Larbi-Odam and others v MEC for Education (North-West Province) and another (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (26 November 1997)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 2/97

CHARLES KWEKU LARBI-ODAM First Appellant
GABRIEL KOFI TUGLO Second Appellant
JOSEPH YEBOA AKWA Third Appellant
EPHRAIM KWAKU ADOM Fourth Appellant
LAWRENCE NTUNGWANA SIMELANE Fifth Appellant
NKHANE ANDRIES RAMAKGAPOLA Sixth Appellant
KWABENA AMOAKOHENE-ABABIO Seventh Appellant
MOSES SAMUEL KIIRYA NTENDE Eighth Appellant

versus

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION (NORTH-WEST PROVINCE) First Respondent
THE MINISTER OF EDUCATION Second Respondent

Heard on: 27 May 1997

Decided on: 26 November 1997

JUDGMENT

MOKGORO J:
[1] This is an appeal from a judgment delivered on 29 August 1996 by Waddington J in the Bophuthatswana Provincial Division of the Supreme Court.[1] The learned judge dismissed an application which in effect sought an order that:
(a) regulation 2(2) of the "Regulations regarding the Terms and Conditions of Employment of Education" (sic) contained in Government Gazette 16814 GN R1743 of 13 November 1995 ("the regulations") was invalid because of its inconsistency with section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution");
(b) alternatively, regulation 2(2) was *ultra vires* its enabling legislation being the Educators' Employment Act 138 of 1994 ("the Educators' Employment Act").

[2] The material portions of the regulations provide:

"[2.](2) . . . no person shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen and meets the requirements of section 212(4) of the Constitution of the Republic of South Africa, 1993.

. . . .

5.(1) Whenever a post becomes vacant, any educator may, notwithstanding anything to the contrary contained in these Regulations, with his or her consent be appointed in a permanent capacity by the employer to such vacant post."

[3] The regulations were issued by the Minister of Education, the second respondent. The first respondent, the Member of the Executive Council for Education of the North- West Province, has relied upon regulation 2(2) in the process of rationalisation of education.[2] That process has included, inter alia, the conversion of temporary teaching posts to permanent ones. Thus the first respondent has advertised the posts held by foreign teachers temporarily employed in the province, and has issued such teachers with notices purporting to terminate their employment. The appellants submit that the restrictions on their eligibility for permanent appointment amount to unfair discrimination, contrary to section 8(2) of the interim Constitution. They are supported in their submissions by the Centre for Applied Legal Studies, which acted as an amicus curiae in the proceedings before this Court.[3]

[4] The eight appellants are foreign teachers temporarily employed in the North-West Province, and were formerly employed as teachers by the government of Bophuthatswana. They are a well qualified group, with most of them holding post-graduate qualifications. They originate from Ghana, Swaziland, Zimbabwe and Uganda. Some of the appellants are permanent residents of South Africa. Some are married to South African citizens and have children born in South Africa. The appellants have been resident in South Africa for various periods of time and, in a number of cases, for periods in excess of 10 years. They belong to an informal association with a membership of around 120 teachers who find themselves in a similar situation.

[5] Prior to the issue of the regulations, the appellants were ineligible for permanent teaching employment because of regulations issued under section 12 of the Bophuthatswana National Education Act 2 of 1979. Regulation 2(1)(a) of those regulations provided that a person could not be appointed or promoted in a permanent post unless he or she was a citizen of Bophuthatswana. The appellants contend that their contracts of temporary employment were repeatedly renewed as a matter of course.[4] Section 8(6) of the Educators' Employment Act provides that temporary contracts of educators can be terminated upon reasonable notice.

[6] A similar bar to the appellants' permanent appointment was introduced by regulation 2(2), relied upon by first respondent in the rationalisation process. As part of that process, first respondent advertised approximately 5000 temporary teaching posts in the North-West Province in July 1995. Some 700 of those posts were held by foreign teachers. Over the course of the following year, several foreign teachers were issued with notices purporting to terminate their services by the then Department of Education, Sport and Recreation of the province, on the basis of their citizenship.[5] In the court *a quo*, the appellants initially sought an interdict restraining the

respondents from enforcing regulation 2(2).[6] In lieu of an interdict, first respondent gave an undertaking not to terminate the services of the appellants or of teachers in a similar position, or to make permanent appointments in the posts held by such persons, pending the outcome in these proceedings.[7] The respondents conceded at the hearing below that the effect of the notices is that none of the appellants' contracts has as yet been terminated.[8] Each remains in paid employment until his or her contract has been lawfully terminated.[9] That position will continue even if an appellant's post has been temporarily filled by a South African citizen, and the appellant has not been required to render any actual service as a teacher.[10]

