REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 15279/2021

In the matter between:

Z[....] H[....]	First applicant
M[....]1 M[....]2 J[....]	Second applicant
Z[....] H[....] and M[....]1 M[....]2 J[....] (in their capacities as guardians of **T[....] Z[....] H[....])**	Third applicant
Z[....] H[....] and M[....]1 M[....]2 J[....] (in their capacities as guardians of **A[....] H[....]**)	Fourth applicant
Z[....] H[....] and M[....]1 M[....]2 J[....] (in their capacities as guardians of **S[....] H[....]**)	Fifth applicant

and

THE MINISTER OF HOME AFFAIRS	First respondent
THE DIRECTOR-GENERAL, HOME AFFAIRS	Second respondent

JUDGMENT DELIVERED ON 20 JULY 2022

VAN ZYL AJ:

Introduction

1. The first applicant is a Bangladeshi national who has resided in South Africa, in Cape Town, since 2009. The second applicant is the first applicant's wife, who resides with him. She was also born in Bangladesh, and they were married in 2003. The first and second applicants (as the third to fifth applicants) represent their children, who are respectively 15, 10 and 6 years old.

2. This is an application for the judicial review of decisions taken by the first respondent ("the Minister") and the second respondent ("the DG"), as well as ancillary relief. The applicants seek, *inter alia*:

2.1 Condonation of the delay in instituting this application and the failure to exhaust internal remedies, pursuant to section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

2.2 A declaration that the first applicant is not a prohibited person in terms of section 29(1) of the Immigration Act 13 of 2002 ("the Immigration Act");

2.3 The judicial review and setting aside of the decisions taken by the Minister and the DG in rejecting the first to fourth applicants' applications for permanent residence permits on various grounds available under section 6 of PAJA; and

2.4 Substitution of the impugned decisions under section 8 of PAJA.

3. Contempt relief that had been sought against the respondents in paragraphs 1 and 2 of the notice of motion has been abandoned because the DG complied, after the launch of this application, with the court order (dated 29 April 2021) upon which that relief was based.

4. The respondents delivered a supplementary answering affidavit in the matter and sought condonation of the late delivery thereof. I granted condonation, which was not opposed by the applicants.

5. The aspects of delay and the failure to exhaust internal remedies are important in that this Court cannot determine the merits of the review application unless condonation has been granted these respects, where necessary (*Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) at para [26]). I propose, however, to discuss these aspects at the end of this judgment simply because the history and background in relation to the merits of the application also inform the question of whether condonation should be granted.

The Minister did not deliver an affidavit

6. It is regrettable that the Minister, as the party (or one of the parties) ultimately responsible for the making of the impugned decisions, did not deem it necessary to deliver an affidavit – even a confirmatory affidavit – in these proceedings. In a prior review application ("the first review application") against the respondents instituted by the applicants in September 2019 under case number 17215/2019 (in respect of a decision not now in issue), the Court also remarked upon the fact that the decision-maker had failed to depose to an affidavit (at para [28] of the judgment: *Hoque and others v Minister of Home Affairs and others*, unreported, case number 17215/2019, 8 July 2020, the Honourable Justice Parker presiding).

7. The DG did deliver an answering affidavit.

8. The answering affidavits in the present matter were (apart from the DG's affidavit) deposed to by officials within the Department of Home Affairs ("the Department"). They do not, however, have personal knowledge as to why the Minister took the impugned decisions. The Court can therefore only take into account those portions of the affidavits in which they refer to matters within their own knowledge, because, insofar as they impute any intention to the Minister, this is hearsay and inadmissible (see *Gerhardt v The State President and others* 1989 (2) SA 499 (T) at 504F-H; *Competition Commission v Wilmar Continental Edible Oils and Fats (Pty) Ltd* [2018] 3 All SA 517 (KZP) at para [40]).

9. Be that as it may, the respondents did little effectively to deny the applicants'

allegations and it was not necessary for me to treat any of the respondents' allegations as inadmissible hearsay in the course of determining the dispute.

The impugned decisions

10. Section 26 of the Immigration Act provides as follows:

26 Direct residence

Subject to section 25 and any prescribed requirements, 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.

