

Immigration and the right to respect for family life in the European context: A reflection on the states' positive obligations and possible lessons for South Africa

1 Introduction

The former Aliens Control Act 96 of 1991 has been repealed by the Immigration Act 13 of 2002(s 54), which commenced on 12 March 2003. On 26 May 2014, amendments to the Immigration Act 13 of 2002 effected by the Immigration Amendment Act 3 of 2007 (GN 656 in GG 30095 dated 18 July 2007) and the Immigration Amendment Act 13 of 2011 (GN 690 in GG 34561 dated 26 Aug 2011) as well as the Regulations were implemented (GN R413 in GG 37679 dated 22 May 2014). With regard to the issuing of permanent residence permits to a foreign spouse of a South African citizen or permanent resident under the former and

now repealed Aliens Control Act, two aspects earlier came under scrutiny in the case of *Dawood, Shalabi and Thomas v Minister of Home Affairs* (2000 1 SA 997 (C), 2000 3 SA 936 (CC)). The first aspect related to a non-refundable fee payable by foreign spouse applicants for immigration permits (now permanent residence permits). The second issue concerned section 25(9)(b) of the Aliens Control Act and, in particular, the question whether it was constitutional to require that an immigration permit could be granted to the spouse of a South African citizen who is *in* South Africa at the time *only* if that spouse is in possession of a valid temporary residence permit. Both aspects were declared to be inconsistent with the Constitution and thus invalid (see the discussion in par 4 3 below). The applicants, whose temporary residence permits had expired, were therefore entitled to remain in South Africa pending the finalisation of their application for an immigration permit. Important to note for purposes of the discussion below, however, is the fact that when they got married, all three applicants were in the Republic *legally*. When initially they applied for permanent residence permits, they were in possession of valid temporary residence permits.

Conversely, a recent judgment by the European Court of Human Rights ('ECtHR') in *Jeunesse v The Netherlands* (appl no 12738/10 of 2014-10-03), involved an application for permanent residence in the Netherlands by an applicant who was *illegally* present in the Netherlands for a number of years, on the basis of her family life in the Netherlands. The existence of 'family life' within the context of article 8 of the European Convention on Human Rights ('ECHR') between the applicant, her husband and three children was not disputed. The pertinent question, however, was whether the Dutch authorities were under a *positive obligation* to allow her to reside permanently and therefore to grant her a permanent residence permit in the Netherlands for the purpose of enabling her to enjoy and exercise family life with her husband and children on their territory (par 85). Article 8 of the ECHR reads as follows:

- (1) Everyone has the right to respect for his ... *family life*, ...
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in *accordance with the law* and is *necessary in a democratic society* in the interests of *national security, public safety* or the *economic well-being* of the country, for the *prevention of disorder or crime*, for the *protection of health or morals*, or for the *protection of the rights and freedoms of others*. (emphasis added)

This contribution reflects on the valuable *general* guidelines provided by the ECtHR on immigration matters in the European family and humanitarian law context. The application of these guidelines by the ECtHR to the facts at hand in *Jeunesse* is mentioned. Special attention is drawn to the exceptional facts and circumstances of the case that led the ECtHR to deviate from the general guidelines and to find a violation of article 8 of the ECHR by the Dutch authorities. The opportunity is then used to briefly investigate the position in South Africa. The Immigration Act and the question whether and how the judgment by the

Constitutional Court in *Dawood, Shalabi and Thomas v Minister of Home Affairs* was implemented by the Act is also addressed. The facts of *Jeunesse* are distinguished from those in *Dawood, Shalabi and Thomas*. Views held by commentators (par 4 1) suggest that *Jeunesse* should be seen as a triumph for the right to respect for family life, but only because of the cumulative effect of the special and exceptional circumstances in the case. Should some of these circumstances exist in isolation, and if one looks at several of these circumstances separately, case law by the ECtHR seems to suggest that they are not so 'exceptional', and would not necessarily afford the protection of article 8 of the ECHR. Lastly, some questions relevant to the discussion are posed for consideration in view of the possible future development of this aspect of the law in South Africa.

2 The Facts of *Jeunesse*

The applicant, Mrs Jeunesse, a Surinamese woman, entered the Netherlands in 1997 on a tourist visa, but did not return to Suriname when the visa expired 45 days later. Instead, she stayed in the Netherlands and made numerous attempts to get a permanent residence permit, all of them unsuccessful due to non-compliance with the immigration process (for the different reasons see parr 14-35). In the meantime she had married a Dutch national of Surinamese origin (whom she had met and lived with before in Suriname) and they had three children. Except for her all family members were nationals of the Netherlands. At the date of the judgment, the applicant had been living in the Netherlands for more than sixteen years (parr 8-13). One of the important reasons for the refusal of a permanent residence permit was, in terms of Dutch immigration law and policy at the time, that foreign nationals wishing to reside in the Netherlands for more than three months were required to hold, for admission to the Netherlands, a valid passport containing a valid provisional (temporary) residence visa issued in the country of origin or permanent residence. The purpose of the requirement of this visa, *inter alia*, was to prevent unauthorised entry and residence in the Netherlands (parr 43-61). The applicant alleged that the refusal to exempt her from the obligation to hold a provisional residence visa and the refusal to admit her to the Netherlands violated her rights under article 8 of the ECHR. Therefore, as stated above, the issue was whether or not the Netherlands was under a duty or had a positive obligation to grant her a permanent residence permit which would enable her to enjoy family life in the country (parr 100 & 105).