[7] Waddington J held that although regulation 2(2) is contrary to section 8(2) of the interim Constitution, it is justified under section 33(1). As regards section 8(2), he stated that "the discrimination [created by regulation 2(2)] cannot amount to anything other than unfair discrimination because [its] effects are each and every one invidious", (citation omitted), and that the "unfairness of the discrimination is loudly proclaimed by the content of regulation 2(2) itself."[11] Waddington J also held that regulation 2(2) was not *ultra vires* its enabling statute.[12] His judgment summarizes with clarity the respondents' case for justification, and merits quotation at length:

"[second respondent] gives the following facts in relation to education in South Africa:-
(a) Twenty-six thousand educators are trained annually . . . .
(b) According to Departmental records, 345543 educators were employed during 1995.
(c) The national educators attrition rate in 1994 was 20500. In 1995 it was 20700.
(d) In the ordinary course of events it would have been possible to accommodate 24340 out of 26000 educators who qualified in 1994.
(e) Similarly, not all educators who qualified in previous years could be accommodated i.e. offered posts in the teaching profession.
(f) In consequence, there are large numbers of unemployed educators in South Africa.
3. The oversupply of educators is exacerbated by the rationalisation process being carried out in accordance with the provisions of section 237 of the Interim Constitution. . . . 15 departments of education . . . are being rationalised into one national and nine provincial education departments. The availability of government funds will permit a pupil/teacher ratio of only 40:1 in primary schools and 35:1 in secondary schools. . . . As a result, about 10976 primary school teachers will become redundant and about 39508 secondary school teachers will become redundant.
In order to alleviate this problem, agreements were reached in the Education Labour Relations Council providing for voluntary redundancy packages and redundancy discharges of educators who cannot be absorbed in the rationalisation process.
Furthermore, the state of affairs outlined above has prompted the education authorities to consider cutting . . . the intake of students into educational training institutions by 40 *per cent*."[13]

[8] Waddington J continues as follows:

"[If it is correct] that foreign-born teachers employed in South Africa number only 1,5% of the total teaching force . . ., a simple calculation reveals that of the approximately 50 484 teachers to be retrenched, 45 301 will be South African citizens while 5 183 will be non-citizens. The

corollary is that if the services of all non-citizen educators were to be retained, 5 183 more South African citizens would be retrenched. This seems to represent the essence of the problem.

. . . .

In my view it has been shown that the principal responsibility of the department of education is to create and maintain as sound an education system as its financial resources will permit. Next, the department is part of the overall administration of the existing government the responsibility of which must be to protect and further the interests of South Africans firstly for the benefit of South Africans. It is therefore the duty of the department, not only to guard and further the interests of those to be educated but also to fulfil its role as part of the general administration in guarding and furthering the interests of those whose permanent home is South Africa. It seems to me that it is a matter of common-sense that the government of any state would wish to ensure that, in fields where employment opportunities are limited, available jobs should in the first instance be made available to the citizens of that state."[1][4]

[9] It should be noted that the figures concerning retrenchment in Waddington J's judgment are based on *national* statistics. Likewise, the reference to foreign teachers as being 1,5% of the teaching population is a national statistic, provided by the appellants with no supporting facts. This translates to approximately 5 000 foreign teachers countrywide. There appear to be approximately 700 foreign teachers employed in the North-West Province.

[10] For the reasons given below, I respectfully disagree with Waddington J's findings with regard to justification. Before I turn to that issue, I will address a question which was raised for the first time at the hearing before this Court, namely the effect of regulation 5(1) on the scope of regulation 2(2).

[11] Regulation 5(1) provides that:

"Whenever a post becomes vacant, any educator may, notwithstanding anything to the contrary contained in these Regulations, with his or her consent be appointed in a permanent capacity by the employer to such vacant post."

At first glance, regulation 5(1) appears to override the prohibition on permanent appointment of non-citizens in regulation 2(2). After the hearing, the parties were given the opportunity to file written submissions on the proper interpretation of the two regulations. Both the appellants and respondents agree that regulation 5(1) does not affect regulation 2(2), and persist in their submissions that regulation 2(2) operates as a complete bar to the permanent appointment of foreign citizens. (The parties differ, obviously, on the constitutionality of that interpretation). The amicus curiae, which was not involved in the proceedings *a quo*, submits that regulation 5(1) operates as a partial override to regulation 2(2). The amicus curiae argues that even that override does not save regulation 2(2) from unconstitutionality.

