



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2023-034681

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

D MLAMBO

26 FEBRUARY 2025

In the matter between:

YONG LU

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS

Second Respondent

Heard: 21 January 2025

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 26 February 2025.

Summary: Immigration Act 13 of 2002 – section 29(1) – declaration of foreigner as prohibited person – upliftment of declaration of foreigner as prohibited person – good cause in application for upliftment of declaration as prohibited person – factors to consider – underlying reason for declaring foreigner as prohibited person is not a factor in considering whether good cause exists to uplift declaration

Promotion of Administrative Justice Act 3 of 2000 – review – failure to consider relevant factors – consideration of irrelevant factors – sufficient evidence required to show consideration of all relevant factors

ORDER

1. The review application succeeds.
2. The decision by the first respondent to refuse to uplift the applicant's status as a prohibited person is reviewed and set aside.
3. The matter is remitted to the first respondent to consider the appeal afresh.
4. Within 30 days of service of this Court order, the first respondent must provide the applicant with an outcome of his appeal, along with the reasons containing all the factors he considered.
5. The first and second respondents are ordered to pay the costs of this review including those of counsel, with the one paying the other to be absolved, on scale A.

JUDGEMENT

MLAMBO, JP

Introduction

[1] In this application, the applicant ("Mr Lu") seeks to review and set aside the first respondent's decision ("Minister"), in upholding a determination made by the second respondent ("Director-General" or "DG") declaring Mr Lu a prohibited person in terms of the Immigration Act.¹

Background

[2] It appears common cause, save what I say below, that on 31 January 1998, Mr Lu, a Chinese national, entered South Africa on a visitor's visa. He was subsequently granted an extension to stay in the country, and the following year in 1999, he applied

¹ 13 of 2002 ("the Act").

for a permanent residence permit. He says he was assisted by an immigration agent, known to him as Ms Lai. His application was successful, and his permanent residence permit was granted on 29 November 2000.

[3] He subsequently used this to apply for a South African ID card in 2001. In 2004, he met Ms Longwei Zhang, also a Chinese national, whom he married on 31 March 2005. Ms Zhang was granted several visas which were periodically extended based on her marriage to Mr Lu. The couple had their first child on 8 June 2006, who was born in South Africa. On 30 December 2009, they adopted their second child, a Chinese national born on 29 November 1994. As a result, their second child was granted several relative's visas. During 2010, Ms Zhang applied for a permanent residence permit based on her marriage to Mr Lu. However her application was, on 1 February 2012, rejected on the basis that Mr Lu's permanent residence permit was obtained fraudulently.

[4] During this time, Mr Lu says he founded a non-profit organisation, Home of Grace and sometime in 2017, he applied for proof of residence from the Department of Home Affairs ("the Department"). He was then informed that his permanent residence permit was deemed fraudulent and as a result he was listed as a prohibited person under section 29(1)(f) of the Act.² On 11 January of 2018, he made an application to the Director-General for the upliftment of his status as a prohibited person in terms of section 29(2) of the Act.³ This application was rejected on 16 August 2018 ("the first rejection"). As reasons for the rejection, the Director-General stated that:

- 4.1. The permanent residence permit was fraudulently obtained;
- 4.2. That Mr Lu did not surrender those fraudulent documents during the amnesty period of 2010;
- 4.3. That he did not present himself personally to the Department; that his South African ID document was erroneously issued; and

² Sections 29(1)(f) provides that: "The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit: anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document."

³ "The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person."

4.4. That this invalidated his wife and daughter's statuses.

[5] On 3 September 2018, Mr Lu appealed this decision arguing that:

- 5.1. He was *bona fide* in his application for permanent residence;
- 5.2. He was assisted by an immigration agent Ms Lai, whom he paid around R40 000;
- 5.3. He was not aware that the permanent residence permit was issued fraudulently, which is why he did not surrender it;
- 5.4. He only became aware of the fraud allegations when his wife applied for a permanent residence which was rejected;
- 5.5. The amnesty period in 2010 was only applicable to Zimbabwean nationals;
- 5.6. That he has been a law abiding resident in South Africa for over 19 years at the time of his appeal; and
- 5.7. That his family's status was entirely dependent on the upliftment of his prohibited person status, which if not lifted would leave his youngest daughter, a South African citizen, stateless.

