LARBI-ODAM AND OTHERS v MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION (NORTH-WEST PROVINCE) AND ANOTHER 1998 (1) SA 745 (CC)

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Citation 1998 (1) SA 745 (CC)

Case No CCT 2/97

Court Constitutional Court

Judge Mokgoro J, Chaskalson P, Langa DP, Ackermann J, Didcott J, Goldstone J, Kriegler J, Madala J, O'Regan J, Sachs J

Heard May 27, 1997

Heard November 26, 1997

Judgment November 26, 1997

Counsel H Lever (with him PM Kennedy) for the appellants

PC Van Der Byl (with him LG Thomas) for the respondents

J Kentridge (with her E Du Toit) for the amicus curiae

Annotations Link to Case Annotations

H

[zFNz]Flynote : Sleutelwoorde

Constitutional law - Human rights - Right not to be unfairly discriminated against in terms of s I 8(2) in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Educators (GN R1743 of 13 November 1995) providing that no person shall be appointed as an educator in a State school in a permanent capacity, unless he or she is a South African citizen - Regulation 2(2) unfairly discriminating against permanent residents of South Africa because they are excluded J

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from employment opportunities and denied security of tenure, notwithstanding their A qualifications, competence and commitment, even though they have been permitted to enter the country permanently - Unfair discrimination not justified in terms of s 33(1) of the Constitution - Aim of reducing unemployment for citizens

cannot justify discrimination against permanent B residents who should be viewed no differently from South African citizens when it comes to reducing unemployment - Regulation 2(2) accordingly inconsistent with the interim Constitution and invalid.

[zHNz]Headnote : Kopnota

Regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of C Educators (GN R1743 of 13 November 1995) (the regulations) provide that no person shall be appointed as an educator in a State school in a permanent capacity, unless he or she is a South African citizen. The first respondent, as part of a rationalisation process, advertised D posts held by foreign teachers temporarily employed in the North-West province, and issued such teachers with notices purporting to terminate their employment. The appellants (eight foreign teachers temporarily employed in the North-West Province, some of whom had permanent residence status) applied to the Bophuthatswana Provincial Division of the Supreme Court for an order declaring reg 2(2) invalid on the grounds that it constituted unfair E discrimination in contravention of s 8(2) of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993). The application was dismissed. The applicants appealed to the Constitutional Court.

Held (per Mokgoro J, the other members of the Court concurring) that the regulation differentiated between citizens and non-citizens to the disadvantage of the latter group. F Because citizenship was not a ground of discrimination specified in s 8(2), the Court had to consider whether differentiation on that ground constituted discrimination. This involved an inquiry as to whether objectively the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. On this basis, the ground of citizenship did discriminate. First, foreign citizens were a minority in all countries, and had little political G muscle. Second, citizenship was a personal attribute which was difficult to change. Finally, specific incidents of threats and intimidation had taken place concerning the appointment of foreign teachers in this case. Such incidents indicated the vulnerability of non-citizens generally. In addition, the overall imputation of the measure was that, because persons were not citizens of South Africa, they were for that reason alone not worthy of filling a permanent post. The H differentiating ground of citizenship in reg 2(2) could therefore be said to be based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens hit by the regulation. (Paragraphs [19]--[20] at 756G--757H, paraphrased.)

Held, further, that to determine whether the discrimination in this case was unfair, regard had I to be had primarily to the impact of the discrimination on the appellants, which in turn required a consideration of the nature of the group affected, the nature of the power exercised, and the nature of the interests involved. Non-citizens were a vulnerable group. The power exercised in this case was a general power to prescribe

regulations governing the terms and conditions of employment of educators nationwide. Finally, reg 2(2) affected employment opportunities, which were undoubtedly a vital interest. A person's profession was an important part of his or her life. J

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Security of tenure permitted a person to plan and build his or her family, social and A professional life, in the knowledge that he or she could not be dismissed without good cause. Conversely, denial of security of tenure precluded a person from exercising such personal life choices. (Paragraph [23] at 758E--G/H.)

Held, further, that the regulations clearly constituted unfair discrimination as regards permanent B residents of South Africa. They had been selected for residence in South Africa by the Immigrants Selection Board, some of them on the basis of recruitment to specific posts. Permanent residents were generally entitled to citizenship within a few years of gaining permanent residency, and could be said to have made a conscious commitment to South Africa. Moreover, permanent residents were entitled to compete with South Africans in the C employment market. It made little sense to permit people to stay permanently in a country, but then to exclude them from a job they were qualified to perform. (Paragraph [24] at 758H--759B.)

Held, further, that reg 2(2) constituted unfair discrimination against permanent residents, because they were excluded from employment opportunities even though they had been D permitted to enter the country permanently. The government had made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner was a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment was a harsh measure. (Paragraph [25] at 759D/E--F.)

