

1.

**IN THE SABWIL HUMAN RIGHTS COURT
AFRICA ROOM, AFSA CHAMBERS, SANDTON**

CASE NO: 1112/19

In the matter between:

PERSON, Donald

First Applicant

PERSON, Mila

Second Applicant

And

MINISTER OF HOME AFFAIRS

Respondent

And

UBUNTU NOW

Amicus Curiae

RESPONDENT'S HEADS OF ARGUMENT

The following document is hereby filed:

Attached hereto is the respondent's Heads of Arguments, presented by

COUNSEL FOR THE RESPONDENT:

Nonopa Vanda, Lead counsel

Karabo Marebate, First junior counsel

Sifiso Thabo Magubane, Second junior counsel

Dated at Johannesburg 11 December 2019

TO: **THE REGISTRAR**
THE SABWIL HUMAN RIGHTS COURT
AFSA Chambers
Africa Room, Sandton
Email: faculty@sabwil.org.za

TO: **COUNSEL FOR THE FIRST AND SECOND APPLICANTS**

TO: ***AMICUS CURIAE***
UBUNTU NOW

1.1. Whether section 6(1) of the South African Citizenship Act 88 of 1995 apply in this matter?

(i) Just Administrative action

2.1.1. The counsel will examine PAJA¹ for the purposes of judicial interference.

2.1.2. The Minister was exercising public function by refusing the Rachel and Mikael to return.

2.1.2. The minister has the discretion to decide who to grant citizenship under s 6(1)(b) of the citizenship Act. This is present in the case of *Lucky Horseshoe*.²

2.1.3. when exercising the power. S6(2)(b) of the PAJA provides for the judicial Review of Administrative Action where 'Mandatory or material procedure or condition prescribed by the empowering provision was not complied with'

2.1.4. Therefore, counsel respectfully submits that not only did Rachel voluntarily acquire nationality of the proto state she was acting on behalf of the group that engaged in war against the republic. S6(1) therefore applies in this matter.

1.2. If so, what are the consequences of that provision of the Act in respect of Rachel and in respect of Mikael?

2.2.1. Section 11 of the Act lays down the consequences on Rachael and Mikael. It states that a South African citizen by naturalisation or registration who ceased to be a South African citizen by virtue of the provisions of any prior law, or by virtue of the provisions of section 6, 7, 8, 9 or 10.

2.2.2. Where Mikael is concerned, s10 states that where the responsible parent (Rachel) of the minor (Mikael) has in terms of the provisions ceased to be a citizen, the Minister with regards to provisions of the Guardianship Act.³

¹ Promotion of Administrative justice Act 3 of 2000.

² Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs and Others 1992 (3) SA 838 (T).

³ Act 192 of 1993.

2.3. If section 6(1) of the Act does apply, was the Minister of Home Affairs empowered to revoke the citizenship of Rachel and Mikael in accordance with section 8(2) of the Act?

(i) Naturalisation

2.3.1. Section 8(2)(b) states that the Minister may deprive such a person of citizenship if he is satisfied that it is in the public interest that such citizen shall cease to be a South African citizen. The decision is left to the satisfaction of the minister.

(ii) Public interest

2.3.2. Decisions of the Executive must be rationally related to the purpose for which the power was given.⁴ This is to prevent arbitrariness in the executive. The power in section 8 is to protect the best interest of the public.

(iii) International norms

2.3.3. Naturalisation in case where a person joins the military or works in the service of another state are permitted by the UN Convention on the Reduction of Statelessness.

2.3.4. This remained the case even after the Universal Declaration of Human Rights established in 1948 that “everyone has a right to a nationality”.

2.3.5. Therefore, counsel respectfully submits that this entails that Mikael will not be statelessness without South African Citizenship but has a right conferred upon him by International Law to be conferred citizenship in the territory that he was born in.

2.4. If the Minister was empowered to revoke their citizenship under section 8(2) of the Act, did this violate Rachel or Mikael’s right to citizenship under section 20 of the Constitution?

⁴ Chaskalson P said in *Pharmaceutical Manufacturers Association and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2002 (2) SA 674 (CC).

2.4.1. In principle this violated both Rachel and Mikael's right to citizenship under section 20 of the Constitution but the counsel submits that this right can be justifiably be limited under section 36 or (limitation clause).

2.5. Or, did it violate any of their constitutional rights?

The counsel submits that no other constitutional rights were violated by the Minister, except for section 20 which is justifiably limitable under section 36 of the Constitution.

2.6. If the decision did violate the constitutional rights of Rachel or Mikael, was the Minister nevertheless justified in making his decision? Whether the minister can rely on section 36 of the Constitution?

2.6.1. In addressing this question, one would have to look at the following factors:

(i) The nature of the right to citizenship

2.6.1.1. Unlike the right to life which is absolute⁵ section 20 of the Constitution can be justifiably limited taking into account the historical injustices of the apartheid system.

(ii)The importance of the purpose of the limitation

2.6.1.2. The purposes of the Act and s 20 of the Constitution go hand in hand. However, for the purposes of my humble submission to this Court I incorporate the objects into one umbrella.

(iii)The nature and the extent of the limitation

2.6.1.3. The subject of the enquiry here is to determine the extent to which the Act restricts the applicants' right to citizenship. Let us take 'the right to human dignity', for example. The applicants must really show that South Africa is their only option.

