

The Constraints of Securing Permanent Residence in South Africa through a Citizen Child

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1 INTRODUCTION

Ulric Huber in 1686 described ‘The Perfect Household’ as either perfect or imperfect, with perfect meaning that there would be a mother, father, child or children and if any of these elements were lacking it would be classified as an imperfect household.¹ Huber further explained that a household deficient of a parent would constitute the greatest imperfection in a household.²

The current concept of a family is significantly different from Huber’s description. Society and the law now recognise a different type of household and its participants. In *Minister of Home Affairs v Fourie with Doctors for Life International, John Jackson Smith and Marriage Alliance of South Africa*³ the Constitutional Court decided that the common law definition of marriage and the Marriage Act⁴ were unconstitutionally discriminatory and should include same-sex marriages.⁵ Judge O’Regan has emphasised that families present themselves in many forms, which translates into the definition of “family” requiring transformation due to external factors such as social practices and traditions.⁶ A simple construction or understanding of a

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¹ Huber *Heedendaegsche Rechtsgeleerdheyt* (translated as *Jurisprudence of My Time*) 1.9.4-13.

² *Ibid.*

³ 2006 1 SA 524 (CC).

⁴ Act 25 of 1961.

⁵ For example, in South Africa due to our rich heritage and unfortunate economic circumstances we have many single parent households, polygamous families, unmarried households as well as child-headed households, to mention a few. *Minister of Home Affairs v Fourie with Doctors for Life International, John Jackson Smith and Marriage Alliance of South Africa* 2006 1 SA 524 (CC).

⁶ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC).

family can be stated as including spouses of a valid marriage or union and children born thereof. However, the situation is much more complicated today.

The South African Constitution⁷ provides protection for the right to family life in terms of section 15,⁸ which is coupled with the right to inherent dignity⁹ and children's right to family care under section 28(1)(b). Although not expressly provided, the right to family life was confirmed in *Chairperson of the National Assembly, Ex Parte: In Re Certification of the Constitution of the Republic of South Africa*.¹⁰ The Universal Declaration of Human Rights of 1948 clearly states that everyone has a right to nationality and this protection is afforded when citizenship is granted and as such, a person without it can face discrimination and marginalisation, which should be avoided as far as reasonably possible. International instruments such as the International Covenant on Civil and Political Rights¹¹ as well as the African Charter on Human and People's Rights¹² further expressly state that 'family' is entitled to protection by the state and society.¹³

A report by the Public Protector of South Africa¹⁴ identified the failure of the Department of Home Affairs to register a child born in South Africa and her mother, a 21-year-old female who was from Lesotho who had been in South Africa since 1998. The complainant, Mpho Mahanetsa, knew nothing about her own mother or any relatives since she was abandoned by her uncle in South Africa. She gave birth to her child in 2008 and they were both ill. Government services could not offer assistance, as they had no identification. The Public Protector was approached with this matter and found failure by the Department of Home Affairs to register the Complainant's child under the Births and Deaths Registration Act.¹⁵ This also amounted to a violation of section 28 of the Constitution. Further, it was noted that minimal investigation was done with regards to an allegation that the child's father may be South African; that the child had no citizenship in any country and therefore it was the duty of

⁷ Constitution of the RSA, 1996.

⁸ Freedom of religion, belief and opinion.

⁹ Section 10 of the Constitution.

¹⁰ 1996 4 SA 744 (CC).

¹¹ Article 23 of the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976 (1967) 6 ILM 368).

¹² Article 18 of The African Charter on Human and Peoples' Rights (concluded on June 27 1981, entered into force on 21 October 1986 (1982) 21 ILM 58).

¹³ Article 7 of the Convention on the Rights of Children, provides that no child should be stateless. *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC).

¹⁴ Report Number 38 of 2011.

¹⁵ Act 51 of 1992.

the Department to ensure that the matter was investigated to assist the child with obtaining citizenship.

