

EXEMPTION REQUESTS, INTERNAL APPEALS UNDER THE IMMIGRATION ACT AND RELIEF BY COURTS

There are a myriad of circumstances that may arise wherein an applicant may apply to the Minister of Home Affairs to grant certain concessions in terms of section 31(2)(b) or under 31(2)(c) under the Immigration Act (the “Act”) that may pertain either to the acquisition of permanent residence “when special circumstances exist” or “for good cause, waive any prescribed requirement or form”.

An illustration of the application of section under 31(2)(b) was illustrated in the case of **Littlewood versus the Minister of Home Affairs 2006(3) SA 474 (SCA)** where the foreign applicant found out to his surprise that the permanent residency permits for himself and his family were issued illegitimately by Home Affairs, unbeknown to him, and quite innocently, in the circumstances.

The Minister of Home Affairs rejected his application for an exemption to grant permanent residence status despite this unfortunate set of circumstances. That matter was taken on judicial review to the Pretoria High Court which upheld the Minister’s decision and was only overturned in the Supreme Court of Appeal which held that the Minister failed to exercise its discretion correctly and referred the matter back to the Minister to reapply its mind in light of the circumstances of the case.

A typical scenario necessitating a waiver under section 31(2)(c) would be where a specific requirement or form is applied to the Minister to be dispensed with.

For example, where two same-sex foreign partners in a permanent relationship desire to immigrate to South Africa but the necessary “official recognition” required in terms of regulation 3(b) of the Immigration Regulations is unavailable due to that country refusing to recognise such a relationship as its domestic laws prohibit such relationships. An internal application would be submitted to the Minister to waive such a requirement on “good cause”.

Should the Minister reject such an application, the Act provides an internal review or appeal mechanism contained in section 8. Section 8(4) and 8(6) of the said Act, read with section 8(3) provides an appeal or review of a decision that materially or adversely affects the rights of any person; first to the Director-General and then to the Minister of Home Affairs.

A weakness is exposed in terms of section 8(4) and 8(6) when the Minister is the initial decision maker since a “decision” made by the Minister cannot judicially be reviewed or appealed by the Director-General - his or her ‘junior’. Moreover, the Minister cannot judicially evaluate its own decision if section 8(6) is invoked by the applicant, nor could it have been the intention of the legislature to apply to the Minister as the first stage of relief.

There have been some interesting judgments going as far as labeling the above situation as “absurdity” by Pakade J in **Ncube versus the Minister of Home Affairs (EHC case no 2074/08 December 2008)**. The Court raised further concerns in the internal appeal mechanism where Pakade J intimated that an internal appeal under 8(4) against the decision of the administrative personnel cannot go to the Director-General as that is deemed to be his decision.

The only alternative is that the aggrieved applicant will now have to take the matter on judicial review to the High Court, which was not the initial intention behind section 8 as it was designed to adjudicate administrative action in a swift, affordable and judicially sound manner without having to resort to the courts.

The only way to amend this situation is to empower another person or body, at 'arms length' to the Department as the authoritative body to grant exemptions or other decisions in terms of the Act in order to pave a legitimate platform for an internal appeal or review mechanism as currently set out in the Act.

It is interesting to note that in August 2004, the Deputy Minister of Home Affairs, in commenting on the Immigration Amendment Bill about to be passed into law that year, praised the proposed amendments to the internal appeals process under section 8, suggesting that it has streamlined the process of internal appeals and brought it in line with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

What the Honourable Deputy Minister meant made sense and was echoed in **Koyabe and Others versus Minister of Home Affairs (CCT 53/08) (2009) ZACC 23**, but the issue, in casu, had more to do with section 8(1) before PAJA could be invoked.

What has emerged in practise especially under section 8(4) and 8(6) though are completely at odds with this statement and it is our submission that the Department of Home Affairs has been misguided in its appreciation of the tenets of administrative law and the legal implications in exercising its powers of delegative authority amongst its personnel.

Section 8 of the Act, **PAJA** and the High Courts

If in fact there is no change in realigning the internal mechanisms afforded under section 8 of the Act, many aggrieved applicants who wish to successfully challenge the administrative actions by the authorities will be 'forced' to resort to the High Court for judicial review, which is expensive and cumbersome as the unintended forum of first instance.

PAJA has been introduced to consolidate much of the common law in the area of administrative law and to bring about greater transparency in the sphere of Government and its administrative arm in the execution of its policies within the various branches of the Executive – the Ministry of Home Affairs being one of them.

PAJA provides specific guidance as to what constitutes administrative action, the measures to determine procedurally fair administrative action, an obligation to provide reasons for such decision, and of cardinal importance, it precludes the right of a court to review administrative action unless the internal remedies of any underlying legislation have first been exhausted.

When it comes to the Act and section 8 it will require that the applicant first exhaust its internal remedies encapsulated under section 8 which was endorsed by the court in **Koyabe**.

Having regard to the earlier submissions that section 8(4) and 8(6) present serious practical issues, we would recommend that any administrative matter or adverse decision that warrants a challenge to the Ministry of Home Affairs, be referred to an immigration attorney to determine which route to follow in enforcing the right to fair administrative action.

It is important to recognise that any relief sought by way of a judicial review will not in most cases substitute the decision of the Director-General or Minister but would determine whether such official had applied his or her mind to the matter at hand and had properly exercised a discretion conferred in terms of the Act.

The court of first instance would be the High Court which has the jurisdiction to hear the matter for review and if such application is upheld such Court will set aside the decision and remit the matter back to the authorities to reapply their minds to the decision at hand.

However, if the High Court rejects that bid, the applicant would have to apply for leave to appeal to the Supreme Court to test that decision, failing which, the matter would be put to rest.