3 Judgment

3 1 Confirmation of General Principles Developed by ECtHR Case Law

The court, firstly, confirmed the following general principles laid down in its earlier case law (for a summary see in general Harris *et al Law of the European Convention on Human Rights* (2014) 532 & 575-578; Leach

Taking a Case to the European Court of Human Rights (2011) 338; *Roagna Protecting the right to respect for private and family life under the European Convention on Human Rights* (2012) 87). A state is entitled to control the entry of aliens (terminology used by ECtHR; for purposes of the discussion the term 'foreigner' as used in the Immigration Act is preferred) into its territory and their residence there. The ECHR does not guarantee the right of an alien to enter, or to reside, in a particular country (par 100; see *Nunez v Norway* appl no 55597/09 par 66). The corollary of a state's right to control immigration is the duty of aliens, such as the applicant, to submit to immigration procedures and leave the territory of the state when so ordered if they are lawfully denied entry or residence (par 100). States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad (par 101). States are therefore, under no obligation to allow them to await the outcome of immigration proceedings on their territory (see *Djokaba Lambi Longa v The Netherlands* appl no 33917/12 par 81). Where a state tolerates the presence of an alien in its territory, thereby allowing him or her to await a decision on an application for a permanent residence permit, such a state enables the alien to take part in the host country's society, to form relationships and to create a family there (par 103). However, this does not *automatically* entail that the state concerned is, as a result, under an obligation pursuant to article 8 of the ECHR to allow him or her to settle in their country (par 103). Confronting the host country with family life as a *fait accompli* does not entail that the host country is, as a result, under an obligation to allow the applicant to settle in the country (par 103). The court has previously held that, *in general*, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (par 103; see *Chadra v The Netherlands* appl no 53102/99; *Benamar v The Netherlands* appl no 43786/04; *Priya v Denmark* appl no 13594/03; *Rodrigues da Silva and Hoogkamer v The Netherlands* appl no 50435/99; *Darren Omoregie v Norway* appl no 265/07 and *B.V. v Sweden* appl no 57442/11).

While the essential object of article 8 is to protect the individual against arbitrary action by the state, in addition there may be positive obligations inherent in effective 'respect' for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both these contexts, the state enjoys a certain margin of appreciation (par 106). Where immigration is concerned, article 8 cannot be considered to impose on a state a general obligation to respect a married couple's choice of country for their matrimonial residence, or to authorise family reunification on its territory. In a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (par 107). Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the state concerned, whether there are *insurmountable obstacles* in the way of the

family living in the country of origin of the alien concerned, and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (par 107; see *Butt v Norway* appl no 47017/09 par 78).

Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such, that the persistence of the family life within the host state, from the outset, would be *precarious*. It is the court's well-established case law that, where this is the case, it is likely only to be in *exceptional circumstances* that the removal of the non-national family member will constitute a violation of article 8 (par 108; see *Abdulaziz, Cabales and Balkandali v The United Kingdom* 1985 7 EHRR 471 par 68; *Rodrigues da Silva and Hoogkamer v The Netherlands* appl no 50435/99 par 39). Where children are involved, their best interests are of paramount importance (see *Neulinger and Shuruk v Switzerland* appl no 41615/07 par 135, and *X v Latvia*, appl no 27853/09 par 96): Alone they cannot be decisive, yet such interests must be afforded significant weight. The court must assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (par 109).

3 2 Application of General Principles to the Facts in *Jeunesse*

Having made numerous unsuccessful attempts to secure regular residence in the Netherlands (especially because she did not have a valid temporary residence permit) on each occasion the applicant was aware, well before she commenced her family life in the Netherlands, of the *precariousness* of her residence status. Confronted with family life as a *fait accompli*, the removal of the non-national family member by the authorities would be incompatible with article 8 only in *exceptional circumstances* (parr 113-114). It is important to note that the court considered, 'first and foremost', that all the members of the applicant's family, excluding herself, were Dutch nationals and that her husband and their three children had the right to enjoy family life with each other in the Netherlands. Furthermore, the applicant was a Dutch national at birth and lost such nationality only when Suriname became independent. Therefore, her position could not be regarded as being on par with that of other potential immigrants who had never held Dutch nationality (par 115).

The applicant had been in the Netherlands for more than sixteen years and she had no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Dutch authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time,

during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands (par 116). The court accepted, in view of the common background of the applicant and her husband and the young ages of her children, that there would not appear to be 'insurmountable obstacles' for them to settle in Suriname. The court opined, however, that it was likely that they would indeed experience 'a degree of hardship' were they compelled to do so (par 117).

