CONSTITUTIONAL COURT OF SOUTH AFRICA

Wycliffe Simiyu Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)

Case CCT 53/08
[2009] ZACC 23

Date of Judgment: 25 August 2009

MEDIA SUMMARY

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

Today, the Constitutional Court handed down judgment in a case involving the withdrawal of residence permits that had been granted to non-South Africans.

The case involves the rights to just administrative action guaranteed in section 33 and to access to courts protected under section 34 of the Constitution. In particular, it deals with the interpretation of section 7(2) of the Promotion of Administrative Justice Act 2000 (PAJA) which prescribes that available internal remedies must be exhausted before a judicial review of an administrative action.

The first and second applicants, Mr and Mrs Koyabe, are both Kenyan nationals. They were granted permanent residence in 2006. In 2007, their permits were withdrawn in a letter addressed to them by the Director-General of the Department of Home Affairs, the second respondent (DG). The letter indicated that an investigation by the Department had revealed that their previously obtained South African identity documents had been obtained by fraudulent means. The letter also informed the applicants that they had failed to submit a request for review within the required three days and therefore their right to a review by the Minister had lapsed. The applicants were therefore prohibited persons and did not qualify for the permanent residence permits. The letter also informed them that they were to be deported but were entitled to request the Minister for Home Affairs, the first respondent, to review the decision to withdraw their permits. The Immigration Act 2002 (the Act) therefore provides an internal remedy which in terms of PAJA must be exhausted before a court is approached to review the Department's decision. The applicants failed to submit an application for review arguing that in order to do so meaningfully, it would first be necessary to obtain the reasons for the withdrawal of their permits. While Mr Koyabe's attorney persistently pursued the Department for reasons on which the withdrawal of the applicants' permits was based, the Department insisted that the reasons stated in the letter which informed them of the withdrawal, were sufficient.

The applicants subsequently approached the North Gauteng High Court for a review of and to set aside the DG's decision. The High Court held that section 7(2)(a) of PAJA requires the exhaustion of internal remedies prior to approaching a court for judicial review. The Court found that the applicants had not exhausted their internal remedy and that there were no exceptional circumstances that would allow it to exempt them from doing so. In dismissing the application with costs, the High Court ordered the applicants to seek a ministerial review.

The applicants sought leave to appeal to the Constitutional Court against the judgment of the High Court. They urged the Court to accept that a lapsing of the time-period for them to seek a ministerial review means that the internal remedy as required under PAJA had been exhausted. To hold otherwise, they argued, would be contrary to their right of access to Court under the Constitution. They contended that they were entitled to be given adequate reasons before seeking a ministerial review.

The respondents argued that the Act does not entitle anyone affected by an administrative decision to reasons before the appeal to the Minister and that the DG’s letter contained sufficient reasons for the applicants to have lodged their application for review.

Lawyers for Human Rights (LHR), admitted as amicus curiae, provided the Court with information about the difficulties experienced by immigrant detainees who, it said, are, in practice unable to exhaust internal remedies as required by the Act due to a lack of access to legal counsel and writing materials and an inability to understand the relevant prescribed forms which are available in English only.

Writing for a unanimous Court, Mokgoro J held that the submissions raised by the LHR are not applicable to the applicants as they are not in detention. Questions of that nature, she held, may be considered in a different case on another day. Regarding the proper interpretation of section 7(2) of PAJA she held that the mere lapsing of the time-period for exercising an internal remedy does not mean that the internal remedy has been exhausted. Nor does it constitute exceptional circumstances under section 7(2)(c) of PAJA.

Mokgoro J found that section 5 of PAJA read with section 33(2) of the Constitution does entitle the applicants to be provided with reasons for the DG's decision to withdraw their residence permits. She however held that the letter informing the applicants of the decision to withdraw their permits contained sufficient reasons for them to have requested a meaningful review by the Minister. The Court agreed with the High Court that the applicants were required to exhaust the available internal remedy before they resorted to a judicial review. Accordingly, the appeal was dismissed.

In dismissing the appeal, the Court directed the applicants to request the Minister to review the decision withdrawing their residence permits within seven days of this judgment. The Court also confirmed the High Court's costs order against the applicants, but made no order as to costs in that Court.