[6] On 4 January 2021, the Director-General, again rejected the appeal ("the second rejection"), citing the same reasons. On 18 January 2021, Mr Lu appealed to the Minister under section 8(6) of the Act.⁴ On 18 October 2022, the Minister rejected the appeal, citing similar reasons provided by the Director-General, namely:

- 6.1. That his stay in the country was based on deception and fraud;
- 6.2. That the Department has no record of him being issued with permanent residence status;
- 6.3. That no application for permanent residence was received;
- 6.4. That being issued with a South African ID does not exonerate him from the provisions of section 48 of the Act;

⁴ "An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision."

- 6.5. That while he claims that he was assisted by the immigration agent Ms Lai, he has failed to provide proof that she actually exists; and
- 6.6. That his family life was noted but that did not mean his transgression could be ignored.

[7] It is against this background, leading to the Ministerial rejection that Mr Lu now approaches this Court for relief.

Grounds for review

[8] Mr Lu contends that the Minister's decision constitutes administrative action in terms of the Promotion of Administrative Justice Act⁵ (PAJA), and section 33 of the Constitution. Alternatively, he argues that if PAJA does not apply, then he seeks to review the Minister's decision under the principle of legality. He raises three main grounds. First, that the Minister failed to take into account relevant considerations. Second, that the respondents have not provided any evidence of fraud regarding his permanent residence permit and thirdly, that the Minister was not the functionary who took the decision.

[9] On his first ground, he argues that he is an innocent party who was defrauded by the immigration agent, Ms Lai. He argues that he cannot remember the specific details regarding Ms Lai assisting him, only that he paid her R40,000 and that she went back to Taiwan during 2007. Further, he argues that the Minister did not consider his long residence in South Africa as a law-abiding citizen for over two decades, his marriage of similar length, his family's dependence on his status, particularly his youngest daughter who will become stateless and his work through his non-profit organisation since 2012. He argues that in terms of section 6(2)(e)(iii) of PAJA,⁶ the Minister's decision is reviewable for failing to take these factors into account.

[10] On his second ground he argues that the decision taken by the respondents was based on speculation and is arbitrary as the Department's records do not contain

⁵ 3 of 2000.

⁶ Section 6(2)(e)(iii) of PAJA provides that: "A court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered."

any evidence of fraud, showing that his permanent residence permit was obtained unlawfully. This is as the Department did not conduct an adequate investigation into how his permit was issued, and that the onus is on them to prove fraud. More so, that he has not even been formally charged with fraud. As a result, it is reviewable under sections 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(ii), 6(2)(h) and 6(2)(i) of the PAJA.

[11] On his third ground he argues that the decision was not taken by the Minister because the signature on his appeal rejection does not match the Minister's signature on other official documents such as the Department's annual report. He says that the need to compare signatures arose after the record failed to provide any paper trail for the Minister's decision, suggesting that he did not even receive the section 8(6) appeal. He calls on the Minister to show when he received the appeal, how he considered it and what considerations he took into account. A failure to do this, it is submitted, would make the decision reviewable in terms of sections 6(2)(a)(i) or (ii), 6(2)(b) and 6(2)(i) of the PAJA.

[12] Despite the fact that this application is targeted at the Minister's decision, the Minister did not submit an answering nor a confirmatory affidavit. It is the DG who filed an answering affidavit, which amounts to a general denial. The answering affidavit does not directly address whether the Minister took all factors into account when Mr Lu's appeal was rejected. The main stance in that affidavit is that the decision to reject the appeal was a lawful one. The main argument being that the Mr Lu's permit was fraudulent. This is the justification advanced for not considering the other arguments provided by Mr Lu.

[13] The DG highlights that section 29(2) of the Act gives the Minister a discretion, and therefore it is up to the Minister to determine what factors are most important. He then appears to argue that by noting Mr Lu's family life, they have discharged their duty.

