

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**Permanent Secretary of the Department of Education of the Government of the
Eastern Cape Province and another v Ed-U-College(PE)(Section21)**

Case CCT 26/00

Decided on 29 November 2000

Media Summary

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

The Permanent Secretary of the Department of Education and the MEC for Education in the Eastern Cape applied for leave to appeal against a judgment of Leach J in the South Eastern Cape High Court. The case concerned a 1997 decision by the Education Department to reduce the amount of subsidies paid to independent schools, including Ed-U-College, in the province. That decision had been taken after the legislature reduced the amount of money allocated to funding independent schools in its annual education budget by approximately 18 %.

Three questions were considered: (a) Could the appropriation of approximately R5,45 billion to education in the budget passed by the Eastern Cape Legislature be reviewed by a court as administrative action under section 33 of the Constitution? (b) Could the appropriation of R8,45 million to independent schools as stipulated in a memorandum circulated with the budget be reviewed by a court under section 33? (c) Could the determination of the precise subsidy formula determining the money to be paid to each independent school be reviewed by a court under section 33 of the Constitution?

O'Regan J, writing for a unanimous court, came to the conclusion that the appropriations under review in questions (a) and (b) did not constitute administrative action as contemplated by section 33 of the Constitution. These appropriations could consequently not be challenged by Ed-U-College on administrative law grounds.

With regard to the third question, O'Regan J was of the opinion that the determination of the subsidy formula by the MEC constituted administrative action within the terms of section 33. Accordingly, it could be reviewed by a court. The Court emphasised that in determining whether a particular act constitutes administrative action, the focus of the enquiry should be on the nature of the power, not the identity of the actor, and that the formulation of policy by elected members of the executive in the course of implementing legislation may constitute administrative action.

Having answered question (c) in the affirmative, O'Regan J pointed out that it was necessary to decide whether the action of the Education Department was procedurally fair and reasonable. In this regard, the Court held that it was impossible to tell at this stage whether Ed-U-College's right to just administrative action had indeed been infringed as full evidence on these issues had not been led. The application for leave to appeal was dismissed with costs. The matter may be pursued further in the High Court by Ed-U-College.