[12] The interplay between the regulations is complex. On the one hand, regulation 2(2) states that "no *person* shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen" (emphasis added). Regulation 5(1), on the other hand, states that "[w]henever a post becomes vacant, any *educator* may, *notwithstanding anything to the contrary* contained in these Regulations, with his or her consent be appointed in a permanent capacity" (emphasis added). "Educator" is defined in section 1 of the Educators' Employment Act as "any person who teaches, educates or trains other persons . . . at any educational institution", a definition which indicates that an individual becomes an "educator" upon appointment to a teaching post. "Person", on the other hand, seems to include both individuals who have been appointed to teaching posts, and individuals who have not been so appointed.[1][5] Because regulation 5(1) refers to "educators", it applies only to individuals who already hold teaching posts. It may therefore only assist those temporary teachers who are already in the system. It cannot assist first time applicants for permanent posts, to whom regulation 2(2) applies in its full rigour.

[13] The regulation 5(1) override may also be partial in other ways. The regulation provides that "*[w]henever a post becomes vacant*, any educator may, notwithstanding anything to the contrary contained in these Regulations, *with his or her consent* be appointed in a permanent capacity by the employer to such vacant post" (emphasis added). The italicised words may indicate that regulation 5(1) is confined to transfers of educators to existing posts, at the instance of employers. In other words, it may not enable appointments pursuant to applications by teachers in the ordinary course of affairs. In terms of this interpretation, foreign citizens who hold temporary posts may not be appointed to newly created posts, nor may their temporary posts be converted to permanent ones. That is because in neither case has a post become vacant. On the other hand, "vacant post" may be broad enough to include newly created posts and posts occupied by an educator on a temporary basis and upgraded to permanent posts.

[14] The meaning of regulation 5(1) and the relationship between it and regulation 2(2) are by no means clear. Even if the regulation were to be held to be wide enough to empower the appointment of non-citizens to any post in the education department which is vacant, whether it is a newly created post or not, it seems to me that there would still be room for constitutional complaint. For even if a broad interpretation of the regulation were to be adopted, the power conferred upon employers by regulation 5(1) would still constitute a special power exercisable at the discretion of the employer. The employer would be entitled to refrain from exercising it and to deal with applications for appointment in a permanent capacity in accordance with regulation 2(2). In the circumstances it cannot be said that regulation 5(1), on any interpretation, has the effect of neutralising the discrimination implicit in regulation 2(2) or its unfairness. It is therefore unnecessary in this case to come to a final conclusion as to the effect of regulation 5(1).

[15] I now turn to consider the constitutionality of regulation 2(2). Section 8 of the interim Constitution provides in relevant part:

"(1) Every person shall have the right to equality before the law and to equal protection of the law.
(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in

particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
(b) . . .
(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

The judgment of the court *a quo* was given before this Court had handed down its judgments in *President of the Republic of South Africa and Another v Hugo*,[1][6] *Prinsloo v Van der Linde and Another*,[1][7] and *Harksen v Lane NO and Others*,[1][8] which lay down a framework for equality analysis under section 8 of the interim Constitution. It is therefore necessary to consider the issue of unfair discrimination in the light of those judgments.[1][9]

[16] As the majority held in *Hugo*:

"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[2][0]

In *Harksen*, this Court explained unfair discrimination as follows:[2][1]

"The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination'. It is as well to keep these two stages of the enquiry separate.
. . . .
Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the fourteen grounds specified in the subsection (a 'specified ground'). The second is differentiation on a ground not specified in subsection (2) but analogous to such ground (for convenience hereinafter called an 'unspecified' ground) which we formulated as follows in *Prinsloo*:
'The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.

. . . .

Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. . . . [U]nfair discrimination, when used in this second form in

section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

. . . .

Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.'

. . . .