[14] The answering affidavit does not address Mr Lu's argument that no investigation into the alleged fraud was carried out or that he was not charged with fraud. Also not addressed is Mr Lu's argument that he has lived in this country for over two decades, as well as his marriage and his non-profit work, and that these are relevant factors that the Minister failed to take into account.

[15] Similarly, the respondents do not engage at all with Mr Lu's claims regarding the Minister's signature and his allegation that the decision was not taken by the correct functionary.

The avenue for reviewing the Minister's decision

[16] Section 33(1) of the Constitution gives everyone the right to "administrative action that is lawful, reasonable and procedurally fair". Section 33(3) states in part that "[n]ational legislation must be enacted to give effect to these rights". The relevant national legislation is the PAJA. In *Minister of Defence and Military Veterans v Motau and Others*,⁷ the Constitutional Court explained the factors to consider when determining whether conduct amounts to administrative or executive action. It said:

"The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions." (Footnote omitted.)

[17] This is not the first time a decision by the respondents to declare a person prohibited in terms of section 29 of the Act is before our Courts. In those matters, it was found that such a decision falls within the definition of administrative action and is reviewable under the PAJA. In *Klemenc v Head of Immigration Inspectorate and Others*,⁸ this Court said:

"The most important question before me is whether the prohibition can be regarded as administrative action.

There must be a decision to declare a person prohibited.

That decision is taken by an organ of state, exercising a public power performing a public function in terms of any legislation...

In this instance the decision is taken in terms of Section 29(1)(f) and 29(2) of the Immigration Act .

⁷ [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC).

⁸ [2024] ZAGPPHC 381.

The Respondents were exercising a public power in terms of legislation.

There is no other conclusion that I can draw that the actions of the Respondents are administrative action and not *ex lege*.”⁹

[12] In *Mukonga v Minister of Home Affairs and Another*,¹⁰ a decision to declare a person prohibited and subsequent refusal to uplift it was taken on review and this Court said:

“As correctly pointed out by [the applicant], the decision of the Minister, being an administrative action, is subject to be reviewed in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 [PAJA]. The Minister's powers to dismiss Mr Mukonga's appeal are found in the Act. It is the implementation of national legislation”¹¹

[13] Furthermore, the respondents have conceded in previous cases that the appropriate avenue for review in matters concerning cancellation or rejection of permanent resident permits is the PAJA. In *Ling and Another v The Director-General of the Department of Home Affairs and Another*,¹² there was a challenge to the rejection of the applicant's permanent residence applications, where it was stated that “[t]he respondents now also agree that the impugned decision is susceptible to judicial review in terms of s 6 of PAJA”.

[14] I therefore conclude on this aspect that the decision was administrative in nature because it was merely the Minister “carrying out the daily functions of the state which necessarily involves the application of policy ... with direct and immediate consequences for individuals”.¹³ Moreover, the Minister was exercising a public power in that he was fulfilling his appeal duties, which itself was done in terms of the Immigration Act, and it adversely affected Mr Lu's rights in that he was declared a prohibited person and liable for deportation. This had a direct, external legal effect on Mr Lu due to the situation his family now faces. Furthermore it does not fall under any

⁹ Id at paras 14-19.

¹⁰ [2022] ZAGPPHC 105.

¹¹ Id at para 30.

¹² [2022] ZAWCHC 177.

¹³ *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 24.

of the exclusions. Before turning to the grounds of review under PAJA, I first set out the relevant sections of the Immigration Act.

The Immigration Act

[15] Sections 8(3) and (4) provide that:

- “(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.
- (4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.”

[16] Sections 31(2) in relevant part provides that:

“31. Exemptions.—

...

- (2) Upon application, the Minister may under terms and conditions determined by him or her—

...

- (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may—
 - (i) exclude one or more identified foreigners from such categories; and
 - (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;
- (c) for good cause, waive any prescribed requirement or form.”

[17] Section 48 provides that:

“No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he or she was admitted or allowed to remain in the Republic through error or misrepresentation, or because his or her being an illegal foreigner was undiscovered.”