In determining the 'best interests of the children' as a principle of paramount importance, the court paid particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they were dependent on their parents. Noting that the applicant took care of the children on a daily basis, it was obvious that their interests were best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname, or by a rupturing of their relationship with her as a result of future separation (parr 118-119; see in this regard also the court's reference to relevant provisions of the United Nations Convention on the Rights of the Child (1989), arts 3, 6, 7, 9, 12, 18 & 27). Accordingly, insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

The court, confirming the relevant principles set out above, found that on the basis of the above considerations and viewing the relevant factors *cumulatively*, the circumstances of the applicant's case had to be regarded as *exceptional*. The court therefore concluded that a fair balance had *not* been struck between the competing interests involved. Therefore, there had been a failure by the Dutch authorities to secure the applicant's right to respect for her family life as protected by article 8 of the ECHR (parr 120-123).

4 Discussion

4.1 General

Peroni ('*Jeunesse v The Netherlands: Quiet shifts in migration and Family life jurisprudence?*' 2014 *Strasbourg Observers* <http://strasbourgobservers.com/right-to-respect-for-family-life>; accessed on 2015-02-24) points out that readers familiar with the court's case law on family life and immigration will know that the applicant's chances of success are slim if family life was formed at a time when those involved knew that the migration status of one of them was such that their family life would be precarious in the state. Where this is the case, the principle is that the expulsion of the non-national family member will amount to an article 8 violation 'only in exceptional circumstances' (*Jeunesse* par 108, *Rodrigues da Silva and Hoogkamer v The Netherlands* par 39 & *Nunez v Norway* par 70). The court has been reluctant to find a violation where there are no

'insurmountable obstacles' to enjoying family life elsewhere (*Arvelo Aponte v The Netherlands* appl no 28770/05, par 60 & *Useinov v The Netherlands* appl no 61292/00 par 9).

In *Jeunesse*, the court did find a violation of article 8 despite the applicant's awareness of her precarious residence status before starting her family life in the Netherlands and despite the absence of 'insurmountable obstacles' for the family to settle in the applicant's country of origin. Peroni (2014 *Strasbourg Observers supra*) emphasises, however, that much remains the same at the level of principles and that the court re-affirmed its strict basic principles in the area as set out above. According to Peroni, key to understanding *Jeunesse* lies in the court's viewing of the relevant factors *cumulatively*, rather than viewing each of them separately. She concludes by stating that (2014 *Strasbourg Observers supra*):

It may be too early to tell what exactly to make of the Court's analysis of the *Jeunesse* exceptional circumstances. Yet there is a sense in which *Jeunesse* looks at old issues with 'new eyes'. The analysis of some of the *Jeunesse* exceptional circumstances may contain some shifts in the Court's approach to certain issues in its immigration and family life case law. Though pinpointing what exactly these shifts may be all about is at times elusive, it appears that they concern the assessment of applicant's attitude and ties in the Contracting state and the best interests of their children.

The factors that weighed in Mrs Jeunesse's favour and which *cumulatively* made this an exceptional case, were: The Dutch nationality of the applicant's husband and children; the fact that the applicant herself had been a Dutch national at birth and only lost such nationality by no choice of hers when her country became independent in 1975; residence at an address of which the Dutch authorities were well aware; residence which they tolerated for over sixteen years; there being no criminal offending during that time; that although there were no 'insurmountable obstacles' to the husband and children relocating to Suriname, there would be 'a degree of hardship' in their being forced to do so; and that the situation of all members of the family had to be considered, especially the best interests of the children (see also Harris *et al supra* at 577).

Yeo ('Strasbourg decides important case on respect for family life' 2014 *Freemovement* <https://www.freemovement.org.uk> accessed on 2015-05-08) opines, although the outcome was a success for the applicant and her family, that it should not be seen as a super-liberal judgment, but rather a case where the facts were genuinely exceptional. He remarks as follows (2014 *Freemovement supra*):

As can be seen from a proper reading of the judgment, there were no insurmountable obstacles in this case, only 'a degree of hardship', but the case still succeeded. *Insurmountable obstacles will cause a case to succeed but are not a minimum requirement for success*. Nor does the judgment introduce any requirement that a case meet some sort of exceptionality threshold. As can be seen from the judgment, what is required is a careful assessment of all

the relevant factors weighing both for and against the migrant before a decision is reached (emphasis added).

Two further points of interest and departure from the so-called 'UK Rules' struck Yeo. The first was the added weight given to family life established while authorities were aware of the person's presence. The second was the fact that the UK Rules make no genuine provision for the impact of refusal of residence on any affected children. Under the UK Rules the effect on children is considered in a completely segregated, compartmentalised way. This provision can be contrasted with the cumulative assessment of article 8 followed by the court in *Jeunesse*.