(iv) The relation between the limitation and its purpose

2.6.1.4. Proportionality test essentially means that there must be a causal connection between the law and its purpose. A rational

⁵ Section 11 of the Constitution of the Republic of South Africa, 1996.

connection exists in the sense that s 8(2) of the Act effectively requires the Minister to consider the public interests of South Africa, whereas acquiring citizenship into the UK is another option available to them. Section 6(1) of the Act applies only to citizenship or nationality that is obtained from a recognised state, the Minister is still, however, empowered by the provisions of s 8 of the Act to deprive them of the right to citizenship.

(v) The less restrictive means of achieving the purpose

2.6.1.4. There are less restrictive means. It is not like the applicants are without any other option – as a matter of fact, they can always return to the UK.

2.7. Whether this Court should take a different approach in respect of the minor child (Mikael) than in respect of Rachel?

2.7.1. The counsel submits that upon the given facts of the case, the Court should not take a different approach with respect to Mikael, regardless of him being a minor. We submit this for the following reasons;

(i) The inseparability of the mother and child

2.7.2. *Prima Facie* the child is not to be separated with either of their parents.⁶ This has been universally expressed in the Convention on the Rights of the Child, further explaining that the child should only be separated with their parents in designated circumstances.⁷ The denial of Ms Person to return to South Africa is by implication the denial of her three month old son Mikael to also return.

2.7.2. The counsel position is to be respectfully considered by this court because it will not only be in the best interest of Mikael which is required by section 28(1)(b) of the Constitution, but it will fulfil the founding purpose of section 28 which is provide children with proper care, starting with family care.⁸ The separation of children from one parent of their stable environment should be avoided at all costs,⁹ and

⁶ R D Mawdsley 'the best interest of the child: a United States and South African perspective' (2010) 26(2) *DHET* 2.

⁷ Convention on the Rights of the Child: Part 1 Article 3.

⁸ Section 28(1)(b) of the Constitution of the Republic of South Africa, 1996.

⁹ R B v M B (3567/2017) [2018] ZAFSHC 187 para 27.

if permitted in this case, it will also be in contrary to parental responsibilities and rights of biological mothers, and, Ms Person is entitled to such rights towards Mikael.¹⁰

(ii) Section 28 as a prohibitory mechanism for the return of Mikael and Ms Person

2.7.3. If this court permits Ms Person and Mikael to return to South Africa it will be against the best interest of the child. This is because Ms Person participated in a movement that committed gross human rights violations and openly expressed how unapologetic she was with her actions during the *ENCA* interview.¹¹ Just like the Apartheid government, it is common cause that this aggravated the people of South Africa.¹² So, it is no longer safe for Ms Person and her son to return to South Africa as this will expose them to torture, inhuman and degrading treatment, either physically or mentally. Which is contrary to the values of our Constitution.¹³

2.7.4. Ms Person's application to return to South Africa should be rejected because it is likely that it will lead to deadly consequences that are against the best interest of Mikael as required by section 28.¹⁴

(iii) Proportionality test

2.7.5. Counsel submits that sending Ms Person and Mikael to Britain is indeed proportionate to the offence she committed, by weighing and balancing all factors relevant to the nature and seriousness of the criminal act in light of the legitimate concerns of the society.¹⁵

2.7.6. The court can also consider the seriousness of the crime with personal motives of Ms Person',¹⁶ her subjective objections of being unapologetic poses danger to the society.

¹⁰ Section 19 of Children's Act 38 of 2005.

¹¹ SHRC Case Scenario, paras 1, 3 and 7.

¹² M Vestergaard 'Who's Got the Map? The Negotiation of Afrikaner Identities in Post-Apartheid South Africa' (2001) 130 (1) *Deadalus* 32.

¹³ *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893

¹⁴ Section 28 (2) of the Constitution of the Republic of South Africa, 1996.

¹⁵ *Malgas v S* (CA&R 137/2009) [2009] ZAECHGHC 77 (16 November 2009) paras 11 and 14.

¹⁶ *Ibid* para 6.

2.7.7. Sending Mikael and Ms Person away is proportionate to the crime she committed and her evil personal motives of destroying unity and equality ought to be achieved by our Constitution.¹⁷

(iii) Exhaustion of available remedies that seeks to protect the best interest of the child

2.7.9. Ms Person has an alternative remedy to seek for a British citizenship where she is less popular and lessor of a threat and to protect the best interest of the child, this easily available remedy is in the best interest of justice.¹⁸

2.7.10. Exemption can only be granted in exceptional circumstances under the Promotion of Justice Act.¹⁹ The counsel submits that this case does not require judicial intervention²⁰

2.8. Then, what is the appropriate remedy if applicable?

(i) Practicability

2.8.1. It is more practical and easily achievable for Ms Person to firstly exhaust any available remedy before moving any further. This will not only protect her from maltreatment, but it will also protect the best interest of Mikael, as Britain will be their hiding place from the possible danger of aggravated South African society.

3. PRAYERS

3.1. The return of Ms Person and Mikael should not be granted, as it will violate their rights to safety, integrity and dignity, also expose them to possible torture and maltreatment.

3.2. Counsel for the Respondents pray that the court dismisses this application with costs.

¹⁷ Section 1, 2 and 9 of the Constitution of the Republic of South Africa, 1996.

¹⁸ MEC for Local Government, Environmental Affairs and Development Planning, Western Cape & another v Hans Ulrich Plotz NO & another (495/2017) [2017] ZASCA 175 para 19.

¹⁹ Ibid paras 22, 23, 24 and 27.

²⁰ Ibid.

DATED AT JOHANNESBURG ON THIS DAY 11th DAY OF
DECEMBER 2019.