[18] The relevant regulations in terms of the Act are regulations 26(6) and (7), which provide that:

“26. Prohibited persons.—

...

- (6) The Director-General shall, in declaring a person not to be a prohibited person, consider the following factors—
 - (a) the reasons for the prohibition;
 - (b) the seriousness of the offence committed; and
 - (c) representations made by the prohibited person, which should include a police clearance certificate.
- (7) The Director-General shall, upon making a decision as contemplated in section 29 (2) of the Act, provide written reasons for such decision.”

[19] As stated, following Mr Lu’s wife’s application for permanent residence, he was informed by the DG that in terms of section 29(1)(f) of the Act he was a prohibited person as a result of being in possession of a fraudulent visa. He argues that the grounds provided by respondents in rejecting his application under section 29(2) are reviewable under PAJA.

[20] Mr Lu submits that the decision is reviewable under a number of the instances found in section 6(2) but the parties are agreed that the issue in this case effectively implicates sections 6(2)(e)(iii),¹⁴ 6(2)(e)(vi),¹⁵ 6(2)(f)(ii)(cc),¹⁶ and 6(2)(h).¹⁷

[21] Mr Lu submits that in reaching his decision, the Minister gave too much weight to an irrelevant consideration, being the alleged fraud, while ignoring relevant

¹⁴ “A court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.”

¹⁵ “A court or tribunal has the power to judicially review an administrative action if the action was taken arbitrarily or capriciously.”

¹⁶ “A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the information before the administrator.”

¹⁷ A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.”

considerations such as the representations made to show good cause. These factors are his innocence and lack of knowledge that his permit was fraudulent and the impact on his family life, that he has been a law-abiding citizen for more than two decades on the understanding that he held a valid permanent residence permit. He argues specifically that the decision to declare him a prohibited person renders his minor daughter stateless. Placing reliance on the Constitutional Court's decision in *New Clicks*,¹⁸ Mr Lu argues that the effect of the Minister's decision was merely to pay "lip service" to his representations. He places reliance on the following paragraphs from the Judgment:

"The Pricing Committee and the Minister must apply their minds to all relevant and material information placed before them. They must properly evaluate such information and attach such weight to it as the degree of its importance requires. They should not pay lip service to this obligation". (Applicant's emphasis.)

And:

"The Pricing Committee and the Minister must therefore do more than pay lip service to the viability of pharmacies. They must address the need for pharmacies to exist in a meaningful way when fixing the appropriate fee and be able to demonstrate that they have done so." (Applicant's emphasis.)

[22] On Mr Lu's first ground, the respondents argue that the Immigration Act should be considered within its full context, that while allowing for and regulating the entrance of foreign nationals into South Africa, it also serves to protect the country's sovereignty and borders. It is for this reason that certain foreign nationals may be deemed to be prohibited and deported. Furthermore, merely being issued with a South African ID does not exonerate a person from the provision of section 48 of the Act. This section states that not being aware that one is an illegal foreigner does not prevent them being treated as such under the Act.

[28] In response to Mr Lu's second ground, the respondents submit that the Department has no record of Mr Lu entering the country in 1998 and obtaining a

¹⁸ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 25; 2006 (8) BCLR 872 (CC).

visitor's visa valid for a period of three months. Nor does the Department have a record of his application for a permanent resident visa or his "approved" permit as a permanent resident. The respondents do not address any of the issues Mr Lu raised in his supplementary affidavit, in particular, the onus on proving fraud, the lack of adequate investigation into the allegations of fraud and that Mr Lu has not been charged with fraud.

[23] The respondents argue that they have given adequate consideration to his submissions and that he had three different opportunities¹⁹ to state his case. They say that in all three he failed to produce substantive evidence to back up his claims about the existence of Ms Lai, nor did he provide any new information. Therefore, having exhausted all internal remedies, his status as a prohibited person must stand.