11. Section 26(a) is applicable to the first applicant; section 26(b) to the second applicant, and section 26(c) to their children (the third to fifth applicants).

12. This application turns on whether the Minister acted lawfully when he rejected the first applicant's application for a permanent residence permit on 3 October 2019. The applicants argue that the reasons given for the refusal are fall to be reviewed and set aside, and that the respondents have infringed the applicants' rights to lawful and reasonable administrative action.

Background

13. On 6 July 2009 the first applicant was issued a general work permit by the Department in terms of section 19(2) of the Immigration Act. The permit was extended on one occasion, in 2014. On 21 July 2017 (some eight years after the first applicant's arrival in South Africa) the Department renewed the first applicant's general work permit, which expired on 30 May 2019.

14. Since his arrival in the Republic, and after he had been issued with the general work permit, the first applicant has been permanently employed at an eatery as a manager and accountant.

15. On 28 May 2019 the first applicant applied for a critical skills visa in terms of section 19(4) of the Immigration Act. At the same time, the first applicant's family made application for visitor's visas in terms of section 11(1)(b)(iv) of the Immigration Act so that they could remain with him.

16. The applicant's application for a critical skills visa, as well as his family's applications for visitor's visas, was initially declined but, following the successful first review application before the Honourable Justice Parker (to which I have referred earlier), the visas were eventually granted. Of note is that, previously, on 12 November 2019 Justice Parker granted an order by agreement between the parties that the first applicant and his family would be allowed to remain in South Africa pending the final outcome of the application.

17. During January 2020 and February 2020 the applicants were forced to launch contempt applications on two occasions to compel the respondents to comply with the agreed order. Two further contempt application were required during February 2021 and April 2021 respectively so as to jolt the respondents into giving effect to Justice Parker's judgment (delivered on 8 July 2020). As a result of these applications, the first applicant's critical skills visa was issued on 29 April 2021. He collected it on 7 May 2021.

18. His family's visitor's visas had not been issued by the time that this review application was instituted, despite the fact that is it was accepted by the respondents in the course of the first review application that, if the first applicant was entitled to a

critical skills visa, his family would axiomatically be entitled to visitor's visas. It appears from the respondents' answering affidavit that those visas were finally issued in, respectively, October and December 2021.

19. In any event, previously, during 2015, the first applicant applied for a permanent residence permit in terms of section 26(a) of the Immigration Act. His wife, the second applicant, applied for a permit in terms of section 26(b) on the basis that she had been married to him for more than five years. Two of the minor children, the third and fourth applicants, applied for permits in terms of section 26(c) on the basis that they were of minority age. The third child, the fifth respondent, did not apply with the other family members for permanent residence.

20. The applications were submitted to the Department on 31 August 2015 by the applicants' attorney. It is common cause on the papers in these proceedings that the permanent residence applications were, and are, fully compliant with the provisions of the Immigration Act.

The Department refuses the applications

21. The deputy director general of the Department rejected the first applicant's application for a permanent residence permit on 28 December 2015. Notably, the application was refused on the same basis later found by Justice Parker in the first review application not to have constituted lawful administrative action under PAJA in relation to the critical skills visa application.

22. The second applicant's application was also refused (effectively on the basis that the first applicant's application had been unsuccessful), but only two years later, on 30 November 2017. The children's applications were likewise refused, on 2 November 2017.

The appeal to the DG

23. Section 8(4) to (7) of the Immigration Act provides for two internal appeal remedies, as follows:

(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.

(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

(6) 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.

(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.

24. On 7 March 2017 the first applicant appealed the Department's decision to the DG in terms of section 8(4) of the Immigration Act. On 24 November 2017, more than a year and a half later, the DG rejected the appeal on the same basis as the Department's reason for the initial refusal thereof.

25. The second to fourth applicants did not lodge an appeal with the DG.

The appeals to the Minister

26. On 21 June 2018 the first to fourth applicants submitted appeals in terms of section 8(6) of the Immigration Act to the Minister.