The view of the Department of Home Affairs was that the complainant and the child were to be deported to Lesotho without considering that there too the child would have no nationality and a registered name, which amounts to a violation of Section 28(c) of the Constitution. Pursuant to section 182(1)(b) of the Constitution, the Public Protector concluded that the remedial actions to be taken by the Department were as follows:

1. The Department was to apologise to the Complainant;
2. The Department was to assist in making a late application for the Complainant with regard to the registration of her baby within 30 days of the date of the report;
3. The Immigration Unit was to assist the Complainant in registration of a Certificate of naturalisation within 30 days of date of the report;
4. The Director General of the Department was to consider both applications as a matter of urgency as soon as they reach an office of the Department of Home Affairs; and
5. The Director General of Home Affairs to report to the Public Protector within 60 days from the date of the report.¹⁶

The Department of Home Affairs was additionally required to consult the Department of Health, other stakeholders, and utilise the Prevention and Combating of Trafficking in Persons Act¹⁷ and the South African Amendment of Citizenship Act¹⁸ to formulate a policy and service level agreement that will assist in the early detection and resolution of similar cases.¹⁹

The right to a ‘protected family’ and the rights of a citizen child and of a parent have unfortunately been infringed due to the constraints in obtaining permanent residence and subsequently citizenship based on a citizen child, which infringements and constraints will be explored hereunder.

¹⁶ “Public Protector of South Africa Report No. 38 of 2011” <http://citizenshiprightsafrika.org/public-protector-of-south-africa-report-no-38-of-2011/> (accessed 03-03-2016). See also “Childhood Statelessness in South Africa” http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf (accessed 03-03-2016).

¹⁷ Act 7 of 2013.

¹⁸ Act 17 of 2010.

¹⁹ “Public Protector of South Africa Report No. 38 of 2011” <http://citizenshiprightsafrika.org/public-protector-of-south-africa-report-no-38-of-2011/> (accessed 03-03-2016); and “Childhood Statelessness in South Africa” http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf (accessed 03-03-2016).

Recent visa regulations and registration of foreign nationals as citizens in South Africa have come under intense scrutiny by public, private and foreign parties.²⁰ Social media has been inundated with complaints and criticisms regarding the process of obtaining permanent residence in South Africa.²¹ Complaints largely appear to be directed at the Department of Home Affairs and the Immigration Act²² (“the Act”), particularly section 27 thereof.

2 ACQUIRING PERMANENT RESIDENCE IN SOUTH AFRICA THROUGH A CITIZEN CHILD

Citizenship can be defined as “the state of being vested with the rights, privileges, and duties of a citizen”.²³ South African citizenship can, subject to the provisions of the South African Citizenship Act,²⁴ be “acquired by birth, descent, naturalisation and previously also by registration in specific instances”.²⁵ Obtaining citizenship in South Africa involves a three-stage process. These stages may be classified as follows: temporary residence, permanent residence and finally citizenship. However, an alternate process is possible in certain circumstances. An example of an alternative process is if a financially independent visa is granted and this results in an automatic granting of permanent residence status.²⁶ It is therefore evident that in order to apply for South African citizenship one must first acquire a permit for permanent residence as a gateway to citizenship.²⁷

²⁰ *Minister of Home Affairs v DGL* (1051/2015 SCA) unreported case.

²¹ Facebook post Ms B Steffen 27 November 2015 www.facebook.co.za/Bridgett_Steffen (accessed 28-11-2015).

²² Act 13 of 2002.

²³ Dictionary.com <http://www.dictionary.com/browse/citizenship> (accessed 03-03-2016).

²⁴ Act 88 of 1995.

²⁵ Department of Home Affairs “Citizenship” <http://www.dha.gov.za/index.php/civic-services/citizenship> (accessed 03-03-2016).

²⁶ Section 25(2) and Section 27(f) of the Immigration Act 13 of 2002.

²⁷ South African Citizenship Act 88 of 1995. Section 5 of the South African Citizenship Act includes the following provisions: “You have a valid permanent residence permit or exemption; as a permanent residency permit holder you have had one year’s ordinary residence in the Republic of South Africa immediately prior to the application for naturalisation; after you acquired permanent residency you have had an additional 4 years of physical (actual) residence in the RSA during the eight years before the application for naturalisation (excluding the year of ordinary residence). Time spent in detention or residence subject to a condition do not count as ordinary or actual residence; or you are married to a South African spouse, and you have had two years of permanent residence and two years of marriage to the South African spouse immediately prior to the application but after you acquired permanent residence status; intend to continue to reside in the Republic or fall within the further categories specified in section 5(1)(e); you are of good and sound character; you are able to communicate satisfactorily in any one of the official languages of South Africa; you have adequate knowledge of the duties and responsibilities of a South African citizen”.