Van Eijken ('Family life & European citizenship: The Strasbourg Court Decision in *Jeunesse v The Netherlands*' *Beucitizen* <http://beucitizen.eu/family-life-european-citizenship> accessed on 2015-03-24) opines that the ECtHR (in *Jeunesse*) therefore, refers to family rights as a collective right – in which the rights of the family as a *whole* have to be taken into account (see in this regard art 20 of the Treaty on the Functioning of the European Union ('TFEU') and the judgment in *Ruiz Zambrano* C-34/09 of 2011-03-08 by the Court of Justice of the European Union ('CJEU')). In *Ruiz Zambrano*, it was decided that *citizens* of the European Union may not be deprived of their 'genuine enjoyment of the substance of their rights' (see *Jeunesse* parr 71-72 & 110-111). The Dutch courts did not accept the possibility of the applicant (a non-European citizen) relying on either the TFEU or *Ruiz Zambrano* with a view to obtaining a derived right to residence in the Netherlands (see par 34 of *Jeunesse*). The ECHR, however, in *Jeunesse* concluded (par 120), under the exceptional circumstances of the case that 'insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit'. Hence, even though the applicant had no right to reside and to family life, on the ground of the status of her children as European citizens, she and her family were protected by the ECHR.

The Immigration Council of Ireland ('Family rights strengthened by European Court of Human Rights' Immigrant Council of Ireland media press release <http://www.immigrantcouncil.ie/pages/articles/2014/20> accessed on 2015-05-08) welcomed the judgment. Becker (a senior solicitor with the Immigrant Council) is quoted as saying that:

The decision of the Court is a reminder to all European Governments of their obligations under the European Convention on Human Rights – which makes clear that an individual's 'right to respect family life' can in exceptional circumstances override a Government's interest in controlling immigration. While the judgment is obviously a personal victory for the family concerned, it is also a further development of the law relating migrants' rights to family life which may prove relevant to many others across Europe.

However, in a minority judgment in *Jeunesse*, three judges held the view (par 10) that the approach adopted by the ECtHR effectively involved giving those prospective immigrants, who enter or remain in

the country illegally and who do not properly and honestly comply with the prescribed conditions for seeking residence, a special premium in terms of Convention protection over those who do respect the applicable immigration law by remaining in their country of origin and who conscientiously comply with the procedures laid down for seeking residence. The result is likely to encourage illegal entry or over-staying and a refusal to comply with the prescribed immigration procedures and judicially sanctioned orders to leave the country. The correct answer in difficult cases is the one that fulfils the obligation of the community to treat its members in a civilised, but also coherent and principled manner. The dissenting judges concluded as follows (par 10):

In replacing the domestic balancing exercise by a strong reliance on the exceptional character of the particular circumstances, the court drifted away from the subsidiary role assigned to it by the Convention, perhaps being guided more by what is humane, rather than by what is right.

4 2 *Dawood, Shalabi and Thomas v Minister of Home Affairs*

In *Dawood, Shalabi and Thomas v Minister of Home Affairs* (2000 3 SA 936 (CC)), the relief sought (for, at least, Mr Shalabi and Mr Thomas) was an order declaring them to be entitled to a temporary residence permit pending the final determination of their application for an immigration permit (or permanent residence) and ordering the Department of Home Affairs ('the Department') to issue such a temporary residence permit (for the facts see parr 5, 6 & 7). In the alternative, to have section 25(9)(b) of the repealed Aliens Control Act requiring a temporary residence permit when such spouse applies for permanent residence – declared unconstitutional – to the extent that it authorises the granting of immigration permits to the spouses of South African residents when the applicant spouse is present in South Africa *only* if the applicant is in possession of a valid temporary residence permit (par 6). Section 25(9) provided as follows:

- (a) A regional committee may, on a application mentioned in subsection (1) made by an alien who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in section 26(1)(b) [s 26(1)(b) is the provision in terms of which work permits are issued], authorise the issue to him or her of a permit in terms of this section *mutatis mutandis* as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic.
- (b) Notwithstanding the provisions of paragraph (a) a regional committee may authorise a permit in terms of this section to any person who has been permitted under section 26(1) to temporarily sojourn in the Republic if such person is a person referred to in subsection 4(b) [s 25(4)(b) refers to a person who 'is a destitute, aged or infirm member of the family of a person permanently and lawfully resident in the Republic who is able and undertakes in writing to maintain him or her'] or 5 [persons referred to in s 25(5) are spouses and dependent children of persons lawfully and permanently resident in South Africa].

The grant of temporary residence permits was governed by section 26(3) of the Aliens Control Act, which provided that:

An immigration officer in the case of an application for a visitor's permit, business permit or a medical permit referred to in subsection (1), or the director-general in the case of an application for any of the permits referred to in that subsection, may, on the application of an alien who has complied with all the relevant requirements of this Act, issue to him or her the appropriate permit in terms of subsection(1) to enter the Republic or any particular portion of the Republic and to sojourn therein, during such period and on such conditions as may be set forth in the permit.

The extension of a temporary permit was governed by section 26(6) which read:

The director-general may from time to time extend the period for which, or alter the conditions subject to which, a permit was issued under subsection (3), and a permit so altered shall be deemed to have been issued under the said subsection.

The court immediately noted (par 26) that it was clear from sections 25 and 26 of the Aliens Control Act, that no guidance was provided as to the circumstances in which it would be appropriate for the Department to refuse to issue or extend a temporary residence permit. The following *dictum* by O'Regan J is by now well established (par 37):

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.* Like all rights, however, the question of whether such a limitation is unconstitutional or not will depend upon whether it is reasonable and justifiable in an open and democratic society in terms of section 36(1) of the Constitution. I now turn to the question of the effect of section 25(9)(b) (emphasis added).