27. The second to fourth applicants' appeals were seemingly treated as appeals in terms of section 8(4) of the Immigration Act (i.e., appeals to the DG, and not to the Minister) and were rejected on 9 February 2019 and 9 March 2019 respectively, prior to the taking of a decision in relation to the first applicant's appeal. They were rejected by the DG on the basis that the first applicant was not in possession of a permanent residence permit. This was despite the fact that, from the appeal documents sent to the Minister, it is clear that the appeals were all directed for the

Minister's attention. Logically, if the Minister upheld the appeal, then the family's appeals would also be successful.

28. On 11 October 2019 the first applicant was notified that the outcome of his appeal was available. In the Minister's letter (dated 3 October 2019) rejecting the first applicant's appeal, two reasons are given for the rejection:

28.1 Firstly, that a "*specific requirement of all categories of permanent residence, is a valid temporary resident visa. You are currently not in possession of a valid temporary residence visa, as a result of which you are illegally residing in the Republic*".

28.2 Secondly, that the first applicant had "*submitted a fraudulent temporary residence visa bearing control number [....]. In accordance with departmental records, the above-mentioned visa was not issued to you. This renders you a prohibited person in terms of Section 29(1)(f) of the Immigration Act. Section 49(15)(a)(ii) renders it an offence to use any fabricated or falsified document in order to enter, remain or depart from the Republic*".

29. The applicants submit that neither of these reasons is valid for the reasons discussed below. They refer, too, to the fact that in the course of the first review application the respondents never suggested that the first applicant had committed the offences alleged in the Minister's letter of 3 October 2019. The respondents have not disputed this averment in the present proceedings.

<u>The first reason</u>

30. As mentioned earlier, the first applicant's general work permit expired on 30 May 2019. Two days prior to the expiry of the work permit, the first applicant applied for a critical skills visa for a period of five years, and his family applied for visitor's visas. That application was only finally determined when the Minister rejected the applicants' appeals, which occurred on 21 August 2019.

31. On 30 September 2019 the applicants launched the first review application,

which, as stated above, was successful. Upon remittal to the respondents the first applicant was eventually granted the critical skills visa on 29 April 2021.

32. The Minister's decision to refuse the first applicant's permanent residence appeal on 3 October 2019 was therefore taken a few days after the first review application had been lodged, which application was eventually successful. If the first applicant was an illegal foreigner at that stage, it was as a result of the Minister's unlawful refusal of his critical skills visa appeal.

33. In the circumstances, the Minister acted irrationally and unreasonably insofar as he based his decision in the permanent residence appeal on the fact that the first applicant was not at that very stage in possession of a valid temporary residence visa. The Minister knew very well that there was a pending review application, and foreign nationals involved in pending legal proceedings regarding their immigration status are typically allowed to remain in South Africa until the conclusion of those proceedings. The applicant and his family's residence in South Africa at the time of the impugned decision was therefore not illegal. No attempt had been made to deport them at that stage.

<u>The second reason</u>

34. Section 29(1)(f) of the Immigration Act provides that anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document is a prohibited person and does not qualify for a port of entry visa, admission into South Africa, a visa or a permanent residence permit.

35. The phrase "found in possession" has a well-established meaning in South African law (see *S v Wilson* 1962 (2) SA 619 (A) at 624E-H; *R v Cassels* 1944 EDL 210 at 213):

35.1 The person concerned must be found by a person in authority, that is, someone authorised to demand production of the relevant item.

35.2 The possession must be current, and not historical.

35.3 The possession need not be physical, but the person must be exercising direct control over the item.

36. The respondents take issue in their heads of argument with the applicants' interpretation of the phrase "found in possession", but they do not provide any evidence upon which the Minister could have come to the conclusion that constituted this second reason for the refusal of the appeal. There is no evidence whatsoever on the papers that the first applicant had been found in possession of a fraudulent visa at any stage, whatever the interpretation of section 29(1)(f). The visa bearing control number [....] (the so-called fraudulent visa) had been issued to the first applicant in 2009 and expired on 25 June 2014. That visa had therefore expired at the time that the applicant and his family made their applications for permanent residence permits, and had expired many years before the date upon which the Minister made his impugned decision on 3 October 2019. The respondents do not contradict this evidence.

