

CASES / VONNISSE

IMMIGRATION AND THE RIGHT TO RESPECT FOR FAMILY LIFE BETWEEN ADULT CHILD AND ELDERLY FOREIGN PARENT FOR PURPOSES OF REUNIFICATION

Senchishak v Finland
**(Application No 5049/12 ECtHR of
18 November 2014)**

1 Introduction

In regard to immigration matters a distinction can be drawn between a decision refusing admission to a state of a family member for reunification purposes and one ordering deportation of a family member or relative already resident in such state. In European context, applicants who are refused admission or who are deported, often argue that such decisions interfere with their right to respect for family and private life in terms of article 8 of the European Convention of Human Rights (hereinafter "ECHR"; and see Harris *et al Law of the European Convention on Human Rights* (2014) 575). Article 8 of the ECHR states:

1. *Everyone* has the right to respect for his private and *family life*, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (author's own emphasis).

Contracting states are entitled to refuse entry or to remove an alien for a good reason under article 8(2) (Harris *et al Law of the European Convention on Human Rights* 576). The question to be answered is whether a fair balance has been struck between the applicant's interest and the public interest in deportation or exclusion (Harris *et al Law of the European Convention on Human Rights* 576). This case discussion reflects on the restrictive interpretation of "family life" within the context of article 8 by the European Court of Human Rights (hereinafter "ECtHR"), and the way in which the "dependency" criterion is narrowly construed in applications for permanent residence by an elderly foreign parent for purposes of

reunification with an adult child. The provisions of the Immigration Act 13 of 2002 as well as the Regulations are investigated to get some understanding of how similar applications are dealt with in terms of South African Immigration law. Although contentious, it is suggested that even though a broader understanding of “family/relative” and the concept of “dependency” exists, less emphasis must be afforded to the ability of the South African resident to maintain the parent financially. It is submitted that this requirement should not effectively sideline emotional ties and affection between the parties. Emphasis is placed on ensuring a human-rights-based culture of enforcement in immigration control as envisaged by the Immigration Act.

2 Facts of *Senchishak v Finland*

The applicant, a 72-year-old woman, had a husband and two daughters in Russia. In 1988 one of the daughters moved to Finland and has lived there permanently since then. She is a Finnish citizen. In November 2006 the applicant suffered a stroke in Russia, leaving her right side paralysed. At that time, she lived with her husband, until he died in 2007. Thereafter the applicant lived with her granddaughter and her family near Vyborg. On 7 December 2008 the applicant arrived in Finland with a tourist visa issued for a period of 30 days, without having lodged a prior application for a residence permit at a Finnish Representation. Since then she had been living with her daughter in Espoo (par 7–9). On 17 December 2008 applicant applied for a permanent residence permit on the basis of family ties to her daughter. The domestic authorities refused her application and ordered her removal to Russia. After lodging several appeals over a period of four years without success her removal from Finland became imminent. Refusal of a residence permit was refused as the applicant was not a “family member”, namely a spouse or minor child, of a person living in Finland. Other relatives than “family members”, such as a parent, were issued a residence permit only in exceptional circumstances, mainly if the purpose was to continue close family life or if the relative was completely dependent on the Finnish citizen (par 10–19). Before the ECtHR it was argued by the state that family life between the applicant and her daughter had been interrupted for 20 years (1988–2008). Her need for assistance and health care also did not show that she was dependent on her relative (daughter) residing in Finland. There was nothing to prevent her relatives supporting her from Finland in financial and other ways (par 37–41).

