

**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

AMICUS CURIAE HEADS OF ARGUMENTS

The application of section 6(1) of the South African Citizenship Act 88 of 1995

1. In terms of section 6(1) of the South African Citizenship Act,¹ a South African citizen shall cease citizenship in the following instances: he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic or he or she in terms of the laws of any other country also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic. Section 6(1) does not apply in the circumstances of this matter.
2. It is of importance to establish Rachel's age when she boarded a flight from South Africa to Cairo, Egypt. Rachel is 19 years of age, in 2015 she was 15 years old, meaning Rachel was still a minor when she left South Africa. A child in terms of the Constitution,² is a person under the age of 18 years. Minor children do not have the capacity to act nor to give consent that is binding.³ A minor child giving consent must be capable of volition (expressing his will) and he must be

¹ South African Citizenship Act 88 of 1995.

² Section 28(3) of the Constitution of the Republic.

³ *R v Taylor 1927 CPD 16.*

intellectually mature enough to appreciate the implications of his act⁴ and the consent must not be contra bonos mores.⁵ Therefore, it cannot be said that at the age of 15 years, Rachel was capable of making sound and reasonable decisions concerning her citizenship. It is also quite clear that Rachel only intended to get married to one of the New Atlantian Republic (hereinafter, NAR) fighters but in actual fact, never got married. Rachel never satisfied the provisions of section 6(1)(a) of the Act.

Lawfully recognised states

3. Intermediate between states and natural persons, corporations, political or religious parties or movements, organized interest groups, transnational ethnic communities, and other non-governmental organizations (NGOs) have proliferated and assumed a role in international society, and this development, too, has required writers to reassess what can constitute a person under international law.⁶ To further establish whether Rachel satisfied the provisions of the Citizenship Act in determining whether she revoked her citizenship in

⁴ Neethling J and Potgieter JM Law of delict 7 ed (LexisNexis Durban2015).

⁵ *S v Collett* 1978 3 SA 206 (RA).

⁶ Grant D "Defining Statehood: The Montevideo Convention and its Discontents".

the Republic, it is important to define what a state is and whether NAR is a recognised state.

4. "State" has been defined as "the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world⁷." It is further explained that a state is [I]f a power is established anywhere, in any manner, which is able to ensure permanent obedience to its coercive order among the individuals whose behavior this order regulates, then the community constituted by this coercive order is a state in the sense of international law. The sphere in which this coercive order is permanently effective is the territory of the state; the individuals who live in the territory are the people of the state in the sense of positive international law.⁸ It remains clear that the NAR is neither a recognised state by any international law nor a country.
5. In terms of the South African Terrorism Act,⁹ terrorism is defined as any person with the intent to endanger the maintenance of law and order in the Republic or any portion thereof; in the Republic or

⁷ Grant D "Defining Statehood: The Montevideo Convention and its Discontents".

⁸ Grant D "Defining Statehood: The Montevideo Convention and its Discontents".

⁹ Section 2(1)(a) of the South African Terrorism Act 83 of 1967.

elsewhere commits any act or attempts to commit, or conspires with any other person to aid or procure the commission of or commit, or incites, instigates, commands, aid, abuses, encourages or procures any other person to commit any act. The NAR has been and still is a threat to various countries, including South Africa. It has been threatening the peace and the stability of states and its establishment is premised on the superiority of the white race. The NAR identifies with the characteristics of the definition of terrorism as provided for by the Terrorism Act and therefore is a terrorist group or organisation and not a state.

6. The provisions of the Citizenship Act¹⁰ requires that a person by law, must have the citizenship or nationality of that country and must have served in the armed forces while that country was in war with the Republic. This section has also not been satisfied as NAR is not a recognised state but a terrorist group.

The powers of the minister to revoke the citizenship of Rachel and Mikael in accordance with section 8(2) of the Act

¹⁰ Section 6(1)(b) of the South African Citizenship Act.