37. Even if this visa was in any way fraudulent, there is no evidence on record that the first applicant was found by a person authority to be in possession of such visa. In any event, the DG issued a critical skills work visa to the first applicant on 29 April 2021. If the first applicant had been found in possession of a fraudulent visa prior to the Minister's decision and was thus a prohibited person in terms of section 29(1)(f) of the Immigration Act, the DG would not have been entitled to issue this critical skills visa at all.

38. Incidentally, in the first review application the Honourable Justice Parker found (at para [30] of his judgment) that the first applicant had never been declared a prohibited person. The respondents acknowledged in the present application that the first applicant is not a prohibited person. In any event, there is no need for a declaration that a person is a prohibited person. The prohibition occurs *ex lege* if the facts concerning the relevant person fall within the ambit of the relevant provisions of the Immigration Act. On the facts available to me, the first applicant is not such a person.

Conclusion on the merits

39. In my view, the respondents failed to place sufficient evidence before this Court to justify the impugned decisions, and the review relief sought by the applicants must succeed.

40. There is nothing in the documents filed of record to substantiate the decisions taken by the Minister and the DG. The DG curiously states in his affidavit in answer to the applicants' allegations that "*the department relies on its records (sic) anything else that is not in the department's records is not the department's responsibility*". Much reliance is further placed on various alleged systemic problems within the Department which – so the respondents effectively state – render the Department unable properly to fulfil its duties.

41. The problem for the respondents is that this attitude does not assist the respondents in furthering their case. It follows that the two reasons given by the Minister was misconceived, and that the decision of 3 October 2019 falls to be reviewed and set aside on the following grounds:

41.1 Section 6(2)(d) of PAJA: The decision was materially influenced by an error of law insofar as the Minister found that the first applicant was illegally in the Republic.

41.2 Section 6(2)(e)(iii) of PAJA: The decision was taken because irrelevant considerations were taken into account, such as the first applicant's alleged "illegal status" in the Republic, and relevant considerations, including the circumstances which led to such "illegal" status, were not considered.

41.3 Section 6(2)(e)(vi) of PAJA: The decision was arbitrary and capricious as it was not based on the true facts, but on an apparent misconstruction of "departmental records" at the disposal of the Minister.

41.4 Section 6(2)(f)(ii)(cc) of PAJA: The decision was not rationally connected to the information that was before the Minister or available to him for consideration.

41.5 Section 6(2)(h): The decision is so unreasonable that no reasonable administrator could have taken such decision.

42. Even if only one of the reasons was ill-founded, that would be sufficient to warrant the setting the setting aside of his decision: in *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para [34] it was held that: "*Once the bad reasons played an appreciable or significant role in the outcome, it is in my view impossible to say that the reasons given provide a rational connection to it*."

43. Insofar as the DG's impugned decisions (on appeals in fact submitted to the Minister under section 8(6) of the Immigration Act) respectively dated 9 February 2019 and 19 March 2019 in relation to the second to fourth applicants' appeals were premised on the fact that the first applicant not having been in possession of a permanent residence permit, it follows that those decisions should also be set aside because the fate of the family's applications is inextricably linked to the outcome of this review application against the Minister's decision. This is common cause between the parties.

Should this Court substitute the Minister's decision?

44. Section 8(1)*(c)*(ii)*(aa)* of PAJA is to the effect that a court in proceedings for judicial review under PAJA may grant any order that is just and equitable, including orders setting aside the administrative action and substituting or varying it, instead of remitting the matter under s 8(1)*(c)*(i) for reconsideration by the original decision-maker. Exceptional circumstances must exist to justify substitution or variation. Section 172(1)*(b)* of the Constitution further grants a court the power to make any order that is just and equitable when deciding a constitutional matter.

45. The question arises whether the decisions should be substituted by this Court instead of being remitted to the respondents. The approach to be taken in determining whether a court may make a substitution order and effectively step into the shoes of the respondents has been dealt with in many cases, and was discussed by the Constitutional Court in the matter of *Trencon Construction (Pty) Ltd v*

Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC) at paras [47]-[54]:

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case.