3 Judgment

The ECtHR observed that (contracting) states have the right as a matter of international law to control the entry, residence and expulsion of aliens (par 42). In case law relating to expulsion and extradition measures, the main emphasis has consistently been placed on the “family life” aspect. This concept has been interpreted as encompassing the effective “family life” established in the territory of a contracting state between persons *lawfully* resident there. Secondly, “family life” in this sense is normally limited to the “core family” (spouses and minor children) (par 54). The court reiterated the principle that relationships between parents and adult children do not fall

within the protective scope of article 8 unless “additional factors of dependence, other than normal emotional ties, are shown to exist” (par 55; and *Emonet v Switzerland* appl 39051/03 par 35). Similarly, where adult children are to be deported, they cannot rely on the existence of “family life in relation to their elderly parents, adults (the parents) who do not belong to the “core family”, unless the latter have been shown to be dependent on the members of their family (par 55; see *Slivenko v Latvia* appl no 48321/99 ECtHR sitting as a Grand Chamber). Family life between the applicant and her daughter was interrupted for at least 20 years. The fact that the applicant had spent the last five years in Finland did *not* create a relationship between her and her daughter amounting to “family life” within the meaning of article 8. This issue (living together the past five years) can in any event not be decisive as the applicant had not been *lawfully* resident in Finland during this time, and she must have been aware of her insecure situation (par 56).

As to “dependence”, the court noted that, even assuming that the applicant was dependent on outside help in order to cope with her daily life, this did not mean that she was necessarily dependent on her daughter who lived in Finland, or that care in Finland was the only option. There are both private- and public-care institutions in Russia and it was possible to hire external help. The applicant’s daughter could support her financially and otherwise from Finland, in particular as her place of residence was not very far from the applicant’s place of residence in Russia. With a view to the court’s case law, the court therefore considered that no such “additional factors of dependence other than normal ties of affection” existed between the applicant and her daughter, and that there was thus no “family life” between them within the meaning of article 8. This article is therefore not applicable in the instant case due to the lack of “family life” (par 56–57).

4 Criticism levelled against the judgment

The judgment in *Senchishak* was severely criticized. Peroni (“Impoverished ‘Family Life’: Its Problematic Pervasiveness at Strasbourg” 2014 *Strasbourg Observers* <http://strasbourghobservers.com/2014/12/18> (accessed 2015-05-19) remarks:

“At a time when family life takes increasingly diverse forms in Europe and elsewhere, the recent judgment in *Senchishak* ... clings to the ideal of parents and *minor* children as the yardstick to determine the existence of family life at Strasbourg ...”

This restrictive understanding of family life is especially, but not exclusively, pervasive in family-reunion and expulsion cases. This approach seems out of place in growing diverse societies. It also impoverishes the notion of family life with unequal implications for those whose family life does not match the parent/*minor* child standard. This highly restrictive approach in excluding *a priori* adult family ties from the scope of article 8, overlooks how close these ties may be in reality (Peroni 2014 *Strasbourg Observers*). The approach seems also to be at odds with the principle that family life is “essentially a question of fact depending upon the real existence in practice of close personal ties” (see *K and T v Finland* app no 2502/94 [2009] ECHR 289).

Although dependency offers a way into relationships between adult children and their parents, the dependency criterion is narrowly construed and not without problems (Peroni 2014 *Strasbourg Observers*). The dependency requirement is not met as long as there is someone available in the country of origin to provide care to the dependent person, be it family members or institutions. Peroni criticizes the court's sidelining of the emotional dimension when establishing the existence of family life. The applicant's physical and material dependency may be attended to elsewhere, but what about emotional and psychological dependency on her daughter? Although the applicant argued that "[i]n Russian culture the grandparents were considered as family members who needed protection, the court remained insensitive to this aspect (par 53; and Peroni 2014 *Strasbourg Observers*). In a dissenting (minority) judgment, however, two judges referred to the diversity of family life across Europe and stated (see dissenting judgment):

"The notion of 'core family' and the level of preserved emotional ties between parents and separated *adult* children vary across the *cultures* and *traditions* of Europe as well as among individuals living in various countries" (author's emphasis added).

