



CONSTITUTIONAL COURT OF SOUTH AFRICA

Florette Kayamba Mulowayi and Others v Minister of Home Affairs and Another

CCT 249/18

Date of judgment: 29 January 2019

MEDIA SUMMARY

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

On 29 January 2019 at 10h00, the Constitutional Court handed down judgment in an application for confirmation of an order of the High Court of South Africa, Western Cape Division, Cape Town (High Court) declaring regulation 3(2)(a) of the Regulations on the South African Citizenship Act unconstitutional and invalid.

The applicants are Mr Nsongoni Mulowayi, Mrs Florette Mulowayi and their minor son, Gaddiel Mulowayi (Gaddiel). Mr and Mrs Mulowayi came to South Africa as refugees from the Democratic Republic of Congo (DRC). They were granted permanent residence in 2011. Mr and Mrs Mulowayi's two eldest children had been recognised as South African citizens by birth but Gaddiel, born in 2017, had not despite being registered in terms of the Births and Deaths Registrations Act. Gaddiel only has an unabridged birth certificate but no identity number.

Mr and Mrs Mulowayi were informed by the Department of Home Affairs (Department) officials that they had to wait for five years before applying for citizenship and that they must renounce their Congolese citizenship. In December 2015, Mr and Mrs Mulowayi renounced their Congolese citizenship and in early 2016 they applied for South African citizenship. In October 2016 Mr and Mrs Mulowayi received a letter from the Department informing them that their application for citizenship had been rejected in terms of regulation 3(2)(a). They were advised that they had applied before time of qualification to do so, which was, pursuant to regulation 3(2)(a), only after ten years of permanent residence. Consequently, the applicants are stateless.

After engagements with the respondents proved fruitless, the applicants launched an application in the High Court seeking an order declaring regulation 3(2)(a) invalid and unconstitutional; reviewing and setting aside the rejection decision and substituting the decision with an acceptance of their application, and an order declaring Gaddiel to be a South African citizen in terms of the Act. The High Court held that if this was the intention of the Legislature to provide for a maximum period of ten years, it would have stated this in the Act but did not do so. The High Court concluded that the ten years in regulation 3(2)(a) was a patent error and was promulgated in a manner inconsistent with section 33 of the Constitution and the Promotion of Just Administrative Justice Act and declared it invalid. However, the High Court suspended the order of invalidity pending confirmation by the Constitutional Court.

In the Constitutional Court, the applicants sought confirmation of the order of constitutional invalidity made by the High Court, alternatively leave to appeal directly to this Court against the suspension of invalidity. The applicants submitted that no prejudice will be suffered by the respondents as they were involved in the discussions in an attempt to resolve the matter.

This matter was decided without a hearing. In a unanimous judgment written by Mhlantla J, the Constitutional Court held that it is trite that declarations of invalidity in respect of regulations are not subject to confirmation by the Constitutional Court. This Court thus dismissed the application for confirmation of the declaration of invalidity of regulation 3(2)(a) of the Regulations on the basis that it is superfluous.

However, in order to provide effective relief to the applicants, the Constitutional Court granted leave to appeal in respect of the suspension of the order of invalidity and upheld the appeal. Accordingly, the order of the High Court was set aside only to the extent that paragraph 2 thereof suspending the declaration of the invalidity was set aside.