…

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and 'it would merely be a waste of time to order the [administrator] to reconsider the matter'… in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.

[51] A court must consider other relevant factors, including delay. Delay can cut both ways. In some instances it may indicate the inappropriateness of a substitution order, especially where there is a drastic change of circumstances and a party is no longer in a position to meet the obligations arising from an order of substitution or where the needs of the administrator have fundamentally changed…

…

[54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those

instances bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.

46. The respondents' counsel urged me to remit the matter so as not to set a precedent for future litigation against the Department and not to allow the applicants effectively to treat the Court as the Department. This was essentially the gist of the answering affidavits, too. I should of course not, merely because I consider myself "as qualified to take the decision as the administrator" usurp the administrator's powers or functions (*University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131G).

47. Whilst it is correct that remittal is considered to be almost always the prudent and proper course, each matter must be obviously determined on its own merits, taking into account all of the relevant facts and circumstances. In some cases, fairness to the applicant may demand that the Court should take a different view (see *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A), where it was held that the Court could substitute its own decision because it was dealing with a type of decision with which it was fully familiar and referring the matter back would serve no purpose (at 31D--E). See also *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* 2019 (3) SA 621 (CC) at paras [112]-[118]).

48. Having considered the very particular facts of this matter I am of the view that this is a matter in which this Court could, and should, substitute the decision instead of remitting it to the respondents. This is so for the following reasons:

48.1 This Court is in as good a position as the respondents to make the decisions, and has all of the pertinent information before it. Given the applicants' detailed setting out of the history of the matter, read with the Rule 53 record and the respondents' answering affidavits, it is difficult to see what further information could possibly be required in determining the applications.

48.2 The respondents were not called upon to exercise any unique expertise in considering the applicants.

48.3 The decision is a foregone conclusion. As stated earlier, it is common cause between the parties that the permanent residence applications were fully compliant with the provisions of the Immigration Act. This is a material consideration in the reaching of my conclusion.

48.4 The fact that the DG issued the first applicant with a critical skills visa on 29 April 2021 meant that he must have had all of the pertinent information and departmental records available to him, including the records relating to the issuing of the work visa bearing control number [....] (the "fraudulent visa"), as well as the record of the proceedings in the first review application which demonstrated that no impediment existed for the grant of the critical skills visa.

48.5 Nothing in the applicants' circumstances has changed to make a re-appraisal of the matter necessary, despite the delay in the institution of this application. The respondents have likewise not given evidence of any change in the legislation applicable to the applicants' applications that could possibly alter the outcome of those applications.

48.6 In this regard, the following was stated in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board* 2001 (12) BCLR 1239 (C) at 1261F-H: "*The respondents have had more than sufficient time and opportunity to put all the relevant facts before this Court. If the respondents at any relevant time had at their disposal additional information impacting negatively upon the applicant's compliance with the 'scarcity of occupational skills requirement', or any of the other criteria governing the issue of an immigration permit, such information could, and should, have been put forward. The fact that no additional information of this kind was forthcoming justifies this Court in concluding that no such information exists and that all the relevant facts are before this Court. This Court is therefore certainly in as good a position as the Regional Committee to make a decision regarding the applicant's application for an immigration permit in terms of section 25 of the Act".*

48.7 The respondents have not suggested that there may be any additional reason, other than those contained in the Minister's letter of 3 October 2019, for the rejection of the permanent residence applications. Therefore, if this Court accepts, as it does, that those two reasons were misconceived on any of the grounds set out in section 6 of PAJA, then there is no basis upon which to reject the permanent residence applications.

48.8 The process has already taken several years, and the applicants have had to turn to the Court for assistance against the conduct (or failure thereof) of the respondents on a number of occasions, *inter alia* to compel compliance with certain aspects arising out of the first review application. I agree with the applicants that a further delay would cause additional, unjustifiable prejudice to them, and that it would be unfair to remit the matter.