The court added that (par 38):

It is implicit in section 25(9), read against the background of section 23, that applicants for immigration permits may not be in South Africa at the time their applications are granted. In the context of this general prohibition, the overall purpose of section 25(9)(b) is to afford to spouses, dependent children and destitute, aged or infirm family members of people lawfully and permanently resident in South Africa a benefit that is not afforded to other applicants for immigration permits. It allows them to remain in South Africa pending the outcome of their application for an immigration permit while other applicants have to leave the country. The effect of section 25(9) read with subsections 26(3) and (6) of the Act is that foreign spouses may continue

to reside in South Africa while their applications for immigration permits are being considered only if they are in possession of valid temporary residence permits. Given the fact that such applications are not automatically granted but have to be considered on their merits, these provisions necessarily authorise immigration officials and the DG to refuse to issue or extend such *temporary permits* (emphasis added).

As section 26(3) and (6) stood, there was nothing to indicate what factors or circumstances could, or ought to be, taken into consideration by the relevant immigration officials and the Director-General (par 43). Section 25(4)(a) merely stated that a regional committee of the Immigrants Selection Board may have issued an immigration permit if the applicant was of good character; and would have been a desirable inhabitant of the Republic; would not likely harm the welfare of the Republic and did not or was not likely to pursue an occupation in which a sufficient number of persons were available in the Republic to have met the requirements of the inhabitants of the Republic. However, section 25(5) stated that a regional committee, notwithstanding the provisions of section 25(4), might have issued an immigration permit to a spouse of a permanent and lawful resident of South Africa. Furthermore, there was no guidance to be found in either section 25(4)(a) or 25(5) as to the circumstances in which immigration officials may refuse to issue or extend a temporary residence permit. As O'Regan J pointed out (par 49):

There will be circumstances in which there are constitutionally acceptable reasons for refusing the grant or extension of a temporary residence permit, but those circumstances are not identified at all in the Act. An obvious example one can think of is where the foreign spouse has been convicted of serious criminal offences that suggest that his or her continued presence in South Africa even under a temporary residence permit would place members of the public at risk. Another would be where it is clear to the official that the immigration permit itself will not be granted and that pending that decision it would not be in the public interest to permit the foreign spouse to remain. These are examples only. It is for the Legislature, in the first place, to identify the policy considerations that would render a refusal of a temporary permit justifiable. However, as the legislation is currently drafted, the grant or extension of a temporary residence permit may be refused where no such grounds existed.

The court concluded as follows (par 58):

In my view, the effect of section 25(9)(b) read with sections 26(3) and (6) results in an unjustifiable infringement of the constitutional right of dignity of applicant spouses who are married to people lawfully and permanently resident in South Africa. There is no government purpose that I can discern that is achieved by the complete absence of guidance as to the countervailing factors relevant to the refusal of a temporary permit. In my view, therefore, section 25(9)(b) as read with sections 26(3) and (6) of the Act is unconstitutional.

The inconsistency with the Constitution therefore lay in a *legislative omission*: The failure to provide guidance to the decision-maker. In view of the cases of *Jeunesse* and *Dawood, Shalabi and Thomas*, it can now be

asked whether, firstly, the abovementioned problems with sections 25 and 26 of the Aliens Control Act have been addressed and rectified in the Immigration Act. Secondly, whether the protection afforded to family life and marriage in *Dawood, Shalabi and Thomas* is also wide enough to cover the factual circumstances in *Jeunesse*, or whether the judgment in *Jeunesse* can serve as a valuable guideline for future development in so far as family law and immigration in South Africa are concerned and one that the South African courts may consider (s 39(1)(c) of the Constitution) in the interpretation of the Bill of Rights. Firstly, then, a brief exposition will be provided of relevant provisions of the Immigration Act (as amended) and accompanying Regulations.

4 3 The Immigration Act 13 of 2002

In terms of section 9(4)(b), a 'foreigner' who is not the holder of a permanent residence permit may only enter the Republic if issued with a valid 'visa' as set out in the Immigration Act ('Immigration Act' or 'the Act'). Section 10(1) reiterates that upon admission, a 'foreigner' who is not the holder of a permanent residence permit may enter and sojourn in the Republic only if in possession of a 'visa'. Section 10(2) provides that one of the 'visas' set out in sections 10A to 23 may be issued to a 'foreigner'. That includes, *inter alia*, a 'visitor's visa', 'study visa', 'treaty visa', 'business visa', 'crew visa', 'medical treatment visa', 'relatives visa', 'work visa' etcetera. Section 11(1) provides that a 'visitor's visa' may be issued by the Director-General in respect of a foreigner who complies with section 10A (port of entry visa) and provides the financial or other guarantees prescribed in respect of his or her departure. Such a visa 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 (s 11(1)(a)). Section 11(6) states, notwithstanding the provisions of that section, that 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 such visa shall only be valid while the good faith spousal relationship exists and 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. A 'relatives visa' may be issued to a 'foreigner' who is a member of the 'immediate family' of a citizen or a permanent resident, provided that such permanent resident or 'citizen' provides the prescribed financial assurance (s 18). In terms of section 10(4), a visa is to be issued on terms and conditions that the holder *is not or does not become* a prohibited or undesirable person.