In the above quoted passage from *Prinsloo* it was pointed out that the pejorative meaning of 'discrimination' related to the unequal treatment of people 'based on attributes and characteristics attaching to them'. For purposes of that case it was unnecessary to attempt any comprehensive description of what 'attributes and characteristics' would comprise. . . .
It is also unnecessary for purposes of the present case, save that I would caution against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history." (Footnotes omitted.)[2][2]

[17] Once discrimination has been established, the next enquiry is whether that discrimination is unfair. The unfairness enquiry is concerned with the impact of the impugned measures on the complainants. As was held in *Hugo*,

"To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[2][3]

In *Harksen* the focus of the unfairness enquiry was further explained as follows:

"In [*Hugo*] dignity was referred to as an underlying consideration in the determination of unfairness. The prohibition of unfair discrimination in the Constitution provides a bulwark

against invasions which impair human dignity or which affect people adversely in a comparably serious manner. However, as L'Heureux-Dubé J acknowledged in *Egan v Canada*, 'Dignity [is] a notoriously elusive concept . . . it is clear that [it] cannot, by itself, bear the weight of s.15's task on its shoulders. It needs precision and elaboration.' It is made clear in para 43 of *Hugo* that this stage of the enquiry focuses primarily on the experience of the 'victim' of discrimination. In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination."[2][4] (Footnote omitted.)

[18] If discrimination is held to be unfair, then the final question to be considered is whether the unfair discrimination is nevertheless justified in terms of section 33(1) of the interim Constitution.

[19] I will now apply the above principles to the facts of this case. The disadvantaged group in this case is foreign citizens. Because citizenship is an unspecified ground, the first leg of the enquiry requires considering whether differentiation on that ground constitutes discrimination. This involves an inquiry as to whether, in the words of *Harksen*:

" . . . objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."[2][5]

I have no doubt that the ground of citizenship does. First, foreign citizens are a minority in all countries, and have little political muscle. In this respect, I associate myself with the views expressed by Wilson J in the Canadian Supreme Court in *Andrews v Law Society of British Columbia*[2][6] that:

"Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'" (citation omitted).

Second, citizenship is a personal attribute which is difficult to change. In that regard, I would like to note the following views of La Forest J, from the same case:

"The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs."[2][7]

This general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race.[2][8] Many

became statutory foreigners in their own country under the Bantustan policy, and the legislature even managed to create remarkable beings called "foreign natives". Such people were treated as instruments of cheap labour to be discarded at will, with scant regard for their rights, or the rights of their families.

[20] Finally, this Court was presented with specific incidents of threats and intimidation concerning the appointment of foreign teachers. Mr Joe Agyenim Boateng, a teacher in a similar situation to the appellants, reports that the only individuals who attended interviews for teaching posts at his school were "foreign born" teachers. Following such interviews, Mr Boateng states, the principal of the school received threatening telephone calls, and was coerced into arranging a second set of interviews, "which the expatriate teachers were not permitted to attend."[2][9] Such incidents indicate the vulnerability of non-citizens generally. In addition, the overall imputation seems to be that because persons are not citizens of South Africa they are for that reason alone not worthy of filling a permanent post. For all these reasons I am of the view that the differentiating ground of citizenship in regulation 2(2) is based on attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens hit by the regulation.

[21] The right of persons who are not South African citizens to live and work in South Africa is regulated by the Aliens Control Act 96 of 1991 ("the Aliens Control Act"). When these proceedings were commenced the Aliens Control Act distinguished between permanent residents and temporary residents. Permanent residents were entitled to live and work in South Africa indefinitely and to apply for South African citizenship by naturalisation after they had lived here for five years.[3][0]

[22] To secure a permanent residence permit a non-citizen had to satisfy the Immigrants Selection Board that he or she was of good character, would within a reasonable time assimilate with inhabitants of the Republic, would be a desirable resident of the Republic, would not be likely to be harmful to the welfare of the Republic, and would not be likely to pursue an occupation in which, in the opinion of the Board, a sufficient number of persons were already engaged in the Republic to meet the requirements of the inhabitants.[3][1] Immigrants who obtained such permits were given a good deal of security, for as long as they refrained from criminal conduct and did not leave the country for long periods, their permits allowed them to live and work in South Africa on a permanent basis without having to secure any further permission to do so.[3][2] Although section 25 has been amended since the commencement of these proceedings, the amendments are not material to the appellants' case.[3][3]

[23] To determine whether the discrimination in this case is unfair, regard must be had primarily to the impact of the discrimination on the appellants, which in turn requires a consideration of the nature of the group affected, the nature of the power exercised, and the nature of the interests involved. I have stated above that non-citizens are a vulnerable group. The power exercised in this case is a general power to prescribe regulations governing the terms and conditions of employment of educators nationwide. Finally, regulation 2(2) affects employment opportunities, which are undoubtedly a vital interest. A person's profession is an important part of his or her life. Security of tenure permits a person to plan and build his or her family, social and professional life, in the knowledge that he or she cannot be dismissed without good cause.

Conversely, denial of security of tenure precludes a person from exercising such personal life choices.