Held, further, that this unfair discrimination was not justified under s 33(1) of the interim Constitution. (Paragraph [26] at 759F/G.) E

Held, further, as to the argument that the regulation was negotiated and agreed upon in the Education Labour Relations Council, which included employee organizations representing non-citizen teachers, that, although in certain circumstances the fact that a provision was the product of collective bargaining might be of significance for s 33(1), it was not relevant in this F case. Where the purpose and effect of an agreed provision was to discriminate unfairly against a minority, its origin in a negotiated agreement would not in itself provide grounds for justification. Resolution by majority was the basis of all legislation in a democracy, yet it too was subject to constitutional challenge where it discriminated unfairly against vulnerable groups. (Paragraph [28] at 760C--D.) G

Held, further, as to the argument that the ability of foreign citizens to return to their country of origin reduced their commitment to South Africa, that the argument

applied with equal force to the many thousands of South Africans who held dual nationality. The regulations did not, however, impose any bar on the eligibility for permanent employment of South Africans with dual nationality. (Paragraph [28] at 760D--E.) H

Held, further, that it was a legitimate purpose for a government department to reduce unemployment among South African citizens. However, the provision of quality education had to be the primary aim of an education department. While reducing unemployment for citizens might in certain circumstances be a legitimate aim, particularly when thousands of qualified educators were unemployed, that had never to be permitted to compromise the primary aim, I especially at a time when quality education was crucial in transforming South African society. Permanent residents should be viewed no differently from South African citizens when it came to reducing unemployment. The government's aim should be to reduce unemployment among South African citizens and permanent residents. Permanent residents merited the full concern of the government concerning the availability of employment opportunities. Unless posts required citizenship for some J

reason, for example due to the particular political sensitivity of such posts, employment should A be available without discrimination between citizens and permanent residents. Thus it was simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent B residents of posts they had held, in some cases for many years, was too high a price to pay in return for increasing jobs for citizens. (Paragraphs [30]--[31] at 760G--761C.)

Held, further, that the problem of the oversupply of teachers might be relevant to immigration policy and to decisions to be taken where the competition for a post was between a citizen and a temporary resident. But where the competing parties were citizens and permanent C residents, an exclusion of permanent residents from the competition on the grounds that they did not hold citizenship was purely discriminatory and had no valid justification. The limitation by reg 2(2) of the right entrenched in s 8(2) of the interim Constitution was not justifed in terms of s 33(1). (Paragraph [35] at 761H--762A/B.)

Held, further, as to the question of the appropriate order, that the declaration of invalidity D could not be limited in its application to permanent residents only. In the absence of argument on the issue, there could be no certainty that, if the declaration of invalidity was limited to educators appointed in a permanent capacity, there would be no injustice to temporary residents. (Paragraphs [36]--[46] at 762B--764G, summarised.)

Held, accordingly, that the appeal be allowed and that reg 2(2) be declared to be inconsistent E with the interim Constitution and invalid. (At 765C).

The decision in the Bophuthatswana Supreme Court in Larbi-Odam and Others v Member of the Executive Council for Education and Another 1996 (12) BCLR 1612 reversed.

Annotations:

Reported cases F

Andrews v Law Society of British Columbia (1989) 56 DLR (4th) 1: dictum at 32 approved and applied

Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC) (1997 (2) BCLR 153): compared

Harksen v Lane NO and Others 1998 (1) SA 300 (CC) : applied G

Larbi-Odam and Others v Member of the Executive Council for Education and Another 1996 (12) BCLR 1612 (B): reversed on appeal

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) (1997 (6) BCLR 708): applied

Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759: H referred to

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): dictum in para [104] applied.

[zSTz]Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 200 of 1993, ss 8(2), 33(1): see Juta's Statutes of South Africa 1996 vol 5 at 1-134, 1-136

The Educators' Employment Act Proclamation 138 of 2 September 1994, Regulations I regarding the Terms and Conditions of Employment of Educators, reg 2(2): see Government Notice R1743 of 1995, Government Gazette 16814 of 13 November 1995.

[zCIz]Case Information

Appeal from a decision in the Bophuthatswana Supreme Court (Waddington J), reported at 1996 (12) BCLR 1612. The facts appear from the judgment of Mokgoro J. J

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MOKGORO J

H Lever SC (with him P M Kennedy) for the appellants. A

P C van der Byl SC (with him L G Thomas) for the respondents.

J Kentridge (with her E du Toit) for the amicus curiae.

Cur adv vult.

Postea (November 26). B

[zJDz]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. * The learned Judge dismissed an application which in effect sought an order that: C

(a) reg 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 s D 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 (`the interim Constitution');

(b) alternatively, reg 2(2) was ultra vires its enabling legislation being the Educators' Employment Act Proclamation 138 of 1994 (`the Educators' Employment Act'). E

[2] The material portions of the regulations provide:

'[2.](2) . . . (N)o 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 s 212(4) of the Constitution of the Republic of South Africa, 1993. F

. . . .