According to Peroni, the reasoning in cases such as *Slivenko* and *Senchishak* ends up privileging a particular cultural form above others and setting a standard against which many people's family lives are judged wanting. A more "culturally-sensitive approach" may reduce these inequality risks. Peroni concludes as follows:

"In reaffirming an impoverished notion of family life, *Senchishak* continues a problematic line of case law that restricts *a priori* the family bonds entitled to protection under family life to one particular cultural ideal. This does not only mute the radical inclusive potential of the notion of "family life" prevailing in the Court's broader Article 8 case law. Most problematically, it disadvantages applicants' family lives that do not conform to the "norm" either by excluding them from recognition (and sometimes from protection) or by encouraging them to fit into a form of family life they do not relate to. The *equal* protection of family life at Strasbourg would be far better served by an account of family life that makes room for other forms on a par with the nuclear family".

Similarly, an equally restrictive interpretation of "dependency" is evident from the so-called new "Adult Dependent Relatives Rules" (ADR Rules) in the United Kingdom, applicable to non-European Economic Area (non-EEA) nationals applying for residence (see discussion below in paragraph 5).

5 Brief exposition of and criticism to the so-called Adult Dependent Relative Rules ("ADR Rules") in the United Kingdom applicable to non-European Economic Area (non-EEA) nationals

The new Adult Dependent Relative Rules ("ADR Rules") came into force in July 2012 as part of the changes to the family Immigration Rules. The ADR Rules effect non-EEA nationals such as parents or grandparents of permanent United Kingdom residents and citizens to apply to join their family in the United Kingdom. Previously, parents or grandparents over 65 years old and financially dependent on the United Kingdom relative, with no other

family abroad were able to apply for settlement (or under 65 if there were exceptional circumstances) (par 317 of the Immigration Rules). Under the new, more stringent rules, relatives must demonstrate that they, as a result of,

“age, illness or disability, require long term personal care to perform everyday tasks e.g. washing, dressing and cooking ... [and are] ... unable even with the practical and financial help of a sponsor to obtain a required level of care in the country where they are living ...” (Immigration Directorate Instructions Appendix FM Adult Dependent Relatives Dec 2012).

In July 2014 the Joint Council for the Welfare of Immigrants (hereinafter “JCWI”) issued a report (hereinafter “Report JCWI”), criticising the ADR Rules (Harsh, Unjust, Unnecessary: Report on the Impact of the Adult Dependent Relative Rules on Families & Children July 2014). This was also in response to the findings of an All-Party Parliamentary Group on Migration (“Report of the Inquiry into New Family Migration Rules” Jun 2013 www.appgmigration.org.uk/sites/default/files/APPGfamily_migration_inquiry_report-June-2013.pdf (accessed 2015-07-28)) finding that the adult dependent-relative route for immigration appears to have been all but closed for British people and permanent residents who may wish to care for a non-EEA elderly parent or grandparent at their own expense. The group, however, questioned whether this was unnecessarily prohibitive and likely to have negative impact on the future by prompting significant contributors to British society to move abroad, or deterring them from working in the United Kingdom at all. The report by the JCWI, however, found these Rules unnecessarily harsh, and rationally disconnected from the Government’s policy on family values. The best interests of the (grand)child has been ignored, since they were significantly impacted as a direct result of these Rules. In many cultures around the world grandparents are treated with reverence and Britain should aspire to these values and not seek to undermine them. The report consequently regarded them as not complying with the United Kingdom’s international obligations under the United Nations Convention on the Rights of the Child, as well as not conforming to the proportionality principle in relation to the Government’s commitments to article 8 of the ECHR (see Report 19–23; and see in general Fripp *The Law and Practice of Expulsion and Exclusion from the United Kingdom* (2015) for a discussion of the position in the United Kingdom).

6 South Africa

Section 10 of the Immigration Act, 13 of 2002 deals with the issuing of visas to temporarily sojourn in the Republic for a prescribed period. Subject to the Act, upon application and in the prescribed manner, a foreigner may, *inter alia*, be issued with a visa to stay with a relative as contemplated in section 18 (s 10(2)(h)). In terms of section 18 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. “Immediate family” mean persons within the second step of kinship (s 1).