[24] A distinction should be drawn between the impact of the regulations on permanent residents and their impact on temporary residents. In my view, the regulations clearly constitute unfair discrimination as regards permanent residents of South Africa. They have been selected for residence in this country by the Immigrants Selection Board, some of them on the basis of recruitment to specific posts. Permanent residents are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa. Moreover, permanent residents are entitled to compete with South Africans in the employment market. As emphasized by the appellants, it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform. Indeed, this is the view of the Department of Home Affairs, in its reply to the following question posed by the Department of Education of the North-West Province:

"Where permanent residence has been lawfully acquired by an expatriate teacher i.t.o. the South African Citizenship Act 88 of 1995 and such is confirmed by the Dept. of Home Affairs, is the said expatriate teacher entitled to the right to permanent employment and residence like any other South African Citizen whose Citizenship has been acquired by birth?"[3][4]

The following response was given by the Regional Director:

"[T]he policy of the Department of Home Affairs is that an expatriate lawfully in possession of a South African Permanent Residence Permit be granted the same privileges as South African Citizens. . . .
The Department of Education, Arts, Culture, Sports and Recreation can only act on expatriate teachers with Temporary Residence and Work Permits."

[25] I hold that regulation 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment is a harsh measure.

[26] I also hold that this unfair discrimination is not justified under section 33(1) of the interim Constitution. The application of section 33(1):

" . . . involves the weighing up of competing values, and ultimately an assessment based on proportionality. . . . In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." (Footnote omitted.)[3][5]

[27] A precondition to the applicability of section 33(1) is that the limitation of a right occur "by law of general application". I hold that precondition to be met in this case. Regulation 2(2) is subordinate legislation which applies generally to all educators in South Africa. The respondents' main argument on justification is the interest of a government in providing employment to its own nationals. They also argued that the regulation was negotiated and agreed upon in the Education Labour Relations Council, which included employee organizations, including non-citizen teachers. Finally, the respondents stated that due to the potential temporary nature of the residence of a foreigner who can return to his or her country of origin at any time, it is against the public interest to appoint a non-citizen in a permanent capacity as an educator. I shall consider these arguments in turn.

[28] The respondents' second and third arguments can be dealt with summarily. Although it may be that in certain circumstances the fact that a provision is the product of collective bargaining will be of significance for section 33(1), I cannot accept that it is relevant in this case. Where the purpose and effect of an agreed provision is to discriminate unfairly against a minority, its origin in negotiated agreement will not in itself provide grounds for justification. Resolution by majority is the basis of all legislation in a democracy, yet it too is subject to constitutional challenge where it discriminates unfairly against vulnerable groups. The respondents' third argument, that the ability of foreign citizens to return to their country of origin reduces their commitment to South Africa, also lacks merit. This argument applies with equal force to the many thousands of South Africans who hold dual nationality. The regulations do not, however, impose any bar on their eligibility for permanent employment.

[29] As regards the aim of providing jobs to South Africans, the appellants disagree that that is a legitimate aim of the respondents. They assert that the respondents should be concerned with the delivery of high quality education to learners, rather than with the provision of jobs for teachers. If the appellants are correct in this assertion, the prohibition on permanent appointment of foreign citizens in regulation 2(2) becomes invalid without qualification — its aim is simply illegitimate.

[30] In my view, the appellants' argument is too sweeping. Surely it must be a legitimate purpose for a government department to reduce unemployment among South African citizens. However the provision of quality education must be the primary aim of an education department.[3][6] While reducing unemployment for citizens may in certain circumstances be a legitimate aim, particularly when thousands of qualified educators are unemployed, that must never be permitted to compromise the primary aim, especially at a time in our history when quality education is crucial in transforming our society.

[31] Permanent residents should, in my view, be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government's aim should be to reduce unemployment among South African citizens *and permanent residents.* As explained above, permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the full concern of the government concerning the availability of employment opportunities. Unless posts require citizenship for some reason, for example due to the particular political sensitivity of such posts,

employment should be available without discrimination between citizens and permanent residents.[3][7] Thus it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens.

[32] Waddington J held that the limitation was justified on the first ground relied upon by the respondents, finding that regulation 2(2) is reasonable in the conditions existing in South Africa where there is an oversupply of teachers. Approximately 50 000 teachers presently in state employment face retrenchment. Newly qualified teachers are not all able to find posts and the intake into teacher training institutions is to be cut by 40%. Waddington J held that the employment of non-citizens as teachers in such circumstances is prejudicial to citizens who are qualified as teachers and deprives them of employment opportunities.

