IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Home Affairs v Eisenberg & Associates
in re: Eisenberg & Associates v Minister of Home Affairs and Others

Case CCT 15/03

Explanatory Note

The following explanatory note is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The judgment delivered this morning relates to the powers of the Minister of Home Affairs (the Minister) to make Immigration Regulations under the Immigration Act 13 of 2002 (the Act).

In the High Court, Eisenberg & Associates had challenged the legality of regulations made by the Minister on the grounds that he had made these regulations without complying with the public notice and comment procedures prescribed by the Act. This contention was upheld by the High Court, and the regulations were declared to be invalid. The Minister appealed to the Constitutional Court against this decision. In a judgment concurred in by all the other members of the Court, Chief Justice Chaskalson upheld the appeal and set aside the declaration of invalidity that had been made by the High Court.

The Act distinguishes between two regulation-making mechanisms: one to be used before the Immigration Advisory Board (the Board) had been established and the other to be used after the Board had been established. The Board has an important role in the public notice and comment procedures prescribed by the Act. The central issue in the appeal was whether these procedures also had to be followed in the case of regulations made prior to the Board being established.

Eisenberg & Associates contended that even before the Immigration Advisory Board was set up, the Minister could not make regulations without going through the notice and comment procedures in so far as they could be followed without involving the Board. It also argued that the Minister's interpretation of the Immigration Act was in conflict with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which requires special procedures to be followed where administrative action materially and adversely affects the rights of the public.

The Minister contended that the notice and comment procedures prescribed by the Act were not applicable to regulations made prior to the constitution of the Board. It was essential to make regulations necessary for the implementation of the Act and he was entitled to do so before the Board was constituted. He saw the regulations as providing a temporary mechanism necessary to bring the Act into operation. He intended to replace these regulations with more detailed regulations after the Board was in a position to discharge its duties under the Act, and would follow the notice and comment procedures before making those regulations. By the time the appeal was heard this process was already underway.

The Act was brought into force in stages by a Presidential Proclamation issued on 19 February 2003. In terms of this Proclamation, sections 7 and 52 of the Act (which contained the

regulation-making mechanisms) came into force on 20 February 2003, while the bulk of the operative provisions of the Act came into force on 12 March 2003. The validity of this Proclamation was not challenged by Eisenberg & Associates in the appeal. The Immigration Regulations were promulgated on 21 February 2003.

It was accepted by both parties to the appeal that the Act would be unworkable without regulations and that existing regulations which remained in force for certain purposes could not fill that void. Chief Justice Chaskalson held that it was competent in the circumstances for the Minister to use the power he had to make regulations prior to the Board being constituted. The public notice and comment procedure was a time-consuming process which could not possibly have been complied with prior to the operative provisions of the Act coming into force. Chief Justice Chaskalson held that the Act distinguished between regulations made prior to the Board being constituted and regulations made after the Board was in place. The public notice and comment procedures were applicable to the latter but not to the former. It was not possible to read the Act in any other way – to do so would be contrary to the clear language of the Act and would render certain sections of the Act unnecessary.

In dealing with the argument relating to PAJA, Chief Justice Chaskalson expressed doubt as to whether PAJA was applicable to the regulations made by the Minister. He found it unnecessary, however, to decide this question. PAJA provides that the special procedures prescribed for administrative action that materially and adversely affects the rights of the public need not be followed if it is reasonable and justifiable in the circumstances to depart from these special procedures. In the present case, there was insufficient time to follow the special procedures prescribed by PAJA between the date of the Proclamation and the date on which the operative provisions of the Act would come into force. As the Act would be unworkable without regulations it was reasonable and justifiable for the Minister to adopt the procedure that he did. Thus even if PAJA was applicable, the Minister was not bound to follow the special procedures on which Eisenberg and Associates had relied.