Section 5 of the Citizenship Act²⁸ appears to indicate that if you can prove that you have complied with the requirements and you have resided in South Africa for the mandatory 5 (five) year period then obtaining South African citizenship by way of naturalization is achievable. However, this is not necessarily the case. The minister can refuse the application for citizenship even if it appears that all the conditions have been fulfilled. The obtaining of citizenship is viewed as a privilege and not a right. Therefore, one's application for citizenship hinges on whether the applicant has acquired permanent residence as only thereafter can the naturalization process occur. Therefore, the process of acquiring permanent residence is fundamental and indeed the gateway to acquiring citizenship by way of naturalization.

3 RESIDENCY CONTROLLING LEGISLATION

In 2011 the Act was amended by the Immigration Amendment Act.²⁹ Three years later, the Amendment Act (with its regulations) was promulgated on 22 May 2014, being published in the Government Gazette.³⁰ The revised Immigration Regulations (hereinafter referred to as "the Regulations") came into effect on 26 May 2014 some four (4) days after publication. The new laws and regulations governing those entering South Africa have not changed the entire South African immigration landscape. However, in their implementation by the Department of Home Affairs, the new laws and regulations have caused confusion and sometimes devastation for both private persons and the business sector alike, even infringing upon the right to a 'protected family' and a citizen child's rights. It is arguable whether the amendments have resulted in improvements to South African legislation.³¹ However, the implementation by way of short notice of these new laws is the cause of complaints and challenges faced by many immigrants.³² There were a number of amendments made to the South African

²⁸ South African Citizenship Act 88 of 1995.

²⁹ Act 13 of 2011 (hereinafter referred to as "the Amendment Act").

³⁰ Government Notice 690 in Government Gazette 34561 dated 26 August 2011. Regulation Gazette No. 10199 Volume 587 Pretoria, 22 May 2014 Number 37679.

³¹ The following are considered to be positive amendments to the immigration legislation: Tightening of regulations related to Relatives Visas to prevent the common situation of people entering South Africa on a visitor's visa and quickly finding a willing South African to be their "life partner"; regulation of Immigration practitioners' fees as some practitioners were well known for charging fees without competently providing services or providing them at all; the definition of the word 'spouse' was expanded to now encompass all types of permanent relationships, whether they be marriages, life partnerships, etc. Visitors visas permit work for a foreign employer on a contract, which requires the conducting of certain work activities in South Africa, including among others teachers at international schools and entertainment industry professionals such as film and advertisement producers.

³² The methods of implementation are the main cause for the cries of "unconstitutionality" and large-scale disappointment from various immigration lawyers across the country. The point to reiterate is that while the laws are an improvement overall, the execution and timing could almost not have been shoddier. Any regulations signed in Parliament and then effective only two working days later, allowed no-one the opportunity to attempt to comply, and many unsuspecting individuals accordingly fell victim to the situations

immigration landscape brought about by the Amendment Act, however this paper deals primarily with section 27(g) of the Act³³ which states that “the Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who (g) is the relative of a citizen or permanent resident within the first step of kinship”.³⁴

whereby they are now banned from South Africa, forced to leave their employment, homes, spouses and children. The new Minister of Home Affairs, Malusi Gigaba, was sworn in only two days after his predecessor, Naledi Pandor, signed the new regulations into effect.

³³ Some of the fundamental changes are the following:

Terminology

All permits are now called visas with the exception of the Permanent Residence Permit. In addition, the word spouse is now meant to encompass all types of permanent relationships, whether they be marriages, life partnerships, etc.

Applying for a visa or permit

Applications to be made only through a Visa Facilitation Services Centre (by appointment only) in South Africa.