Permanent residence permits, on the other hand, can be applied for in terms of either section 26 (Direct residence) or section 27 (Residence on

other grounds). Section 27, however, stipulates that a permanent-residence permit may only be issued to a foreign relative of a citizen or permanent resident if the foreign relative is a relative within the first step of kinship (s 27(g)). First-kin relatives refer to a parent, child or spousal relationship. A “spouse” (see def s 1) will, however, normally apply for direct permanent residence in terms of section 26. Second-kin relatives of the South African citizen or permanent resident, such as grandparents, grandchildren, brothers and sisters, can thus not apply for a permanent-residence permit in terms of section 27(g).

Regulation 23 (GG No 37679 of 2014-05-22) stipulates that an application for a permanent-residence permit contemplated in section 25(2) of the Act shall be made on Form 18 illustrated in Annexure A and shall be submitted by the applicant in person. This includes a permanent-residence permit “on other grounds” in terms of section 27, and more specifically section 27(g) on the basis or ground of being a relative of a citizen or permanent resident within the first step of kinship. This application for a permanent-residence permit shall be accompanied by, amongst others, medical and radiological reports, excluding that of children under the age of 12 years or pregnant woman (Reg 23(1)(f)). In terms of Regulation 23(7) the citizen or permanent resident have to satisfy also the Director-General that he or she is able and willing to support and maintain the foreign relative making the application. Unlike section 18 of the Act regarding an application for a (temporary) relatives visa, requesting the citizen or permanent resident to provide prescribed “financial assurance”, Regulation 23(7) speaks of “such citizen or permanent resident being able and willing to support and maintain” the foreign relative. The amount of R8 500 seemingly applies to both instances. Documentation that is *inter alia* required in the application includes – evidence of the applicant’s relationship to the citizen or permanent resident, evidence that the person named is willing to host the applicant and can maintain him or her in the Republic, a letter establishing that the resident will provide financial, medical and physical responsibility for the applicant and a temporary residence visa if the applicant is already in the Republic (see Form 18 (BI-947); “Kinship Permanent Residence Permit” *Immigration South Africa* <http://immigrationsouthafrica.com> (accessed 2015-07-16); and relatives permit/visa for immigration to South Africa *Integrate Immigration* <https://www.integrate-immigration.com> (accessed 2015-07-16)).

Statistics released recently by Statistics South Africa (“Documented immigrants in South Africa” 2013 PO 351.4 released July 2015 www.statssa.gov.za (accessed 2015-07-28) revealed the following: In 2013 6 801 permanent-residence permits were issued in total, including all the possible categories (par 4.1 36). 3 962 permanent-residence permits were issued in the form of “relatives permits” (s 27(g) par 4.1 36). Of the total 6 801 permanent-residence permits, however, only 2,2% of the recipients were above the age of 65 years. Unfortunately, no further statistics are available on what portion of the 2,2% specifically applied for permanent residence on the basis of a “relatives permit”. Even though people above the age of 65 years can also apply for the “retired persons” visa, or a “business visa”, one can still assume that 2% or fewer persons above the age of 65 years received a “relatives permit”. No statistics are available on the actual number of applications that were received in this regard. It is clear, however,

that only a very small number of elderly people are annually successful in their applications for a relatives permit, mainly due to the inability of the relative in South Africa to maintain and support him/her financially to the extent required (for a percentage distribution of the 3 962 relatives permits by nationality see Figure 4.4 43).