[33] The judgment *a quo* refers to the practice in Botswana, the United Kingdom and the United States of America where citizenship is a requirement for certain posts in the civil service and concludes that regulation 2(2) is consistent with procedures followed in democratic countries.[3][8] Waddington J was of the opinion that the measure was:

" . . . a reasonable method of alleviating the plight of a large number of South African citizens albeit requiring the right not to be unfairly discriminated against being eroded to some extent in the case of alien teachers who have throughout their careers enjoyed no status any different from that envisaged by the regulation."[3][9]

[34] The fact that regulation 2(2) is consistent with the conditions under which the appellants were previously employed does not seem to me to be a relevant consideration. Since the coming into force of the interim Constitution the appellants are entitled to have their conditions of employment as state employees regulated by provisions that are consistent with their rights under the interim Constitution.

[35] The problem of the oversupply of teachers may be relevant to immigration policy and to decisions to be taken where the competition for a post is between a citizen and a temporary resident. But where the competing parties are citizens and permanent residents, an exclusion of permanent residents from the competition on the grounds that they do not hold citizenship, is in my view purely discriminatory and has no valid justification. I accordingly hold that the limitation by regulation 2(2) of the right entrenched in section 8(2) of the interim Constitution is not justified in terms of section 33(1).

[36] The final matter for consideration is the question of the appropriate order to be made. During the course of argument counsel were asked whether regulation 2(2) discriminates unfairly against non-citizens who are temporary residents, and if it does not, whether it would be competent for this Court to make an order that the regulation is invalid only to the extent that it applies to non-citizens who are permanent residents.

[37] Non-citizens who are temporary residents have more restricted rights to live and work in South Africa than permanent residents. Section 26(5) of the Aliens Control Act as it read prior to the amendment provided that:

"[a temporary resident] who remains in the Republic after the expiration of the period for which, or acts in conflict with the purpose for which, or fails to comply with a condition subject to which, [the permit] was issued, shall be guilty of an offence and may be dealt with under this Act as a prohibited person."

The section as amended now makes provision for different categories of temporary residents' permits. The relevant category of permit as far as those appellants who are temporary residents are concerned is a work permit. In terms of paragraph 1(b) of the section:

"a work permit . . . may be issued to any alien who applies for permission --
(i) to be temporarily employed in the Republic with or without any reward".

These provisions have to be read with sections 32(2)(c) and 58(1)(c) of the Act which prohibit temporary residents from taking up employment or being employed or continuing in the employment of any person in any capacity except that specified in their permit, or for a period longer than the period so specified.

[38] The impact of regulation 2(2) on educators who are temporary residents is materially different to its impact on those who are permanent residents. As far as permanent residents are concerned the regulation is the source of their insecurity, denying them the opportunity to take up permanent employment and requiring them to accept the more precarious status of temporary employees with all the disadvantage attached to that, or to abandon their chosen profession and seek work in other fields. Temporary residents are in a different position. They have no right to remain in the country beyond the period for which they have been given a permit. Irrespective of the regulation, their continued residence in South Africa is precarious. They cannot make firm commitments beyond those allowed by their permits, and they can never be sure whether they will be permitted to remain in the country for a period longer than that for which the permit has been granted.

[39] I have considered whether the order to be made should in the circumstances be limited in its application to permanent residents, but I have come to the conclusion that it would not be appropriate to do so in the present case.

[40] When one speaks of "temporary" employees one generally speaks of people who are employed in jobs not considered to be permanent, such as replacements for women on maternity leave or for employees who are temporarily absent from employment for other reasons, or people employed in tasks that are finite in nature. Different terms and conditions of employment are generally afforded to "temporary" employees than those afforded to other employees. Their job security is often less rigorously protected and the benefits afforded to them may be considerably less than those afforded to permanent employees. In this sense, one cannot say the appellants'

employment was “temporary”.

[41] Although the right of the appellants who were temporary residents to live and work in South Africa was restricted by the terms of their permits, they were entitled to apply for renewal of their permits from time to time[40] and through doing so they remained in the country as “temporary residents” for many years. According to the founding affidavit, the third appellant, Mr J Akwa, who is a temporary resident, first came to South Africa in 1984 when he was employed in the Transkei (as it was then known). In 1989 he became a teacher in a College of Education in Bophuthatswana where he is still employed. He is married to a South African and has four children all of whom are South African. During this period he has lived and worked in South Africa in terms of work permits issued on an annual basis. Five of the other appellants have similarly been employed for an extended period of time in South Africa in terms of work permits which have been annually renewed. The first appellant, referring to this history, states that:

“the applicants have come to regard their employment as being of a fairly extended nature and have regulated their financial, social, residential, professional and family lives accordingly.”

