

## **Larbi-Odam and others v MEC for Education (North-West Province) and another 1996 (12) BCLR 1612 (B)**

### **1) Reference Details**

Jurisdiction: South African, Constitutional Court of South Africa

Date of Decision: 26 November 1997

Case Status: Concluded

Link to full case: <http://www.saflii.org/za/cases/ZACC/1997/16.html>

### **2) Facts**

South Africa's Regulation 2(2) of Regulations dealing with the terms and conditions of employment of educators (GN R1743 of 13 November 1995) provides that, subject to certain exceptions, only South African citizens may be appointed to permanent teaching posts in state schools. In the light of this regulation, eight temporarily-employed teachers were issued with notices of termination. The teachers were foreign citizens some of whom had permanent residence and some temporary residence permits. They challenged the regulation in the Bophuthatswana Provincial Division and failed.

### **3) Law**

- Section 8(2) of the Interim Constitution of South Africa

### **4) Legal arguments**

#### *The Respondent*

The respondent argued that non-citizens had a reduced commitment to South Africa because there was another country to which they could go to. Therefore the regulation should be upheld.

#### *The Plaintiff*

The Plaintiff contended that the regulation was discriminatory and inconsistent with the South African Constitution.

### **5) Decision**

The Constitutional Court (the Court) declared that Regulation 2(2) was invalid on the grounds that it was unfair discrimination inconsistent with s. 8(2) of the Interim Constitution. The Court further noted that citizenship was not a listed ground of prohibited discrimination in the Constitution. However, it held that distinctions on the basis of citizenship could be discriminatory. The Court gave three reasons for this:

1. Foreign citizens are a minority with little political muscle.
2. Citizenship is a personal attribute which is difficult to change.
3. There were specific threats and intimidation that the foreign teachers in this case faced. All of these reasons made foreign citizens a vulnerable group.

The Court held that denying permanent residents job security when they are allowed to live and work in South Africa indefinitely (and to apply in due course for citizenship) was unfair discrimination.

The Court stated that, unless a post requires that its incumbent should be a citizen, for example because of the particular political sensitivity of the job, employment opportunities should be available to permanent residents and South African citizens on an equal basis. The government's aim should be to reduce unemployment among South African citizens and permanent residents. Furthermore, the fact that the regulation was the product of collective bargaining did not justify its unfair discrimination.

The Court rejected an argument that non-citizens had a reduced commitment to South Africa because there was another country to which they could go. The Court noted that this argument applied with equal force to South African citizens who hold dual nationality, yet the regulation did not impose any bar to their eligibility for permanent employment. With regard to temporary residents, the Court did not come to a final conclusion as to whether the regulation was unfair discrimination with respect to them. The Court noted that irrespective of the regulation, the position of temporary residents in South Africa was precarious, since they cannot stay for longer than specified in their residence permit and cannot be employed for longer than that period. However, the Court also noted that the regulation at issue allowed these temporary residents to be disadvantaged to a greater degree than was required by their residence permits with respect to job security and other employment benefits. Further, the Court noted that some of the teachers, although employed on 'temporary' contracts in form, were in substance employed in contracts that were consistently renewed on an annual basis.

Subsequently, given the injustice that might be caused if the regulation was invalidated only with respect to permanent residents and not with respect to temporary residents, the Court decided to invalidate the regulation in its entirety.