Relatives Visas

The main changes appear to align the relative visa with the new definition of spouse as indicated under terminology above. Accompanying Life Partner and Spousal visas: The regulations propose that the parties to a spousal relationship must have cohabited for a period of two years before they qualify to apply for a visa or permit. The foreign spouse of a temporary work visa holder who wants to work in South Africa can now work for a foreign employer pursuant to a contract that partially requires conducting of certain activities in South Africa. Spouses and life partners must be able to prove a relationship of at least two years when applying for a visa. Benefits for spouses and dependents are that, for example, accompanying family members can apply for temporary residence accompanying spouse visas, accompanying parent visas and study visas. This is in addition to spouses being able to forego the normal requirements to be able to conduct business, work or study in the Republic.

Work Visas

There are now four main work visa types: a general work visa, an intra-company visa, commonly used by multinationals to rotate management around the world, a corporate visa, typically used to import specialised skills for large infrastructure projects as well as unskilled migrant labour, a critical skills visa, in which foreigners with designated skills sets will be able to enter SA regardless of an employment offer and visas for short-term contractors in the fields of entertainment, journalism and film production. Under the new regulations, applicants for general work visas will be required to obtain certification from the department of labour, stating among other things that their salary and benefits are commensurate with those paid to South African citizens in similar positions. The labour department would also have to take steps to confirm that the employer is registered with the Commission on Intellectual Property and Companies. General Work Visa: While it is widely appreciated that this visa type still exists it will become even more tedious and will take much more time to apply for than before. The new regulations now require not only a South African Qualification Authority (SAQA) evaluation for every applicant’s qualifications, even for those without qualifications. The Department of Labour is now required to issue a certificate confirming that despite a proper search, the applicant’s employer was unable to find a South African citizen or permanent resident with qualifications and skills or experience equivalent to those of the applicant. In addition, the salary and qualifications of the applicant are taken into account, as well as checking that the employment contract adheres to labour law standards in SA. Exceptional Skills and Quota Work Permits/Visas both do not exist anymore and have been replaced by the Critical Skills Visa. This visa is based on the General Work Visa with identical requirements, but requires in addition proof of application for a certificate of registration with such body. There are no repatriation fees payable anymore.

³⁴ Section 27 states: “(a) has received an offer for permanent employment, provided that-

- (i) such foreigner has proven to the satisfaction of the Director-General that the position exists and that the position and related job description was advertised in the prescribed form and no suitably qualified citizen or permanent resident was available to fill it;
- (ii) the application falls within the specific professional category or within the specific occupational class contemplated in section 19(1); and
- (iii) the permit may be extended to such foreigner's spouse and children younger than 18 years of age;

The elements to be proven by the applicant in terms of section 27 of the Act do not appear too onerous. However, the Director-General gives the impression that he has an overarching discretion, originating in the phrase “to the satisfaction of the Director-General”, which phrase is repeated throughout section 27 of the Act.³⁵ In correspondence addressed to those who have applied for permanent residence and subsequent appeals thereto, the prevailing reason furnished by the Director-General for rejection of such application/s was that the applicant has not satisfied the Director-General.³⁶

4 CONSTITUTIONALITY OF SECTION 27 (g) OF THE ACT

Section 27(g) of the Act pertaining to permanent residence is perhaps one of the most controversial sections in the new immigration regime and has been the cause of much tumult. Many foreign nationals have cried foul at the new formulation of the Section, which now restricts the granting of permanent residence under this category to applicants who are members of the immediate family, within the first step of kinship, of South African citizens or permanent residents who are able to support the foreign relative financially.³⁷ Practically, this section does not allow for applicants with minor children to apply for permanent residence anymore

(b) taking into account any prescribed requirement, has demonstrated to the satisfaction of the Director-General that he or she possesses extraordinary skills or qualifications, and to those members of such foreigner's immediate family determined by the Director-General under the circumstances or as may be prescribed;

(c) intends to establish or has established a business in the Republic, as contemplated in section 15, and investing in it or in an established business, as contemplated in section 15, the prescribed financial contribution to be part of the intended book value, and to the members of such foreigner's immediate family: Provided that-

(i) the Director-General may waive or reduce such financial or capital contribution for businesses prescribed to be in the national interest or when so requested by the Department of Trade and Industry; and
(ii) the permanent residence permit shall lapse if the holder fails to prove within two years of the issuance of the permanent residence permit and three years thereafter, to the satisfaction of the Director-General, that the prescribed financial contribution to be part of the intended book value is still invested as contemplated in this paragraph;

(d) is a refugee referred to in section 27(c) of the Refugees Act No. 130 of 1998, subject to any prescribed requirement;

(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she-

(i) has the right to a pension or an irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life; or

(ii) has a minimum prescribed net worth;

(f) has proven to the satisfaction of the Director-General that he or she has a prescribed minimum net worth and has paid a prescribed amount to the Director-General; or the Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who-

(g) is the relative of a citizen or permanent resident within the first step of kinship”.

