SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 26 September 2017

STATUS Immediate

***Minister of Home Affairs & another v Ahmed & others* (1383/2016) [2017] ZASCA 123 (26 September 2017)**

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) upheld an appeal brought by the appellants, the Minister of Home Affairs and the Director-General of that Department (collectively referred to as the DHA) against a judgment of the Western Cape Division of the High Court, Cape Town (court a quo). The issue was whether holders of asylum seeker permits in terms of s 22 of the Refugees Act 130 of 1998 (the RA) may, whilst they are within this country, apply for a visa in terms of the Immigration Act 13 of 2002 (the IA). The court below held that they are entitled to do so.

The second, third and fourth respondents are in South Africa as asylum seekers in terms of s22 of the RA. The second respondent first entered the country on 3 June 2009. Her permit was extended on 12 occasions and eventually expired in 2016. She then applied for a visitor's visa in terms of s11 of the IA but the DHA's agent, VFS Global, refused to accept the application. The third and fourth respondents applied for a critical skills visa in terms of s19 of the IA but the DHA rejected their applications.

The DHA refused and rejected all three applications on the strength of a departmental policy which was set out in an Immigration Policy Directive 21 of 2015 issued by the Director-General of Home Affairs on 3 February 2016. The departmental policy states that asylum seekers do not qualify for change of condition or status within the Republic and that such application must be made abroad.

In the court a quo, it was held that asylum seekers are entitled to apply for visitor's and work visas while in South Africa. It based its finding on, amongst other things, that there was nothing in the IA and the RA that would 'make it inherently inimical or offensive to their legislative scheme, for a failed asylum seeker to apply for temporary residence and work rights under the Immigration Act.' The court below thus held the departmental policy to be inconsistent with the Constitution and invalid, and set it aside. It directed that all three respondents should be permitted to submit their applications for visas in terms of the IA.

On appeal, the SCA held that asylum seekers are bound by the general rule laid down by s 10(2) of the IA read with regulation 9(2) of the Immigration Regulations that applications for visas must be made abroad. The respondents could not lawfully apply for visitor's and work visas within South Africa. The DHA therefore correctly declined their applications. The SCA further stated that the court a quo's finding that nothing prevented the two Acts being read together such that an asylum seeker or refugee could make application for the full range of visas and permits provided for by the Immigration Act, overlooked this general rule.

As a result, the appeal was upheld.