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 G respondent, the Member of the Executive Council for Education of the North-West Province, has relied upon reg 2(2) in the process of rationalisation of education. * 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 H 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 s 8(2) of the interim Constitution (the Constitution of the Republic of South Africa

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Act 200 of 1993). They are supported in their submissions by the Centre for Applied Legal A Studies, which acted as an amicus curiae in the proceedings before this Court. *

[4] The eight appellants are foreign teachers temporarily employed in the North-West B 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 C 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 D employment because of regulations issued under s 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 E Bophuthatswana. The appellants contend that their contracts of temporary employment were repeatedly renewed as a matter of course. * 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 reg 2(2), relied F upon by first respondent in the rationalisation process. As part of that process, first respondent advertised approximately 5 000 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. * In the Court a quo, the appellants initially sought G an

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interdict restraining the respondents from enforcing reg 2(2). * In lieu of an interdict, the first A 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. * The respondents conceded at the hearing below B that the effect of the notices is that none of the appellants' contracts has as yet been terminated. * Each remains in paid employment until his or her contract has been lawfully terminated. * 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. * C

[7] Waddington J held that although reg 2(2) is contrary to s 8(2) of the interim Constitution, it is justified under s 33(1). As regards s 8(2), he stated that `the discrimination (created by reg 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 D loudly proclaimed by the content of reg 2(2) itself'. * Waddington J also held that reg 2(2) was not ultra vires its enabling statute. * His judgment summarises with clarity the respondents' case for justification, and merits quotation at length:

'(The second respondent) gives the following facts in relation to education in South Africa: E

(a) 26 000 educators are trained annually . . . .

(b) According to Departmental records, 345 543 educators were employed during 1995.

(c) The national educators attrition rate in 1994 was 20 500. In 1995 it was 20 700. F

(d) In the ordinary course of events it would have been possible to accommodate 24 340 out of 26 000 educators who qualified in 1994.

(e) Similarly, not all educators who qualified in previous years could be accommodated, ie offered posts in the teaching profession.

(f) In consequence, there are large numbers of unemployed educators in South Africa. G

3. The oversupply of educators is exacerbated by the rationalisation process being carried out in accordance with the provisions of s 237 of the interim

Constitution . . . 15 departments of education . . . are being rationalised into one national and nine A 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 10 976 primary school teachers will become redundant and about 39 508 secondary school teachers will become redundant. B

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%.' * C

[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 D 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 E 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 F 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.' *

[9] It should be noted that the figures concerning retrenchment in Waddington J's judgment are G 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 H 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 reg 5(1) on the scope of reg 2(2).

[11] Regulation 5(1) provides that: I

'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.'

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At first glance, reg 5(1) appears to override the prohibition on permanent appointment of A non-citizens in reg 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 reg 2(2), and persist in their submissions B that reg 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 reg 5(1) operates as a partial override to reg 2(2). The amicus curiae argues that even that override does not save reg 2(2) from unconstitutionality. C

[12] The interplay between the regulations is complex. On the one hand, reg 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 D contrary contained in these Regulations, with his or her consent be appointed in a permanent capacity' (emphasis added). `Educator' is defined in s 1 of the Educators' Employment Act as `any person who teaches, educates or trains other persons . . . at any educational institution', a E 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. * Because reg 5(1) refers to `educators', it applies only to individuals who already hold teaching posts. It may F therefore only assist those temporary teachers who are already in the system. It cannot assist first-time applicants for permanent posts, to whom reg 2(2) applies in its full rigour.

[13] The reg 5(1) override may also be partial in other ways. The regulation provides that G `(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 reg 5(1) is confined to transfers of educators to existing posts, at the instance of H 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 I

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post' may be broad enough to include newly created posts and posts occupied by an educator A on a temporary basis and upgraded to permanent posts.

[14] The meaning of reg 5(1) and the relationship between it and reg 2(2) are by no means clear. Even if the regulation were to be held to be wide enough to empower the appointment of B 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 C upon employers by reg 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 reg 2(2). In the circumstances it cannot be said that reg 5(1), on any interpretation, has the effect of D neutralising the discrimination implicit in reg 2(2) or its unfairness. It is therefore unnecessary in this case to come to a final conclusion as to the effect of reg 5(1).

[15] I now turn to consider the constitutionality of reg 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. E

(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. F

(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 ss (2) shall be presumed to G 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, * Prinsloo v Van der H Linde and Another, * and Harksen v Lane NO and Others, * which lay down a framework for equality analysis under s 8 of the interim Constitution. It is therefore necessary to consider the issue of unfair discrimination in the light of those judgments. *

[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 A 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.' *

In Harksen, this Court explained unfair discrimination as follows: * B

'The determination as to whether differentiation amounts to unfair discrimination under s 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.