³⁵ Section 27(a)(i), 27(b), 27(c)(ii), 27(e) and 27(f) of the Act.

³⁶ The problem statement can be gleaned from the following scenario: *A* marries *B*. *A* is a foreign national and *B* is a South African Citizen. The parties marry in South Africa and register their marriage accordingly. The parties then have a child, *C*. *C* is regarded as a citizen of South Africa. *A*, for all purposes, is a permanent resident of South Africa, unless shown otherwise. *A* still remains a foreign national. *A* must await confirmation from the Director-General if *A* has applied. *A* has been living in South Africa for more than 5 (five) years.

³⁷ Section 27(g) of Act 13 of 2002.

until these children are able to support them financially. Surely, this interpretation cannot be the intention of the Legislator in that its constitutionality is questionable.

Based on the aforementioned construction, the rights of children, specifically in terms of section 28 (1)(b) of the Constitution would be infringed. Section 28(1)(b) states that “every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment”. Section 28(2) of the Constitution also provides that a child’s best interests are of paramount importance in every matter concerning the child. These provisions are also contained in the Children’s Act,³⁸ sections 7, 8 and 9 respectively. It is difficult to argue against the school of thought that holds that denying citizenship to parents of South African citizen children is not in the best interests of the child and arguably is a direct violation of their rights in terms of section 28 of the Constitution and section 7 of the Children’s Act.³⁹ This view is reinforced by the fact that the temporary residence equivalent of the relative’s permanent residence in section 18 of the Act⁴⁰ does not allow the holder to engage in work or obtain gainful employment. This means that a parent, while exempt from the financial assurance requirement above, may lawfully reside in the republic but cannot earn a living in order to support her/his citizen child. Therefore, the seemingly viable route is to apply for permanent residence, then secure employment, and thereafter satisfy the common law parental duty of support. However, this school of thought does not withstand legal scrutiny.

The right that is limited is not necessarily only the child’s right/s but also the parent’s right to apply for permanent residence. Whether the right of the parent to obtain permanent residence exists is doubtful given that it arises by operation of law. But, if for the moment, we accept that the child’s right has been limited directly by section 27(g) of the Act, we are then required to ascertain whether such limitation is in line with the principles of the limitation clause in section 36 of the Constitution,⁴¹ namely, whether the limitation of section 28 of the Constitution is

³⁸ Act 38 of 2005.

³⁹ *Ibid.*

⁴⁰ Section 18 provides as follows: “Relative’s visa (1) [a] relative’s visa may be issued for the prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance. (2) The holder of a relative’s visa may not conduct work”.

⁴¹ Section 36 of the Constitution - Limitation of rights provides: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less

limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.

The State is without a doubt entitled to regulate who enters and remains in the Republic and more so the procedure for obtaining permanent residence and subsequently citizenship. Government may accordingly have a legitimate purpose for requiring that the applicant satisfy further requirements in addition to being a parent to a South African citizen child before obtaining permanent residence. Other jurisdictions regulate this requirement by imposing additional requirements in the form of an age limit and additional financial requirements.⁴² In the United States, for example, the citizen child must be 21 (twenty-one) years old before s/he may petition to bring her/his parent/s permanently to the republic.⁴³ Therefore, the current situation in South Africa is not unique to South Africa but is in line with international standards. What is significant, however, is that when foreign national parents gain temporary residency in the United States through their minor child, they are entitled to obtain gainful employment.⁴⁴ This is significantly different from the situation in South Africa. The argument advanced by protagonists who disapprove of the current formulation of the provisions pertaining to the permanent residence relatives' category is that, if you can gain temporary residence for as long as the relative is alive, you should at least be permitted to obtain gainful employment. Perhaps what appears to be unconstitutional is the limitation on the right to obtain gainful employment by a foreign national parent on a relative's temporary residence visa.