In terms of section 10(7), the Director-General may, on application in the prescribed manner and on the prescribed form, extend the period for which a visa contemplated in subsection (2) was issued. With regard to an extension, Regulation 9(8) merely requires that an application contemplated in section 10(7) of the Act shall (a) be made on Form 10 illustrated in Annexure A, as the case may be; (b) be accompanied by an

affidavit by the applicant attesting to having complied with his or her existing visa, the terms and conditions attached thereto and the laws of the Republic; and (c) be submitted in person at any office of the Department no less than 60 days *prior to* the expiry date of his or her visa and if the visa was issued for less than 30 days, not later than seven working days before the expiry of the visa. The prescribed application fee requirement has been done away with (Regulations of fees GN R615 in GG27725 dated 27 June 2005; Department of Home Affairs-Permanent Residency available at <http://www.home-affairs.gov.za/index.php/permanent-res>).

Section 25(2) provides that one of the permanent residence permits set out in sections 26 and 27 may be issued to a 'foreigner'. The Department shall issue a permanent residence permit in terms of section 26 (so-called 'direct residence') to, *inter alia*, a 'foreigner' who has been the spouse of a citizen or permanent resident for five years, provided that a good faith spousal relationship exists. 'Spouse' in terms of section 1 means a person who is party to a 'marriage' or to a permanent homosexual or heterosexual relationship as prescribed. 'Marriage' is defined as (a) a marriage concluded in terms of the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998; (b) a civil union concluded in terms of the Civil Union Act 17 of 2006; or (c) a marriage concluded in terms of the laws of a foreign country (s 1).

Important to note are the strict measures contained in the Act pertaining to 'illegal foreigners'. Section 32 states that any illegal foreigner *shall depart, unless authorised by the Director-General to remain in the Republic* pending his or her application for a 'status'; and that any illegal foreigner shall be deported (s 32(1) & (2); see in general *Littlewood v Minister of Home Affairs* case no 160/04 of 2005-03-22). 'Status' means the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of the Act (section 1). Sections 32(2) and 34 make provision for the deportation and detention of illegal foreigners (section 32 is an important section for purposes of the discussion below). In terms of section 38, no person shall employ an 'illegal foreigner' and, save for necessary humanitarian assistance, no person shall aid, abet, assist or in any manner help an 'illegal foreigner' (s 42(1)(a) & (b)). Section 43(b) is also of importance for purposes of the discussion below where it states that a foreigner *shall depart* upon expiry of his or her 'status' (see also ss 48 & 49 regarding offences). Lastly, in terms of section 49, being an illegal foreigner is regarded as an offence.

The question to be answered is whether sections 25(2) and 10(7) have now been supplemented by circumstances or grounds, previously omitted in terms of the Aliens Control Act, whereby officials are provided with guidance as to the factors relevant to the refusal of an application for the grant or extension of a visa or permanent residence permit? The Act, unfortunately, does not contain a clear and conclusive provision regarding the question whether a 'spouse' can apply for a permanent residence permit from within the country *after* a visa to temporarily

sojourn has expired. As stated above, section 32 provides that an 'illegal foreigner' shall depart, *unless authorised by the Director-General to remain in the Republic, pending his/her application for a status*. Only a *legal* foreigner can thus (as a general rule) remain in the Republic pending his application for a status, especially permanent residence. When will the Director-General, accordingly, not grant or extend an application for a visa or permanent residence permit? Sections 29 and 30, read with the Regulations, seemingly provide guidance in this regard. They read:

29. Prohibited persons

- (1) The following foreigners are prohibited persons and do not qualify for a ... visa or a permanent residence permit:
 - (a) Those infected with or carrying infectious, communicable or other diseases or viruses as *prescribed*;
 - (b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a *foreign country* in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;
[Para (b) substituted by s 19(b) of Act 13 of 2011.]
 - (c) anyone previously deported and not rehabilitated by the Department in the prescribed manner;
 - (d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and
 - (e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends.
 - (f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.
[Para (f) substituted by s 19(c) of Act 13 of 2011.]
[Sub-s (1) amended by s 19(a) of Act 13 of 2011.]
- (2) The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person.
[S. 29 substituted by s 30 of Act 19 of 2004.]

30. Undesirable persons

- (1) The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration do not qualify for a port of entry visa, visa, admission into the Republic or a permanent residence permit:
 - (a) Anyone who is or is likely to become a public charge;
 - (b) anyone identified as such by the Minister;
 - (c) anyone who has been judicially declared incompetent;
 - (d) an unrehabilitated insolvent;
 - (e) anyone who has been ordered to depart in terms of this Act;
 - (f) anyone who is a fugitive from justice;
[Para (f) substituted by s 20(b) of Act No 13 of 2011.]
 - (g) anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences; and
[Para (g) substituted by s 20(b) of Act No 13 of 2011.]
 - (h) any person who has overstayed the prescribed number of times.
[Para (h) added by s 20(c) of Act 13 of 2011.]