Although six of the appellants have had the legal status of temporary residents, in substance, their employment in South Africa has in fact not been temporary.

[42] The contracts that the appellants entered into with the education authorities at the time they were employed allowed for the possibility that their “temporary” employment might be continued indefinitely. The first appellant refers to the contracts in his founding affidavit and says that the letters of appointment of all the appellants were essentially the same. This allegation was not denied. He annexed his own letter of appointment to illustrate the terms on which the appellants were appointed. It shows that the temporary appointment was for an indefinite and not a fixed period and that provision was made for increments and for him to be admitted to membership of a provident fund.

[43] Citizens may make their living through taking up temporary employment in different capacities from time to time. On the other hand temporary residents may in fact have employment of a permanent nature through holding one job and renewing their temporary residents’ permits from time to time. Although their temporary residence status may give rise to insecurity and expose them to the risk that they will be required to terminate their employment and leave the country, it could well be argued that they should not be exposed to discrimination in the job market for as long as they are permitted to live and work in South Africa.

[44] In terms of the regulations, educators appointed in a permanent capacity have greater rights than educators appointed in a temporary capacity. The former have security of tenure and can only be discharged on limited grounds; the latter can be discharged by the giving of “reasonable notice”,[41] which may be given during the currency of their residence permit and may force them to leave their jobs although they are legally entitled to work in South Africa.

[45] If employees working under temporary residence permits were denied job security only to

the extent required by the terms of lawful permits, it could not be said that such discrimination was unfair. But regulation 2(2), in effect, may go beyond that. Depending on what is meant by "reasonable notice", it may permit employers to discharge teachers without cause at a time when they are legally entitled to continue working under their "work" permits. It is also not clear whether other disadvantages attach to the status of being a "temporary" educator, and if they do, whether redress for such disadvantages can be secured through the Labour Relations Act 66 of 1995 or other legislation. No argument was addressed to this Court on these issues and I cannot be sure that if I were to limit the declaration of invalidity to educators appointed in a permanent capacity, I would not be doing an injustice to temporary residents.

[46] Nor can I be sure that once it has been alerted to the discrimination which may result in practice from the employment of teachers for long periods in a "temporary" capacity — and the facts of the present case illustrate the prejudice that may be suffered — the legislature would want to retain in its present form the general prohibition contained in regulation 2(2).[4][2] In the circumstances I do not consider this to be an appropriate case in which to make an order of partial invalidity.

[47] My finding that regulation 2(2) is invalid does not affect the immigration status of those appellants who are temporary residents. Their right to live and work in South Africa is regulated by the Aliens Control Act. If they wish to obtain the security accorded to permanent residents they must apply for immigration permits under section 25 of the Act, which if granted, will entitle them to permanent residence in South Africa. The final decision as to their status will then rest with the Immigrants Selection Board which is the appropriate body to make the nuanced decisions as to permanent residency in the light of the significant ties the appellants have to South Africa.

[48] The appeal therefore succeeds. The appellants are all individuals who have successfully obtained constitutional relief against an organ of state. In my view, they should be entitled to recover their costs.

[49] The following order is made:

1. The appeal is allowed with costs, such costs to include the costs attendant on the employment of two counsel.
2. The order of Waddington J in the court below is set aside and for it the following substituted:
"a. Regulation 2(2) of the "Regulations regarding the Terms and Conditions of Employment of Education" in Government Gazette 16814 GN R1743 of 13 November 1995 is declared to be inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 and invalid.
b. The respondents are ordered to pay the applicants' costs."

Chaskalson P, Langa DP, Ackermann J, Didcott J, Goldstone J, Kriegler J, Madala J, O'Regan J, and Sachs J all concur in the judgment of Mokgoro J.

For the appellants: H Lever SC and PM Kennedy instructed by AK Ahmed.

For the respondents: PC van der Byl SC and L Thomas instructed by the State Attorney, Mmabatho.

For the amicus curiae: J Kentridge and E du Toit instructed by Webber Wentzel Bowens.

---

[1] *Larbi-Odam and Others v Member of the Executive Council for Education and Another* 1996 (12) BCLR 1612 (B).

[2] That rationalisation is part of a nationwide process, whereby 15 departments of education, including departments of the former TBVC states and self-governing territories, are being rationalised into one national education department and nine provincial education departments.