Parents have a responsibility to provide for their children and children have a right to family life, which includes the right to support; accordingly the unjustifiable or unreasonable limitation of that right is certainly unconstitutional.⁴⁵ A similar argument was proposed in motivating the right to obtain gainful employment for spouses due to the common law duty of

restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

⁴² Section 201(a)-(b) of the Immigration and Nationality Act of 1965; McCarran Walter bill of 1952, Public Law No. 82-414.

⁴³ *Ibid.* US Citizenship and Immigration Services "Bringing Parents to live in the United States as Permanent Residents" <https://www.uscis.gov/family/family-us-citizens/parents/bringing-parents-live-united-states-permanent-residents> (accessed 22-10-2016).

⁴⁴ US Citizenship and Immigration Services <https://www.uscis.gov/i-687> (accessed 22-10-2016).

⁴⁵ Section 36 of the Constitution.

support that exists between spouses.⁴⁶ This was the basis for the amendment of the Act that gave rise to section 11(6) of the Act,⁴⁷ which allows spouses to engage in work, study or run their own businesses. Spouses are included in the definition of ‘relative’ contained in the Act and it is conceivable that the same rights can be extended to foreign parents of a citizen child. There is no foreseeable prejudice to Government in adopting such a position in processing applications for the relative visa. The Amendment Act has yet to be subjected to constitutional scrutiny. Section 26 of the Act deals with direct residence and this section states that:

“The Director-General may issue a permanent residence permit to a foreigner who-

- (a) has been the holder of a work visa in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;
- (b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death;
- (c) is a child under the age of 21 of a citizen or permanent resident, provided that such visa shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having turned 18 years of age; or
- (d) is a child of a citizen.”

5 CONCLUSION

Undoubtedly, it could not have been the intention of the South African Department of Home Affairs and by inference, the State, to disrupt the nature of a family. The ability of the said Department to implement tough new immigration regulations is questionable. The new regulations could affect businesses considering new employees with critical skills, which they cannot locate locally and could further frustrate highly skilled foreigners seeking to live and work in South Africa lawfully. This may increase the number of fraudulent applications by applicants to the Department of Home Affairs in an endeavour to secure the safety and longevity of their family or to satisfy their desperation for employment. Furthermore, the power and unfettered discretion of the Director-General is problematic in that this power and

⁴⁶ Strategies Migration Services South Africa “Is section 27(g) South African Permanent Residence- Relatives Category Unconstitutional?” <http://www.immigrationspecialists.co.za/is-section-27-g-south-african-permanent-residence-relatives-category-unconstitutional/> (accessed 24-01-2016).

⁴⁷ Immigration Act 13 of 2002 Section 11(6) – “Visitor’s Visa: Notwithstanding the provisions of this section, a visitor’s visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22: Provided that- (a) such visa shall only be valid while the good faith spousal relationship exists; (b) on application, the holder of such visa may be authorised to perform any of the activities provided for in the visas contemplated in sections 13 to 22; and (c) the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa”.

discretion has not been clearly defined within either the Act⁴⁸ or the Citizenship Act.⁴⁹ The reasons espoused by the Director General in relation to the utilisation of this power and unfettered discretion are generally vague and uncertain. Utilising the power and discretion requires justification, especially in relation to parents who meet and even surpass the criteria for permanent residence but are denied it. It is proposed that an amendment to the current legislation regarding the unfettered discretion and powers of the Director General is required. The proposed amendment must include a list of reasonable justifications upon which the Director General can rely when utilizing his power and discretion in refusing permanent residence, especially after all the required measures have been met. The use of well-articulated and sound reasons will assist in decreasing the unnecessary court actions and cost orders granted against the Department of Home Affairs.

Finally, it is proposed that if either parent is a foreign national and has a child, proven to be theirs, then the Department of Home Affairs should issue them with 'Immediate Relative Status', a status and procedure similar to that employed in the United States. This would allow the parent in such a position to work and live in South Africa whilst the process for obtaining permanent residence is ongoing, thereby protecting and ensuring the best interests of the child and family in alignment with the paramountcy principle.

⁴⁸ Immigration Act 13 of 2002.

⁴⁹ Act 88 of 1995.