[24] Indeed, by merely "noting" Mr Lu's family situation, the Minister merely paid lip service to it and failed to demonstrate in any meaningful manner what they considered about it. This is especially in light of the constitutional injunctions that "[a] child's best interests are of paramount importance in every matter concerning the child."²⁰ To this, the respondents rely on the Constitutional Court's decision in *Nandutu and Others v Minister of Home Affairs and Others*,²¹ where it was confirmed that the paramountcy of the child's best interests do not override all other rights, as the Constitution allows all rights to be limited in terms of section 36. It should however be noted that the respondents have not made out any case as to why it is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" to limit this right in this case, nor have they undertaken a section 36 analysis.

[25] In *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others*,²² the Constitutional Court had to decide whether to confirm a declaration of constitutional invalidity made by the high court which found that section 22(12) and (13) of the Refugee's Act were unconstitutional. These sections provided that an

¹⁹ The application to the DG to remove his status as a prohibited person (11 January 2018); the appeal to the DG in terms of section 8(4) which was rejected; and the appeal to the Minister in terms of section 8(6) which was rejected and is the subject of this review.

²⁰ Section 28(2) of the Constitution.

²¹ [2019] ZACC 24; 2019 (8) BCLR 938 (CC) ; 2019 (5) SA 325 (CC).

²² [2023] ZACC 45; 2024 (4) BCLR 592 (CC); 2024 (3) SA 330 (CC).

application for asylum that was deemed abandoned if an asylum seeker who was granted an asylum seeker visa did not present themselves for its renewal one month after it expired. In confirming the declaration of unconstitutionality, the Constitutional Court considered the rights of children, whose status is tied to that of their parents. It said:

“Aside from this, the impugned subsections also unjustifiably limit the rights of children, as submitted by the amicus. This Court has emphasised that “[t]he recognition of the innate vulnerability of children is rooted in our Constitution, and protecting children forms an integral part of ensuring the paramountcy of their best interests.” It cannot be in the best interests of children to deem their applications as having been abandoned, with all its consequences, due to bureaucratic circumstances beyond their control.

Children’s applications for asylum are generally tied to those of their parents. The deemed abandonment of parents’ asylum applications has had drastic consequences on their children. CoRMSA adduced evidence that the children of an asylum seeker whose application was deemed to be abandoned could not attend school for the entire 2020 academic year because they had no visas. In another case, an asylum seeker’s son could not register for matric. Like their parents, without visas, children also face the risk of arrest, detention and deportation. As this Court said in *Centre for Child Law*, it is unjust to penalise children for matters over which they have no power or influence.”²³ (Footnotes omitted.)

[26] Although that decision dealt with the Refugees Act, the situation facing children is analogous to the situation *in casu*. While I accept that the respondents have stated that Mr Lu’s minor child may re-apply for her birth certificate based on her birth in South Africa, it does not change the fact that currently, her status is based on her father’s permanent residence. As a minor, she is entirely dependent on her parents. Should her parents be deported to China, she too would inevitably have to leave with her parents. Citizenship in China is regulated by the Nationality Law of the People’s Republic of China.²⁴ Article 3 of this law provides that:

“The People’s Republic of China does not recognize dual nationality for any Chinese national.”

[27] Article 5 provides that:

²³ Id at paras 41-2.

²⁴ Accessed from http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384056.htm

“Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. *But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.*” (Emphasis added.)

[28] This makes it clear that Mr Lu’s minor child does not qualify for Chinese citizenship, and if she were to leave with her parents for China, she may face the same issues faced by minor children of asylum seekers in this country that were highlighted by the Constitutional Court. She would effectively be a foreigner in China, possibly limiting her access to essential services like education and employment. It must also be pointed out that this Court is the upper guardian of all minor children and therefore must conclude on this point that the Minister failed to consider the implications of his decision on Mr Lu’s minor child. Without his reasons on this aspect, beyond merely “noting it”, I cannot make a determination as to whether such a decision was rational. Of course, this does not mean there is no circumstance under which Mr Lu’s status as a prohibited person can be upheld because of the citizenship of his minor child, it merely means that there is no evidence before me to the effect that the Minister considered this factor when making his decision. Under PAJA, once an affected person has established a reviewable irregularity, that is the end of the matter. In the words of the Constitutional Court:

“[T]here is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b).”²⁵

[29] Mr Lu also relies on two further decisions, *A.K and Others v Minister of Home Affairs and Another*²⁶ and *Najjemba v Minister of Home Affairs and Another*.²⁷ In *AK* the applicant was a Russian citizen and illegal foreigner in this country found with a fraudulent work visa. She had three children who were born in this country to a South African father. Upon discovering the fraudulent visa she was declared a prohibited

²⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 25.