7. There are allegations against Rachel that she has been involved in criminal activities. In order to establish her guilt, she has to be tried in the court of law. Should the Minister exercise his powers under section 8(2)(a) and (b), there might be a risk of Rachel not being prosecuted for her alleged crimes.
8. If it is established that Rachel, over the past 4 years had been involved in any criminal act and involved in the NAR, she will have to be treated and tried as a minor under the Child Justice Act¹¹ and the Children's Act.¹² It is the responsibility and duty of the states under international law to ensure that children do not partake in armed forces. It is the responsibility of the state to protect the interests of children as they are of paramount importance.¹³
9. The unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, inter alia, forced or compulsory recruitment of children for use in armed conflict.¹⁴ It is therefore the duty of the states in accordance with the provisions international humanitarian law, to not

¹¹ Child Justice Act 75 of 2008.

¹² Children's Act 38 of 2005.

¹³ Section 28(2) of the Constitution of the Republic of South Africa.

¹⁴ Article 10 of the Convention on the Rights of the child.

involve minors to participate in hostilities. Article 1¹⁵ provides that states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

The risk of both Rachel and Mikael becoming stateless

10. Many children are caught up in armed conflicts in which they are the targets of violence. Victims of a general onslaught against civilians while others die as part of a calculated genocide. Some suffer the effects of sexual violence or multiple deprivations which result inter alia in the lack of food and educational facilities, and the deprivation of parental care and a family environment, and contribute to the spread of diseases.¹⁶

11. Depriving both Rachel and her minor child their right to citizenship might expose both of them to abuse and the risk of being stateless. A “stateless person” is someone who is not considered a

¹⁵ Article 1 of the Convention on the Rights of the child

¹⁶ Robinson JA The right of child victims of armed conflict to reintegration and recovery.

national by any state under the operation of law.¹⁷ A stateless child lacks the guaranteed protection of any state.¹⁸

12. In exercising his right under section 8(2) in an unconstitutional manner, the Minister might also run the risk of Rachel not being rehabilitated if she was involved in the alleged criminal activities. It is the duty of the Republic to ensure that Rachel and her son her integrated into the community and this will limit the risk they will find themselves involved in terrorism.

Respondent's decision to revoke the appellant's citizenship is unconstitutional.

13. The respondent is afforded power in section 8(2) of the Citizenship Act to revoke citizenship of a person if in his/her capacity as the minister is satisfied that it is in the public interest to do so¹⁹. The Respondents decision of revoking the applicant's citizenship is not in the interest of the public as it implies that the applicant shall not be subjected to an appropriate punishment by a competent court.

¹⁷ Legal Research Centre "In pursuit of equality in South Africa".

¹⁸ Convention relating to the status of stateless person 1954.

¹⁹ Section 8(2) of the South African Citizenship Act 88 of 1995.

14. The actions of the applicant do satisfy the definition of terrorism in accordance to the Terrorism Act²⁰. According to the Terrorism act the applicant, since she is charged with the crime of terrorism, the act requires that the applicant must be tried by a judge²¹. Pursuant to this act the applicant should appear before a South African court.
15. The respondent is clearly in violation of section 20 of the constitution²². The applicant is a South African citizen and therefore she and her child are protected by this section.
16. The respondent is also in violation of Section 34 of the constitution²³. This section affords the applicant the right to be heard fairly in court, since the crime that she is charged with can be settled in court as it is stated in the Terrorism act. The respondent by revoking the applicant's citizenship because of the crime she allegedly committed violates the right in section 34 of the constitution.
17. The government has a duty to allow the applicant to return to south Africa because she is a citizen. This was emphasized in the *Kaunda and Others v President of the Republic of South Africa and*

²⁰ Section 2(1)(b) of the South African Terrorism Act 83 of 1967.

²¹ Section 5(a) of the South African Terrorism Act 83 of 1967.

²² Section 20 of the Constitution of the Republic of South Africa Act 108 of 1996.

²³ Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996.

*Others*²⁴ where the court held that the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment. The *Kuanda* case also referred to article 7 of the African Charter on Human and people's rights²⁵ which confirms the right of the applicant which is found in section 34. Based on this case and taking into account section 34 of the constitution, it is clear that the respondent has a duty to protect the applicant since their internationally recognised human rights are being violated²⁶. The fact that a child of the appellant has died under such conditions should serve as an aggravating factor for the government to act.

The Respondent's decision is unconstitutional and cannot be justified under section 36 of the constitution.