. . . . C

Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the 14 grounds specified in the subsection (a ``specified ground''). The second is differentiation on a ground not specified in ss (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 D 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 E and characteristics attaching to them. . . . (U)nfair discrimination, when used in this second form in s 8(2), in the context of s 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 F fundamental dignity as human beings, it will clearly be a breach of s 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 s 8(2) as well."

. . . .

In the above quoted passage from Prinsloo it was pointed out that the pejorative meaning of G ``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 H 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 categorise, 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 I 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 A 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.) * B

[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, C

'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.' *

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

'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. E 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 F the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.' *

(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 s 33(1) of the interim Constitution. G

[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 H 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'. *

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 I

this respect, I associate myself with the views expressed by Wilson J in the Canadian Supreme A Court in Andrews v Law Society of British Columbia * 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 B 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: C

'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.' *

This general lack of control over one's citizenship has particular resonance in the South African D 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. * Many became statutory foreigners in their own country under the Bantustan policy, and the E 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 F 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 G permitted to attend'. * 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 reg 2(2) is based on H attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens hit by the regulation.

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[21] The right of persons who are not South African citizens to live and work in South Africa A 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 B Africa indefinitely and to apply for South African citizenship by naturalisation after they had lived here for five years. *

[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, C 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. * Immigrants who obtained such permits were given a good deal of security, for as long as they refrained D 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. * Although s 25 has been amended since the commencement of these proceedings, the amendments are not material to the appellants' case. * E

[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. F 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 G 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 H 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 A 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 emphasised by the appellants, it makes little sense to permit people to stay permanently in a B 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 in terms of the C South African Citizenship Act 88 of 1995 and such is confirmed by the Department 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?' *

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 D 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 reg 2(2) constitutes unfair discrimination against permanent residents, because E 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. F

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

'. . . involves the weighing up of competing values, and ultimately an assessment based on G 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.' H

(Footnote omitted.) *

[27] A precondition to the applicability of s 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 I

argument on justification is the interest of a government in providing employment to its own A nationals. They also argued that the regulation was negotiated and agreed upon in the Education Labour Relations Council, which included employee organisations, including non-citizen teachers. Finally, the respondents stated that due to the potential temporary nature B 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 C may be that in certain circumstances the fact that a provision is the product of collective bargaining will be of significance for s 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. D 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 E 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 F 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 reg 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 G 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. * While reducing unemployment for citizens may in certain circumstances be a H 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 I 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

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country. After a few years, they become eligible for citizenship. In the interim, they merit the A 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 B permanent residents. * 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. C

[32] Waddington J held that the limitation was justified on the first ground relied upon by the respondents, finding that reg 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 D 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 E United States of America where citizenship is a requirement for certain posts in the civil service and concludes that reg 2(2) is consistent with procedures followed in democratic countries. * 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 F 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'. *

[34] The fact that reg 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 G 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 H 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 A accordingly hold that the limitation by reg 2(2) of the right entrenched in s 8(2) of the interim Constitution is not justified in terms of s 33(1).

[36] The final matter for consideration is the question of the appropriate order to be made. B During the course of argument counsel were asked whether reg 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. C

[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 D 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 ss (1)(b) of s 26 E

`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 ss 32(2)(c) and 58(1)(c) of the Act which prohibit F 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 reg 2(2) on educators who are temporary residents is materially different to G 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 H 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. I 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. J

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[40] When one speaks of `temporary' employees one generally speaks of people who are A 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 B 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 C South Africa was restricted by the terms of their permits, they were entitled to apply for renewal of their permits from time to time * and through doing so they remained in the country as `temporary residents' for many years. According to the founding affidavit, the third D 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 E 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'. F

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 G 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 H 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 I 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 A 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 B 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', * 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. C

[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 D discrimination was unfair. But reg 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 E 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. F

[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 G want to retain in its present form the general prohibition

contained in reg 2(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 reg 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 H regulated by the Aliens Control Act. If they wish to obtain the security accorded to permanent residents they must apply for immigration permits under s 25 of the Act, which if granted, will entitle them to permanent residence in South Africa. The final decision as to their status will I 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.

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[48] The appeal therefore succeeds. The appellants are all individuals who have successfully A 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. B

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 C 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.

2. The respondents are ordered to pay the applicants' costs.'

Chaskalson P, Langa DP, Ackermann J, Didcott J, Goldstone J, Kriegler J, Madala J, D O'Regan J and Sachs J concurred.

Appellants' Attorneys: A K Ahmed. Respondents' Attorney: State Attorney. Attorneys for the Amicus Curiae: Webber, Wentzel, Bowens.