7 Discussion

It can be argued that the Immigration Act through section 27(g) clearly acknowledges and respects family life between an adult child in South Africa and a foreign parent, and therefore a broader definition of “family” than the mere “core family” as protected by *Senchishak*. This position is welcomed. Interestingly to note, is the mere requirement to submit evidence of the applicant’s (that is, a parent’s) relationship to the South African citizen or permanent resident. No further requirement such as proof of *de facto* close-personal family ties as required in *Senchishak* is required. Proof of “additional factors of dependency” as in *Senchishak* is not required, although the citizen or permanent resident (that is, the adult child of the foreign-parent applicant) must provide evidence that he/she can support and maintain the applicant parent to the amount of seemingly R8 500 per month.

“Dependency” of the foreign-parent applicant on the permanent resident, thus seems to be implied although not in the narrowly defined form as required in *Senchishak*. However, it is because of this financial-assurance requirement that many applications by foreign parents for permanent residence seem to be rejected. The undertaking (see Form 18) to stand in or take responsibility for the seemingly *private* medical care of your elderly parent upon receipt of his/her permanent-residence permit, seems in my opinion, to be at odds with section 25 of the Act. Section 25 states that a permanent-residence permit holder will have the same rights and privileges of a citizen (unless only ascribed to citizenship by the Constitution). This means that an elderly parent, after receiving his permanent-residence permit should be able to have access to basic public-health services. How then can the abovementioned undertaking by the resident be a condition for receiving a permanent-residence permit? If the elderly parent is seriously ill and likely to burden the public health-care system he/she can still be declared an undesirable person by the Director-General in terms of section 30(1)(a). In view of the (in my opinion) valid criticism against the narrow and restrictive interpretation of “dependency” by the ECtHR in *Senchishak*, one can analogously argue that less emphasis should be placed on the financial and material dependency of the parent in terms of the Immigration Act and Regulations. Why should an amount of R8 500 be fixed without any investigation into the living standard of the parties and irrespective of whether an adult child can maintain the parent for less? It is submitted that the “implied dependency requirement” and the ability of the sponsor (adult child) to take responsibility for the financial, medical and physical needs, sideline emotion and affection in deciding whether the applicant and adult child should be reunified in South Africa? Each and every application should be decided on its own merit. In a recent publication De Lange (“Honour thy father and thy mother” – What do grown children owe their aged parents?” 2013 *NGTT*: Oopbron – <http://right.journals.ac.za126>) describes some visions on filial obligation, current in modern ethical theory, and evaluates

them from a theological perspective. Should children help their elderly parents out of gratitude, friendship, because they are indebted to them, or is it simply because they are their parents? He reaches a surprising conclusion. According to De Lange, with reference to Keller ("Four Theories of Filial Duty" 2006 *The Philosophical Quarterly* 254), apparently the most satisfactory theory is the so-called "special goods theory", which underlines the special relationship between parent and child.

Fundamental to this approach is a distinction between "generic goods" which could just as well be provided by others, and "special goods", which parents can receive from no-one but their children, or which children can receive from no-one but their parents. Medical care, housekeeping, a ride to the shops, financial advice – these are "generic goods" that can be delivered by others. To the "special goods" in the parent-child relationship, however, belong: keeping in touch, visiting, spending time together, listening, being present, recalling memories, seeking advice, opening up their family life to each other – not in the role of, for example, a pastoral caregiver, but precisely as a *child* of his parent. Adult children provide parents with something that they will not get otherwise, by making them part of their adulthood. Elderly parents may, according to Keller (267):

"experience a sense of continuity and transcendence, a feeling that they will, in some respect, persist beyond their own deaths. There is also a kind of joy, and a kind of wisdom, that comes from a close involvement with the development of a person from birth to childhood and beyond."