18. The Respondent's decision of violating the appellant's rights is not justified under section 36 of the constitution²⁷. The minister is not justified in making the decision, the decision of revoking citizenship

²⁴ *Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC).*

²⁵ Article 7 of the Organization of African Unity (OAU) African Charter on Human and people's Rights.

²⁶ Article 10 of the UN General Assembly, Universal Declaration of Human Rights 217(III) A(Paris, 1948).

²⁷ Section 36 of the Constitution of the Republic of South Africa Act 108 of 1996.

should have been as means of last resort, after considering the prosecution of the appellant. In *August and Another v Electoral Commission and Others*²⁸ the court in its judgement emphasised that a right may not be limited without justification and legislation. The minister's limitation based on section 8(2) is not justified.

19. In *Mohamed and Another v President of the Republic of South Africa and Others*²⁹ the court held that the government was ordinarily under an obligation to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country. Based on this case, revoking the applicant's citizenship is unconstitutional since it violates their internationally recognized rights. The Respondent knew the conditions they will be subjected to in the camp.

20. The minister's decision was also in violation of section 28(2) of the constitution which requires that in every matter the best interest of the child must be prioritized.³⁰ The decision to deprive the applicant's their citizenship is in conflict with this section, since it is

²⁸ *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).

²⁹ *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

³⁰ Section 28(2) of the constitution of the Republic of South Africa Act 108 of 1996.

not in the child's best interest to be deprived citizenship considering the conditions they are living under.

21. The respondent's decision is unconstitutional as it grossly violates the appellants fundamental constitutional rights. The respondent limited the applicant's right pursuant to section 8(2) of the Act. The limitation of the applicant's right is against public policy, because the best interest of the child was not taken into account which is a gross violation of section 28 of the constitution and that the applicant's right to a fair trial which is afforded by section 34 of the constitution is also violated. Section 8(2) which the respondent relies on has to be read in accordance with the constitution, in this case in accordance with section 28 and 34 of the constitution respectively. The minister failed to do this which is why the limitation was unlawful and cannot be justified as being reasonable under section 36.

22. According to the United Nations Convention of the Right of a child, a child is anyone under the age of 18. All children have these rights, no matter who they are, where they live, what their parents do, what language they speak, what their religion is, whether they are a boy or girl, what their culture is, whether they have a disability, whether they are rich or poor. No child should be treated unfairly on

any basis.³¹ South Africa has agreed to the rights under the convention and subsequently bounded. In terms of the South African Constitution, refugee children are equally entitled to the right to basic nutrition, shelter, basic health care services, and social service.³²

23. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³³ States Parties have an obligation to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.³⁴ Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

24. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious

³¹ Article 2 of the United Nations Conventions of the Rights of a child.

³² Section 28(1)(c) of the Constitution of the Republic of South Africa, 1996

³³ Article 3 of the Convention on the Rights of the child

³⁴ Article 8 of the Convention on the Rights of the child

manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.³⁵

25. A child in the position of Mikael who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. States Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.³⁶

26. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or

³⁵ Article 10 of the Convention on the Rights of the child.

³⁶ Article 20 of the Convention on the Rights of the child .

her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

27. South Africa is a party to the African Charter on the Rights and Welfare of the Children. Article 1 of the Charter provides that; State members of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provision of this Charter. In this case, the South African courts have an obligation to approach Mikael's case in accordance with the provision of Article 16 of the charter which provides for the right of a child to care and protection; Article 21 which provides protection of a child against harmful socials and cultural practices and Article 23 which makes provision for refugee children.

28. Article 16 provides that;

1. State Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, negligent or maltreated including sexual abuse, while in the care of the child.

2. Procedures for the establishment of special monitoring units to care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

29. Appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardian or close relatives, receive appropriate protection and humanitarian instruments to which the states are parties.

Conclusion

It is clear from the conventions which South Africa entered into that they have an obligation to act in the best interest of Mikael.

Relief

1. The amicus curiae supports the relief sought by the applicants as follows:

- i) An order declaring section 6(1) of the South African Citizenship Act not applicable to Rachel and Mikael.
- ii) An order declaring that the respondent should not act under the powers given to him in section 8(2) of the South African Citizenship Act, in an unconstitutional manner.
- iii) An order mandating the respondent to allow Rachel and her minor child back in the Republic and integrate them back into the society.