

Retrospective application of section 4(3) of the South African citizenship act

The decision in *Ali and Others v Minister of Home Affairs and Another* has changed the way section 4(3) of the South African Citizenship Act, 88 of 1995 (“the Act”) should be interpreted.

In this case five applicants applied to the Western Cape Division of the High Court for the interpretation of section 4(3) of the Act. All five applicants were majors, born in South Africa and have lived in the country for the past 18 years.

The Respondents, the Minister of Home Affairs and the Director-General of Home Affairs, refused to grant applications for citizenship to the Applicants in terms of section 4(3) of the Act.

Because of the refusal, the Applicants brought an application seeking an order directing the Respondents to, amongst others, grant each of the Applicants South African citizenship in terms of the Act, alternatively, an order directing the Respondents to accept applications on affidavit from each applicant for the granting of South African citizenship in terms of the Act.

Section 4(3) of the Act provides as follows:

“A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if

(a) he or she has lived in the Republic from the date of his or her birth to date of becoming a major; and

(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act 51 of 1992).”

It was common cause that all the applicants met the requirements of section 4(3)(a) and (b). However, section 4(3) of the Act was introduced into the Act by the South African Citizenship Amendment Act, 17 of 2010, which came into operation on 1 January 2013. It was also common cause that all applicants were born before 1 January 2013 and that they all attained majority after 1 January 2013.

The Respondents’ argument was that there is no prejudice to be suffered by the Applicants because they may apply for refugee status, alternatively, permanent

residency. They furthermore argued that section 4(3) does not apply to persons, who were born before 1 January 2013.

The Court dismissed the first argument of the Respondents and stated that there is prejudice to be suffered by the Applicants.

The essential issue the Court had to decide upon was whether section 4(3) of the Act can be interpreted to apply retrospectively to persons, who were born before its effective date (1 January 2013).

The Applicants argued that section 4(3) should be interpreted to apply retrospectively. They stated that they merely sought to have section 4(3) of the Act operate for the benefit of those persons, who qualified for citizenship after it came into operation.

The Court held that the interpretation of the Applicants must, on a proper construction of section 4(3), be the correct interpretation. Therefore, the Court found that the section can be interpreted to apply retrospectively to persons, who qualified for citizenship after it came into operation. This was because the retrospective application only seeks to benefit people and not to take away any vested rights or create new obligations.

The Court also said that even if the Court's decision was wrong, the Respondents' interpretation of the section takes no account of the Court's duty to interpret statutes in a manner that promotes the spirit and objections of the Bill of Rights as required by the Constitution. The Respondents' interpretation also violated the Applicants' right to equality and, potentially, the right to dignity.

The Applicants' application succeeded and the Respondents were directed to accept applications of each of the applicants on affidavit for the granting of citizenship. An order directing the Respondents to grant the application for citizenship would amount to the court over-reaching and trying to take over the powers of the Respondents.

In conclusion, this case is a depiction of when a court will allow the retrospective application of a statute, or section in a statute, to give all people the same benefits which the section or statute provides for.

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