For some other views see Nelson *et al* "Frail parents, Robust Duties" 1992 *Utah LR* 747; Wise "Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly" 2001 *Legislation and Public Policy* 563; Theixos "Adult Children and Eldercare: The Moral Considerations of Filial Allegations" 2013 <http://quod.lib.umich.edu/m/mfr/4919087.0017.105> (accessed 2015-07-23)). Theixos explains the relationship as follows:

"There is an identifiable, measurable expectation in our society that children have obligations to their parents ... it is not a strict duty with clear parameters, but more of a normative expectation grounded in conceptions of natural connection and concern, reciprocity, empathy, and parental respect ... Admittedly, the force of such an obligation is difficult to articulate, since factors such as the parent's specific needs, desires, and history may mitigate it, but the content of the obligation is verbally explicit, legally supported, and socially reinforced. There are also distinct culturally-specific pressures (*in my own experience Pakistani, Indian, Chinese, and Greek families have explicit codes of filial care*)."

Another potential problem arises if the foreign elderly-parent applicant is illegally in the country and thus subject to deportation. Should an illegal foreign-parent applicant be in the country in contravention of the Act (that is, in case of overstay) he/she shall be deported (ss 7(1)(b); 33(5)(b) and 34)). Should the fact that he/she, for example, overstayed after the lapsing of a temporary residence visa, have the effect that his application for permanent residence be disregarded? In the recent case of *Jeunesse v The Netherlands* (appl no 12738/10 of 3/10/14) the ECtHR held that family-life relationships can exist even where the status of the applicant has not been regularised under domestic law. The fact of being illegally in the country

appears to be irrelevant for the existence of emotional ties between the elderly applicant parent and his/her adult child in the country. In view of their right to respect for family life, or dignity (see *Dawood, Shalabi, Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC)) it can be argued that the parent be allowed to remain in the country. The Preamble to the Immigration Act of 2002, after all clearly states that in providing for the regulation of admission and departure of foreigners, the Act aims at setting in place a new system of immigration control which, *inter alia*, ensures that a human-rights based culture of enforcement is promoted (par (n)) Thym "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?" 2008 *International and Comparative Law Quarterly* 87–112) states (97):

"Human rights oblige national authorities and courts to take into account the legitimate interests of the *individuals* concerned. Immigration law, on the contrary, has long been characterized by its focus on the *public interest*. The concept of state sovereignty is the ultimate legal justification for the general freedom of States to control the entry, residence and expulsion of aliens. With their emphasis on the individual, human rights do therefore pose a direct challenge to the concept of state sovereignty. *Human rights law holds the potential to reverse the immigration law's traditional orientation at the public interest and redirect it towards the individual*" (author's emphasis added).

A matter that is often overlooked by immigration authorities is the "best interest" of possible (grand) children affected by the rejection of a permanent residence permit to a foreign elderly grandparent of the child (s 28(2) of the Constitution of the Republic of South Africa, 1996; article 3 of the United Nations Convention on the Rights of the Child, hereinafter CRC). In *Marckx v Belgium* ((1979) 2 EHRR 330 333 par 45), the court decided that family life includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives may play a considerable part in family life. Van Dijk and Van Hoof (*Theory and Practice of the European Convention on Human Rights* (1998) earlier made the following valuable comment:

"In our opinion, in cases concerning family ties one must take account, *inter alia*, of the question who took the initiative for the separation in the past, of the nature of the continued ties, and of the family traditions within the religious, ethnic, and/or cultural community to which the persons in question belong. For instance, in several cultures it is a self-evident obligation for a grandchild to adopt his grandparent into his household after his parents have died, even if he and his grandparent may have been separated for many years. Furthermore, the degree of dependence of the applicant on his parents or other relatives, in material or in immaterial respects, must be considered. And in any case the mere fact that a person has grown up does not mean that he is no longer entitled to any form of protection of the family unit of which he formed part as a child, not even when he himself has married meanwhile" (author's emphasis added).