49. In the circumstances, a substitution order is in my view just and equitable.

The delay in the institution of the application

50. Section 7(1) of PAJA provides as follows:

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-
(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

51. In *Opposition to Urban Tolling Alliance v South African National Roads Agency LTD supra* at para [26] the Supreme Court of Appeal held as follows:

"*At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the*

delay should in all the circumstances be condoned (see eg Associated Institutions Pension Fund and others v Van Zyl and others 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. … That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) para 54)." [Emphasis supplied.]

52. The applicants' application under PAJA was launched on 7 September 2021. Since the applicants had internal remedies at their disposal, one must therefore determine when the appeal to the Minister under section 8(6) of the Immigration Act was concluded. In *Scenematic Fourteen (Pty) Ltd v The Honourable Minister of Environmental Affairs and Tourism and others* 2004 (4) BCLR 430 (C) at 434D-435G it was held that the appeal was concluded when the applicant was notified of the refusal. (This finding was not disturbed in a subsequent appeal to the Supreme Court of Appeal: *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA).)

53. The applicants submit that the appeal proceedings were concluded only when the first applicant collected the Minister's decision on 7 May 2021 and thus became aware of the content of the decision and the reasons therefor. The applicants argue that it is not suggested by the respondents that the applicants knew or should have known of the Ministers impugned decision before 7 May 2021. On this basis, therefore, the review application was properly brought within the prescribed 180 days.

54. I do not agree that the application was instituted within the prescripts of PAJA. The first applicant was informed on 11 October 2019 that the outcome of his permit application was available. He only uplifted the Minister's letter on 7 May 2021, when he collected his critical skills visa. In the circumstances, he could reasonably have become aware of the contents of the letter (and thus the reasons for the decision) on 11 October 2019 or shortly thereafter.

55. The applicants submit in the alternative that, if the Court finds that the appeal proceedings concluded at the time that the applicants' agent communicated to them that a decision had been made, that is, October 2019, then it would be just and equitable to extend the 180-day period until the date of the institution of the application as contemplated in section 9(2) of PAJA.

56. In assessing whether to extend the 180-day period, the Court should have regard to, *inter alia*, the following factors as set out in *City of Cape Town v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para [46]:

" *… s 7(1) of PAJA states that '(a)ny proceedings for judicial review . . . must be instituted without unreasonable delay'. The SCA, relying on this court's decisions in Van Wyk and eThekwini, adeptly set out the factors that need to be considered when granting condonation as follows:*
'The relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success."

57. The applicants submit that they acted reasonably in awaiting the outcome of the critical skills application (which visa was finally issued only on 29 April 2021), and that there were delays thereafter as a result of the Covid pandemic. The application was brought four months in September 2021, after the first applicant had collected his critical skills visa.

58. Further, insofar as the immigration status of the applicants bear on their constitutional rights, including the rights of the children to have their best interests are paramount, the applicants that it would be in the interest of justice if the time periods stipulated in franchise extended.

59. I agree with these submissions. The following factors, in addition, are relevant:

59.1 The relief sought by the applicants is of great significance to them. The family has been in South Africa for 13 years, and returning to Bangladesh would be highly prejudicial, especially for the children who have ever only ever known South Africa is their home.

59.2 At the time that the Minister's decision was made (on 3 October 2019) and the fact that a decision had been made was communicated to the first applicant (on 11 October 2019), the applicants had already commenced with the first review application. The outcome of those proceedings would have had a bearing on the applications for permanent residence.

59.3 The predominant cause for the delay was the wait for the conclusion of the first review, the issuing of the critical skills visa, and thereafter the intervention of the Covid pandemic. Incidentally, the respondents themselves blame the Covid pandemic for the delays in giving effect to the order granted in the first review application.

59.4 The delay has not caused any negative effect on the administration of justice or other litigants. The respondents have not alleged any prejudice.

59.5 The explanation for the delay is reasonable.

59.6 The applicants' prospects of success were good, as appears from what is set out in relation to the merits above.

60. In all of these circumstances I am of the view that it would be in the interests

of justice to extend the 180-day period prescribed by PAJA so as to allow for the consideration of the review relief sought by the applicants.