- (2) Upon application by the affected person, the Minister may, for good cause, waive any of the grounds of undesirability.
[S. 30 substituted by s 31 of Act 19 of 2004.]

The guidance these sections provide is confirmed by section 25(3) which states: 'A permanent residence permit *shall* be issued on terms and conditions that the holder is not a prohibited or an undesirable person ...' (emphasis added) as well as section 10(4) which confirms that a visa is to be issued on condition that the holder is not *or does not become* a prohibited or undesirable person and, arguably, also relates to the extension of a visa. These sections therefore contain grounds or guidelines for the refusal of a visa (including the extension thereof) or permanent residence permit and, arguably, are in line with the possible 'examples' the Constitutional Court provided in *Dawood, Shalabi and Thomas* above (par 49 of judgment), where, especially, public interest demands such an exclusion or refusal. Furthermore, applicants for the grant or extension of a visa (temporary residence) obviously also have to comply with the requirements and conditions set for the respective visas (see s 11(6) regarding a visitor's visa to a spouse of a citizen or permanent resident above, read with Regs 3 & 9-23).

In terms of Regulation 3(1), an applicant for a visa or permanent residence permit who asserts that he or she is a 'spouse', as defined in section 1 of the Act, must prove such fact in a manner set out in sub-regulation (2). Such applicant must submit a notarial agreement signed by both parties attesting, in the event of a permanent homosexual or heterosexual relationship, that such a relationship has existed for at least two years before the date of application and that the relationship still exists to the exclusion of any other person (reg 3(2)(a)(i)). Furthermore, they must attest that neither of the parties is a spouse in an existing marriage or a permanent homosexual or heterosexual relationship (reg 3(2)(a)(ii)). Documentation to prove financial support to each other, and the extent to which the related responsibilities are shared by the applicant and his/her spouse, has to be provided (reg 3(2)(d); for further requirements see reg 3(3)-(7)). The interpretation of this part of the Act does not seem to be entirely clear as it could possibly be read as meaning that a life partner can apply for permanent residence at the same time as applying for temporary residence if they meet the two year criterion. However, referring back to the original Immigration Act of 2002 and the lack of change in the 2011 Amendment Act in this regard, it would seem that permanent residence can be applied for by the spouse of a citizen or permanent resident only after five years (see s 26(b); see also 'South Africa's New Immigration Act Summary – 2014' in *Homecoming Revolution* available at <http://homecomingrevolution.com>).

Although section 25, read with sections 26 and 27, implies that a permanent residence permit can be issued to a spouse of a citizen or permanent resident only if the spouse/applicant is a *legal* foreigner, the Director-General has the discretion to authorise the illegal spouse/applicant to remain in the Republic pending his/her application for a

status (s 32). If the illegal foreigner/spouse/applicant is not a prohibited or undesirable person in terms of sections 29 and 30, then, certainly, in view of the Constitutional Court judgment in *Dawood, Shalabi and Thomas*, it would appear that the Director-General cannot require the illegal foreigner/spouse/applicant to leave the Republic pending the outcome of his application. The Preamble of the Immigration Act aims at setting in place a new system of immigration control which, *inter alia*, ensures that immigration control is performed within the highest applicable standards of human rights protection (par l) and that a human rights based culture of enforcement is promoted (par n). It can be argued that the Act, however, did not make sufficient use of the opportunity to embrace and promote family life and 'marriage' as one would have expected after *Dawood, Shalabi and Thomas*. The uncertainty with regard to the abovementioned position should have been clarified.

4 4 Questions for consideration

In view of the decision in *Dawood, Shalabi and Thomas* as well as the discussion of the Immigration Act and Regulations above, the following questions arise: (a) Does the protection afforded to marriage and family life (albeit as part of the right to dignity) grant the illegal foreign spouse merely the right to remain in South African while an application is made for the extension of a *visa* (temporary residence), or does it possibly even extend to a right for the illegal foreign spouse to be granted permanent residence? (b) What will the legal position be if a South African court is confronted by facts similar to that of *Jeunesse*? In *Jeunesse*, the applicant foreign spouse's right to family life was extended to a right to reside in the Netherlands for the purpose of enabling her to enjoy family life with her husband and children, based, however, on *exceptional* and *special* circumstances; (c) Would the legal position in South Africa differ if the illegal foreign spouse was 'merely' married to the citizen or permanent resident, or otherwise regarded as a 'spouse' within the definition of the concept in section 1, without there being any additional, exceptional circumstances (as in *Jeunesse*) present to support such a claim to family life?