[3] This Court would like to express its gratitude for the helpful submissions of the amicus curiae.
[4] Although the contracts were expressly stated to be temporary, it appears to have been the practice not to specify termination dates. The appellants allege that:

"[n]o special acts of renewal of the appointments of the applicants took place at the commencement of each academic year. The applicants were merely expected to renew their residence permits at the end of each year. Accordingly the applicants have come to regard their employment as being of a fairly extended nature and have regulated their financial, social, residential, professional and family lives accordingly. In particular the pattern of conduct of the respondent's predecessor and of the respondent herself, until fairly recently, has been to regard the applicants' tenure of office as being fairly established."

[5] The following is an extract from the notices:

" . . . the Department of Education, Sport and Recreation has advertised and conducted interviews in respect of permanent posts of which the one you occupied is affected whereafter the continued rendition of your services becomes terminated because of your disqualification for reason or reasons as hereunder:
1. You are not a South African Citizen in terms of Chapter 2, Section 5 of the Constitution of the Republic of South Africa Act of 1993.
2. A suitably qualified South African Citizen has been interviewed and appointed to the said post.
Notwithstanding any reason given in the aforegoing for the termination of your service, the Department calls upon you to submit a written representation within fourteen days from receipt of this notice, and also in compliance with the rules of natural justice and fair labour practise, [sic] as to why your services should not so be terminated."

[6] Supra n 1 at 1616D-G.

[7] Id at 1616H-I.

[8] Id at 1615F-G.

[9] Id at G.

1[0] Id at 1615G-H.

[1]1 Id at 1621G-I.
1[2] Id at 1634C.

.

1[3] Id at 1624A-H.

1[4] Id at 1626E-G, 1630I-1631B.

1[5] This interpretation of "person" differs from that proposed by the amicus curiae in that "person" includes individuals who currently hold teaching posts, as well as those who do not hold such posts. The interpretation originally raised by this Court in its directions to the parties following the hearing, was that "person" might refer to individuals who do not hold teaching posts.

1[6] 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

1[7] 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

1[8] CCT 9/97, 7 October 1997, as yet unreported.

1[9] *Prinsloo* and *Harksen* also examine the meaning of section 8(1) of the interim Constitution, and its relationship to section 8(2).

2[0] Supra n 16 at para 41.

2[1] Although this Court differed in its application of equality principles to the facts of *Harksen*, there was unanimity as regards the formulation of those principles.

[2]2 Supra n 18 at paras 45-9.

2[3] Supra n 16 at para 43.

2[4] Supra n 18 at para 50.

2[5] Supra n 18 at para 53(b)(i).

2[6] (1989) 56 DLR (4th) 1 at 32.

2[7] Id at page 39.

2[8] See generally: Olivier "The Presence and Employment of Blacks in the Urban Areas of South Africa: A Historical Survey of Legislation" (1984) *Acta Juridica* 1, at 8-12. I wish to make clear that the apartheid policy of denationalization on the basis of race was a major human rights violation. It is not suggested here that the effect of regulation 2(2) is as invasive of human rights.

2[9] While the respondents do not specifically address Mr Boateng's allegations, Mr Van Wyk concedes on behalf of first respondent that some expatriate teachers have been prevented from attending interviews.

3[0] Section 5(1) of the South African Citizenship Act 88 of 1995.

3[1] Section 25(4) of the Aliens Control Act.

3[2] Section 31 and Chapter VI of the Aliens Control Act.

[3]3 The proceedings were commenced on 13 May 1996. The amendments to section 25 made by Act 76 of 1995 came into force on 1 December 1996. What was previously referred to as a permanent residence permit is now referred to as an immigration permit, but the conditions for granting such permits remain substantially the same.

3[4] In this question, the Department of Education of the North-West Province appears to be referring to the Aliens Control Act, which governs acquisition of permanent residency.

3[5] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

3[6] This primary aim of education is evident at numerous points in legislation providing the framework of education. See, eg, South African Schools Act 84 of 1996, Preamble, section 20; National Education Policy Act 27 of 1996, section 8.

3[7] See, eg, sections 42(1), 99(2), 110(4), 115(1), and 119(2) of the interim Constitution, which provide that members of Parliament, judges of the Constitutional Court, the Public Protector and members of the Human Rights Commission and Commission on Gender Equality shall be South African citizens.

3[8] Supra n 1 at 1626G-1630A.

3[9] Id at 1632E.

4[0] Section 26(4) of the Aliens Control Act (prior to its amendment).

4[1] See section 8(6) of the Educators' Employment Act.

4[2] Cf *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 48.