²⁶ [2023] ZAWCHC 52; [2023] 2 All SA 349 (WCC); 2023 (3) SA 538 (WCC) (“AK”).

²⁷ [2022] ZAWCHC 199 (“*Najjemba*”).

person in terms of section 29(1)(f) and her appeal to reverse her status was similarly to Mr Lu, refused. In that matter too, the applicant claimed that she was a victim of fraud and had no reason to believe that her visa was fraudulent.

[30] The Court found the decision reviewable because, amongst other reasons, the DG was fixated on the fraud without conducting a proper investigation into the applicant's plea of innocence. This resulted in failing to consider relevant factors while not considering the best interests of the minor children.²⁸ The Court noted that regulations 26(6) and (7) provide guidance on the factors to consider, stating:

“What this means is that the DG must have regard to all the facts placed before him by way of representations when exercising his discretion under section 29(2) of the Immigration Act. Whether the first applicant knowingly falsified her visa (on the one hand) or is either innocent or merely neglectful (on the other hand) is a material factor. Nowhere in the reasons provided by the DG is there any indication that the DG, or his officials, pursued or attempted to investigate the first applicant's explanation that Aksu had perpetrated the fraud and that the officials of the Department may have been involved. Nor is there any indication that they attempted to ascertain the circumstances surrounding the provisional withdrawal of the charges or the likelihood that these charges would be reinstated. The applicant provided all the evidence at her disposal relating to her interactions with Aksu. It is difficult to ascertain what more she could, or should, have done”.²⁹

[31] In *Najjemba*, the applicant was a Ugandan national who had paid an immigration specialist to assist her in applying for a work visa. Like AK and Mr Lu, it later turned out that the visa was fraudulent and she was declared a prohibited person. The Court reviewed and set aside the decision on a similar basis in that there was no evidence of the Minister considering all the relevant factors. The Court said:

“To the extent that the Minister intended to include in his reasoning those reasons contained in the letter from the DG as his reasons for rejecting the applicant's prohibition, in my view, the reasons of the DG do not contain anything more significant at all. The only additional reason seems to be that the DG concluded that the applicant claimed that she had employed the services of an immigration agent to obtain a work visa with no substantial evidence. The applicant provided all the evidence at her disposal, including various communications with Masondo. It is difficult to ascertain what more the applicant should have done.

²⁸ Id at para 49.

²⁹ It at para 30.

The justifications provided and contained in both letters from the DG and the Minister respectively, which in my view were inadequate as required by law, focuses only on the alleged transgression of section 29(1)(f) of the Act and ignore the other pertinent reasons put forth by the applicant as to why her prohibition should be lifted. I agree with counsel for the applicant that section 29(2) is broader than a mere internal appeal of a previous (the DG's or the Department's) decision. It empowers the Minister, to lift a declaration of prohibition "for good cause". Section 29(2) therefore requires the consideration of a different question to that of section 29(1)(f)."³⁰

[32] The Court went on to state that:

"The Minister was not called to consider whether the applicant obtained a fraudulent visa, but rather whether good cause exists why her prohibition should be lifted. For this consideration, I cannot see how the Minister could have applied his mind properly to the question before him without the missing documents as listed above. The applicant relies, amongst other, on the contents of the missing documents in her case for the liftment of her prohibition. For this reason alone, the Minister's decision should be set aside."

[33] In the matter *in casu*, the parallels are indeed striking with the decisions in *AK* and *Najjemba*. This as the Minister did not show what considerations he took into account, and his reasons merely mirror those of the DG that fraud occurred, and that is the end of the matter. The requirement to show good cause is self-standing and the Minister must go beyond the allegation of fraud by independently considering whether the reasons provided by a person seeking an upliftment of their status as prohibited, show enough good cause for that to happen.

