

Dawood and Another v Minister of Home Affairs and Others;
Shalabi and Another v Minister of Home Affairs and Others;
Thomas and Another v Minister of Home Affairs and Others.

CCT 35/99

Explanatory Note

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

The applicants in this case are South African citizens and their spouses, who are neither citizens nor permanent residents of South Africa. The case examines the constitutional right of spouses to cohabit and the need for Parliament, when granting government officials powers that touch on constitutional rights, to lay down proper guidelines.

Section 25(9) of the Aliens Control Act requires applicants for immigration permits to be outside South Africa when their permits are granted but exempts spouses, permanent same-sex life partners, dependant children and destitute, aged or infirm family members of South African citizens and permanent residents: they may remain in the country pending the outcome of their applications provided they have valid temporary residence permits.

Justice Kate O'Regan, for a unanimous Court, noted that there is no automatic entitlement to such temporary permits. Each application is considered on its merits and the grant or extension of a temporary residence permit to a foreign spouse may be refused. The South African spouse is then forced to go abroad with the foreign spouse or remain behind alone pending the outcome of the application. Many are too poor to have this choice and have to remain in South Africa without their spouses. Enforced separation places strain on any relationship and may destroy the marriage relationship altogether.

Although the right to family life is not expressly mentioned in the Bill of Rights, such right

is constitutionally protected. The right to family life is recognised in international treaties and receives protection in a variety of ways, while marriage and the family are of vital importance to society. Also, human dignity - entrenched in section 10 of the Bill of Rights - is of fundamental importance to our society and our constitutional interpretation, especially because of our past where it was routinely and cruelly denied. Human dignity is a foundational value which informs the interpretation of many, perhaps all, other rights.

The right to enter into and sustain permanent intimate relationships is part of the right to dignity. Entering into and sustaining a marriage relationship are of defining significance for many people. Not only legislation that prohibits the right to form a marriage relationship infringes the right to dignity; any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit such a right. A central aspect of marriage is cohabitation and the right and duty to live together. Legislation that significantly impairs the ability to honour this obligation constitutes a limitation of the right to dignity.

There may be constitutionally acceptable reasons for refusing the grant or extension of a temporary residence permit, but they are not identified in the Act. The legislature should identify the policy considerations that would render a refusal of a temporary residence permit justifiable. It must take care to limit the risk of an unconstitutional exercise of the discretionary powers it confers, as it has a constitutional obligation to “respect, promote, protect and fulfil the rights in the Bill of Rights”. The omission from the Aliens Control Act of criteria relevant to a refusal to grant or extend temporary residence permits introduces an element of arbitrariness that is inconsistent with the constitutional protection of the right to marry and establish a family.

Section 25(9)(b) is therefore invalid, the invalidation being suspended for two years. In the meantime officials, when dealing with applications for the granting or extension of temporary residence permits of spouses of South African citizens or permanent residents and the other persons exempted, must take into account the constitutional rights of such people and issue or extend temporary residence permits to them unless good cause exists to refuse, for example where even the temporary issue or extension of a permit would constitute a real threat to the public.

7 June 2000