The relief granted in *Dawood, Shalabi and Thomas* was in the form of a *mandamus* and required immigration officials and the Director-General, when exercising the discretion conferred upon them by sections 26(3) and (6) in relation to applicants who were people referred to in sections 25(4)(b) or (5) of the Aliens Control Act, to take into account the Constitutional rights of such people and not to refuse to issue or extend temporary residence permits for such applicants unless good cause for such refusal was established. Good cause for refusal, for instance, would have been established were it to be shown that the issue or extension of a permit, even for the temporary period until the immigration permit application had been finalised, would constitute a real threat to the public. Good cause to refuse to issue or extend such permits will also exist if the applicants fail to lodge a complete application for an immigration permit within a reasonable time. These recommendations,

arguably, are now encapsulated in sections 10 to 32 of the Immigration Act and Regulations. These provisions, however, do not extend to or include a right for the foreign illegal spouse to be granted permanent residence simply based on marriage, family life and their right to dignity. Even if confronted by marriage and family life as a *fait accompli*, the state is under no positive obligation to allow the applicant permanent residence. If exceptional circumstances exist, however, as for example in *Jeunesse*, including the duty to consider the best interests of children as factor of paramount importance, and by looking at the circumstances *cumulatively*, the court may consider the development in European family and humanitarian law in deciding whether to allow the illegal foreign spouse to reside in the country for purposes of continuing to enjoy such family life (s 39(1)(c) of the Constitution). Whether the five years of marriage requirement in section 26 will stand in the way of a possible positive obligation is uncertain. In *Patel v Minister of Home Affairs* (2000 2 SA 343 (D)); although in the context of a deportation order) the court decided that foreigners are entitled to the same protection under the Constitution as citizens. The court stated (350B-E):

In the result, I take the view that the second applicant is entitled to the rights set out in ss 9, 10, 12, 21 and in particular to the rights set out in s 35 to administrative action which is lawful, reasonable and administratively fair. He is thus entitled to the right to be heard in respect of his application for permanent residence and in respect of the issue of the deportation order. In my view, the applicants have established *prima facie* that they were not given a hearing or, at any rate, an adequate hearing in respect of both the application and the issue of the deportation order. They have also established *prima facie*, in my view, that those decisions were not taken after due consideration of the applicants' constitutional rights to live together as spouses in community of life (cf *Dawood's* case) and of freedom of movement placing first applicant 'in the dilemma of having to decide whether to accompany' second applicant to India or to exercise her constitutional right to continue residing here without her husband (emphasis added; see also *Rattigan v Chief Immigration Officer Zimbabwe* 1995 4 SA 182 (2) & *Salem v Chief Immigration Officer, Zimbabwe* 1995 4 SA 280 (2)).

Another important aspect that the court referred to, is the fact that a deportation order will infringe the applicant's children's right to family or parental care in terms of section 28(1)(b) of the Constitution (see also the United Nations Convention on the Rights of the Child (1989) as referred to by the ECtHR in *Jeunesse*). *Jeunesse* provides valuable guidelines for possible future consideration by South African courts. Can it not be argued that mere 'marriage', or for a person otherwise to be regarded as the 'spouse' of a citizen or permanent resident in terms of the definition in section 1, should suffice for purposes of permanent residence? Why is there a 'five year marriage' requirement (see in general *Booyesen v Minister of Home Affairs* (CC) case CCT 8/01 of 2001-06-04)? The protection of permanent intimate relationships is after all, in my view, the underlying message in both *Dawood, Shalabi and Thomas* as well as in *Patel*.

5 Conclusion

The purpose of the Immigration Act is to provide for the regulation of admission of persons to, their residence in, and their departure from the Republic. Strict measures pertain to illegal foreigners. The Act does not guarantee the right of a foreigner to enter or to reside in the country. Illegal foreigners are required to leave the Republic, unless authorised by the Director-General to remain in the Republic pending their application for a status. The Act does not contain a clear provision that a spouse whose visa has expired can apply for a renewal or permanent residence permit from within the country. This authorisation, arguably, will be granted in the event of an illegal foreign spouse who is either married upon entry or who got married to a citizen or permanent resident while illegally in the country, provided he/she is not a prohibited or undesirable person. Authorisation can be done in view of the protection afforded to marriage, 'spouses' and family life (albeit as part of the right to dignity). However, it does not automatically entail that the state is under a positive obligation to allow the applicant, because of the marriage, to settle in the country and thus enjoy a right of permanent residence. Section 26 requires that the foreigner must have been the 'spouse' of the citizen or permanent resident for five years and a good faith spousal relationship should have existed. If the state, however, tolerates an illegal foreigner in its territory, not deporting him/her and enabling him/her to form relationships, to get married, to have children, etcetera, the situation becomes more complicated. Should special and exceptional circumstances prevail, as in *Jeunesse*, their cumulative effect, as well as the importance attached and the protection afforded to marriage or other 'spousal relationships' in terms of *Dawood, Shalabi and Thomas*, could lead to such an illegal spouse being afforded a right to permanent residence in view of international trends and developments. In this regard, the best interests of children can be a persuading factor. 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 recommended. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (ito European case law see, amongst others, *Rieme v Sweden* (1993) 16 EHRR 155 181 par 54-56; *Margaretha and Roger Anderson v Sweden* (1992) 14 EHRR 615). The right of families to be together must be protected and respected. In order to prevent such legal issues arising and the occurrence of similar situations, authorities should discourage illegal entry and/or over-staying in the Republic in line with the aims of the Act, by effectively employing deportation measures as provided for in the Act.

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