[34] The conclusion to be drawn from all this is that the review should be granted and the Minister's decision set aside. To counter this conclusion, the respondents take the view that the applicant is approaching this court with "unclean hands" and therefore should not be allowed to approach this Court in the first place. The unclean hands doctrine is a subset of the abuse of court principle and it effectively means that the Courts cannot be used by persons who seek to advance a dishonest or *mala fide* cause. The respondents accuse the applicant of fraud, and in the context of immigration, a serious problem in this country that cannot be tolerated by our Courts. In *Lazarus Estates Ltd v Beasley*,³¹ Lord Denning said of fraud:

³⁰ *Najjemba* above n 27 at paras 39-40.

³¹ [1956] 1 All ER 341.

“Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.”³²

[35] It cannot be said that the Department has proven fraud. As things stand, all they have said is that they have no records of the applicant entering the country in 1998, applying for and being granted a permanent resident visa. Indeed, this may very well be a result of fraud committed by Ms Lai alone, Ms Lai with the applicant or poor record keeping by the Department. In the absence of an investigation, this Court cannot accept the mere say-so of the respondents. To bar a litigant on the basis of the unclean hands doctrine places an onus on the party alleging to prove the underlying reason for the unclean hands. The respondents have hardly made out a case why this Court should limit the applicant’s right of access to Court. This is because they cannot say that because the applicant committed fraud, he has failed to show good cause why his prohibited status must not be uplifted because he committed fraud. As stated in *Najjemba*, the Minister must consider factors other than the underlying reason for declaring a person prohibited in determining whether good cause has been shown.

[36] From all the above, the doctrine of unclean hands does not apply in this instance and the Minister’s decision stands to be reviewed and set aside.

Just and equitable relief

[37] The applicant has sought that the matter be remitted back to the Minister for him to supplement or provide additional reasons for his decision. I am not convinced that this will be appropriate in the circumstances of this case. I agree that the appropriate relief is for the matter to be remitted, but I am of the view that the Minister must consider the appeal afresh, including the following aspects:

- 37.1. The reliability of the Department’s record keeping system and methods, in particular, whether there is a chance that an application could have been made but not show up in their system;

³² Id at 345.

- 37.2. Whether, according to their records, any other person was assisted by Ms Lai, and her legitimacy as an immigration agent;
- 37.3. The prevalence of “ghost agents” and whether this is a tactic used by unscrupulous persons when they are caught with fake documents;
- 37.4. Whether any investigation has been made into Mr Lu’s plea of being an innocent victim and;
- 37.5. What will happen to Mr Lu’s minor child, should his prohibited person status be upheld; and
- 37.6. The relevance of Mr Lu being a law-abiding citizen who contributes to his community through his non-profit organisation.

[38] I in no way intend to fetter the Ministers discretion as to what is and is not relevant, however, I find it hard to see how he can come to a rational decision without taking into consideration any of the above factors. He of course, is not limited to only these factors and will be in a better position than this Court to decide what factors will be relevant in reaching his decision.

Costs

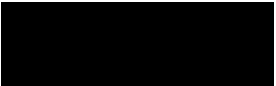
[39] The applicant was successful and there is no reason that costs should not follow the result.

[40] In the result the following order is made:

Order

1. The review application succeeds.
2. The decision by the first respondent to refuse to uplift the applicant’s status as a prohibited person is reviewed and set aside.
3. The matter is remitted to the first respondent to consider the appeal afresh.
4. Within 30 days of service of this Court order, the first respondent must provide the applicant with an outcome of his appeal, along with the reasons containing all the factors he considered.

5. The first and second respondents are ordered to pay the costs of this review including those of counsel, with the one paying the other to be absolved, on scale A.



D MLAMBO
Judge President
Gauteng Division of the High Court

Date of hearing: 21 January 2025
Date of judgment: 26 February 2025

Appearances

For the Applicant: V Mabuza
instructed by MVB Attorneys

For the Respondents: F Mzilikazi
instructed by Office of the State Attorney, Pretoria