With regard to the CRC, article 2 (Non-discrimination) provides that states shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The CRC applies to all children, whatever their race, religion, ethic or social origin. No child should

be treated unfairly on any basis. Rules that apply only to children from a migrant background and prevent them from enjoying family life with their grandparents *prima facie* breaches the non-discrimination provisions (see the Report by the JCWI 19). Article 3 (Best interests of the child) states:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Depriving children from being able to interact with their grandparents in a meaningful way on a regular basis cannot be in their best interest. Research shows that grandparents contribute significantly to a child's life and enhance it (Report JCWI 19). In this regard the United Kingdom Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* ([2011] UKSC 4), held that the best interests of the child “must be considered first” before going on to consider what other factors, cumulatively, might act as countervailing considerations, for example the need to maintain firm and fair immigration control (par 25). In terms of article 4 (Protection of rights), states shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, states shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation. States must help families protect children's rights and create an environment where they can grow and reach their potential. In some instances, this may involve changing existing laws or creating new ones. It is arguable that helping to preserve and enhance a child's background and family relations help preserve a migrant child's sense of identity (Report JCWI 20).

It would also be prudent in formulating rules on family migration if the views of the child were ascertained (a 12 CRC). Article 30 (Children of minorities/indigenous groups) provides that in those states in which *ethnic, religious or linguistic minorities* or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, *in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language* (author's own emphasis). Again, intrinsic in this right is the recognition that the specific needs of children from a migrant background should be taken into account. The benefits grandparents can bring to a child from a migrant background in helping them understand their heritage, culture, roots and language are immense. This helps develop a child's sense of identity and is vital as they grow up to become fully integrated members of society with a holistic sense of their cultural origin (Report JCWI 20).

8 Conclusion

The right to family and family life is constitutionally protected even though an explicit right in this regard is absent (see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) par 99 and 100; and *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par

27–39 where family life is protected under s 10 (right to dignity)). Section 7(1) states that the Bill of Rights enshrines the rights of *all people* in our country and affirms the democratic values of human dignity, equality and freedom (author's own emphasis). Based on this premise this contribution promotes a flexible approach to applications for permanent residence permits by elderly parents of an adult South African citizen or permanent resident. The essence of following a more relaxed and flexible approach when it comes to an elderly dependent parent applying to join an adult child in South Africa is encapsulated in the sentiment expressed by the minority judgment in *Senchishak*:

“A time comes when elderly parents do need the loving care of their adult children and actually receive it as a matter of moral duty and preserved feelings of affection. To deny this is to hold that once an individual comes of age, the emotional ties with his or her parents are to be considered once and for all *de facto* and *de jure* severed and that for this reason neither a moral nor a legal duty to provide care may be said to exist between them. In our understanding this is incorrect in both legal and moral terms.”

Objections to this approach and reasoning might include the proposition that, should someone be so concerned about an elderly parent, he/she should go back to where that relative resides and care for him/her there. It might also be argued that immigration control is a justified interference with and limitation of any right to family and family life, dignity or identity anyone might have. In view of section 25(1) of the Act clearly stating that the holder of a permanent residence permit has *all* the rights, privileges and obligations of a citizen, save for those explicitly ascribed to citizenship by the Constitution, critics can argue that there already exists severe pressure on infrastructure and resources (water, electricity, medical services, *etc*), due to especially illegal immigration. Allowing even more people to enter can be argued to be against the economic well-being of the country. It is submitted, however, that emotional and psychological factors, the so-called “special goods” an adult child can provide, cultural and family traditions within a certain religious or ethnic community and the “best interest” and views of children, should trump abovementioned objections. Each application should be decided on its own facts and circumstances and not simply on financial considerations. Emphasis must also be placed on a just administrative process, taking into account the views of all interested parties (s 33 Constitution). Such reasoning conforms to the aims in the Preamble to the Immigration Act setting in place a new system of immigration control which ensures that a human-rights-based culture of enforcement is promoted and the international obligations of the Republic are complied with. In the words of Thym (2008 *International and Comparative Law Quarterly* 97), human rights law holds the potential to reverse the immigration law's traditional orientation at the public interest and direct it towards *individual(s)*, in the context of this publication the relationship between adult child in South Africa and his/her foreign elderly parent.

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