The failure to exhaust internal remedies

61. Section 7(2) of PAJA provides as follows:

(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

62. The second to fourth applicants did not submit an internal appeal in terms of section 8(4) of the Immigration Act to the DG before they appealed to the Minister in respect of the refusal of their permanent residence permits. Although, as stated earlier, their appeals to the Minister appear to have been treated as appeals to the DG, they had intended to appeal directly to the Minister. This was because the rejection of the family's applications was received almost two years after the refusal of the first applicant's application, and long after the first applicant had submitted his appeal to the DG in March 2016.

63. The DG rejected the first applicant's appeal in terms of section 8(4) on 24 November 2017, a few weeks after the applications of the third and fourth applicants were rejected by the Department on 2 November 2017, and a few days before the second applicant's application was rejected on 30 November 2017.

64. Should one assume (as the Department did) that the family's appeals were submitted to the DG, then it means that the internal remedy not exhausted by the

second to fourth applicants was the section 8(6) appeal to the Minister.

65. Either way, one of the internal remedies available to them was not exercised. In the peculiar circumstances of this case and the manner in which the applications have been treated by the Department and the respondents, however, I am of the view that exceptional circumstances exist for the exemption of the first respondent's family from the duty to exhaust internal remedies, and that it would be in the interests of justice to do so.

66. The applications are clearly inextricably linked. The first applicant's family's appeals were rejected because a permanent residence permit had not been granted to the first applicant. Given the provisions of section 26(b) and (c) of the Immigration Act, the results of the family's applications will always inevitably follow the result of the first applicant's application. This was acknowledged by the respondents.

67. In the circumstances an appeal by the family to the DG (or to the Minister, when viewed from the Department's apparent angle) would not have been an effective remedy, as there was no point in appealing to the DG (or Minister) separately in relation to the rejection of the family's applications. An order in terms of section 7(2)(b) of PAJA would not be practical or sensible.

68. I agree with the applicants that the context within which the failure to exhaust internal remedies arose gives rise to exceptional circumstances which justify an exemption being granted to those applicants. I am fortified in this decision by the fact that this Court in the first review application granted such exemption in relation to the family's failure at that stage to have appealed against the decision of the Department refusing their applications for visitor's visas, prior to making application for judicial review.

Costs

69. The applicants were successful in the application, and there is no reason to depart from the general rule that costs follow the event.

Order

In the circumstances, it is ordered as follows:

70. The applicants' failure to institute their application for judicial review within the time period prescribed in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is condoned and the period is extended under section 9 of PAJA until the date of the institution of the application.

71. The second to fourth applicants' failure to exhaust the internal remedy available to them under section 8 of the Immigration Act 13 of 2002 ("the Immigration Act") in relation to the decisions taken on 9 February 2019 and 9 March 2019 is condoned under section 7(2)(c) of PAJA.

72. It is declared that the first applicant is not a prohibited person in terms of section 29(1) of the Immigration Act.

73. The first respondent's decision dated 3 October 2019 dismissing the first applicant's appeal against the refusal by the second respondent of the first applicant's application for a permanent residence permit under section 26(a) of the Immigration Act is reviewed and set aside.

74. The second respondent's decisions respectively dated 9 February 2019 and 9 March 2019 dismissing the second to fourth applicants' appeals against the refusal of their applications for permanent residence permits under section 26(b) and (c) of the Immigration Act are reviewed and set aside.

75. The first to fourth applicants' appeals under section 8(6) of the Immigration Act are upheld.

76. To the extent necessary, the second to fourth applicants' appeals under section 8(4) of the Immigration Act are upheld.

77. The second respondent is directed to issue permanent residence permits to

the first to fifth applicants under, respectively, section 26(a) (in respect of the first applicant), (b) (in respect of the second applicant) and (c) (in respect of the third to fifth applicants) of the Immigration Act.

78. The respondents shall pay the applicants' costs on the scale as between party and party.

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicants: D. Cooke, instructed by Eisenberg & Associates

For the respondents: S. Ngombane, instructed by the State Attorney