “These channels must respond to the specific needs and rights of refugee and migrant individuals, families, and children, acknowledge that family unity and family life are universally recognized rights, and recognize the family as the first place and protector of children.”<sup>17</sup>

No matter the circumstances, the critical point remains that family unity is paramount and that it should be protected irrespective of immigrant status. Also, all that seeks to derail that unity, whether it be in policy, legal mechanisms or practice, should be abrogated.

Albeit unintentionally, the judgement also shows expressions of the four verbs which Pope Francis often uses in his discourse around mobile people. He speaks of the need to show a fundamental attitude of welcome, to make space so that that which is helpful and supportive of our humanity can be embraced, to offer protection, to ensure promotion so that they come into the fullness of their being, and then to

integrate into the community, so that there is a reciprocal benefit for everyone. It is easy to relate these verbs to the judgement.

## 5. A Restriction

The judgement should not be understood as an 'open door authorisation' for immigration. In the case of a Zimbabwean who had let his documentation lapse, and who now asked on the basis of care for his child to be allowed to remain in South Africa, Judge Sher drew a line. The press reports on the judgment state: "Judge Sher declined to grant this order. He said the man had been in the country illegally since 2012 and had shown a 'blatant disregard for the law. Although the Court's sympathies lie with his child, assisting him would encourage and effectively grant a licence to foreigners to enter the country illegally, and to live and work here illegally until the moment when they have a child who is a South African citizen or permanent resident, which they need to

support, which they could then use to legalise their stay. No country that functions in terms of the rule of law can endorse such a stance."<sup>18</sup>

## 6. Conclusion

Against the backdrop of legislation designed to roll back the rights of foreigners to live and work in South Africa, this judgement makes an important point about more humane approaches to extending privileges and rights to foreigners. In this situation it will be a relatively small group that will benefit immediately, but it is important to secure the principle. It is also certain that the principle will serve to safeguard the rights of children in analogous situations, and that it will be an important contribution to refugee jurisprudence. The principles of the best interests of the child and of family unity provide a strong moral foundation to this less restrictive jurisprudence. This judgement should be warmly welcomed.

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<sup>1</sup> <https://tinyurl.com/yyj5c77s>

<sup>2</sup> *ibid*

<sup>3</sup> <https://www.citizen.co.za/news/3051373/home-affairs-aaron-motsoaledi-zim-permits-grace-period/>

<sup>4</sup> <https://tinyurl.com/yyj5c77s>

<sup>5</sup> <https://pmg.org.za/call-for-comment/1138/>

<sup>6</sup> <https://eisenberg.co.za/services/immigration-services/spousal-visas/>

<sup>7</sup> <https://tinyurl.com/yyj5c77s>

<sup>8</sup> [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2225-71602019000200007](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602019000200007)

<sup>9</sup> <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>

<sup>10</sup> <https://www.ohchr.org/sites/default/files/Documents/Issues/Children/HumanitarianSituations/InternationalCatholicMigrationCommission.pdf>

<sup>11</sup> <https://www.usccb.org/news/2018/us-bishops-migration-chairman-urges-administration-keep-families-together>

<sup>12</sup> <https://bmjpaedsopen.bmj.com/content/2/1/e000338>

<sup>13</sup> <https://bmjpaedsopen.bmj.com/content/2/1/e000338>

<sup>14</sup> <sup>14</sup> <https://bmjpaedsopen.bmj.com/content/2/1/e000338>

<sup>15</sup> <https://www.hrw.org/news/2022/02/04/us-border-programs-huge-toll-children>

<sup>16</sup> <https://www.right-to-education.org/resource/status-right-education-migrants-international-legal-framework-remaining-barriers-national>

<sup>17</sup> <https://www.ohchr.org/sites/default/files/Documents/Issues/Children/HumanitarianSituations/InternationalCatholicMigrationCommission.pdf>

<sup>18</sup> <https://tinyurl.com/yyj5c77s>

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