



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Nwafor v The Minister of Home Affairs and Others (1363/2019) [2021] ZASCA 58 (12 May 2021)

Today the Supreme Court of Appeal (SCA) dismissed with costs, the applicant's appeal against an order of the High Court, Gauteng Division, Pretoria. The high court dismissed with costs the applicant's application for an order to review and set aside the first and second respondents' (the respondents) decision to deprive the applicant and his minor children of their citizenship in South Africa.

The applicant acquired South African citizenship upon being granted a certificate of naturalisation (the certificate) by the Department of Home Affairs (the department), which was issued in terms of s 5 of the South African Citizenship Act 88 of 1995 (the Citizenship Act). Prior to granting this certificate the department issued to the applicant a permanent residence permit (the exemption certificate) in terms of s 28(2) of the Aliens Control Act 96 of 1991 (the Aliens Act). The applicant secured the grant of this exemption certificate on the strength of his marriage to a South African citizen, Ms Vilankulo, on 25 April 2003 and the validity of this marriage is strenuously disputed.

The department addressed a letter to the applicant and his family advising that the Minister of Home Affairs intended to deprive him and his minor children of their South African citizenship on the following basis: the applicant obtained the permanent residence permit by means of a false representation in that he was still married to Ms Nwafor when he married Ms Vilankulo; the applicant's marriage to Ms Vilankulo took place when Ms Vilankulo was still a minor without the requisite permission from her guardian; and that the permanent residence permit was issued to the applicant in conflict with the applicable law. In the same letter, the applicant was advised that, in terms of s 3 the Promotion of Administrative Justice Act 3 of 2000 (PAJA), he was entitled to make representations, within ten days of receipt of the letter setting out reasons why the Minister should not proceed with the intended deprivation of citizenship. Importantly, the applicant could approach the high court in terms of s 25 of the Citizenship Act, to review the decision made by the Minister. On 3 May 2016, representations were made in a letter in which the applicant denied everything and it was contended that the applicant had followed all the required procedures for the application for permanent residence and citizenship.

The second respondent eventually in terms of s 22 of the Citizenship Act, deprived the applicant and his family of their citizenship. The reason for the deprivation of citizenship was that the permanent residence permit of the applicant had been acquired through false representation and concealment of a material fact. The applicant then brought an application in the court a quo, in terms of ss 3 and 6 of the PAJA, to review and set aside the decision of the deprivation of citizenship. The matter was eventually argued before Potterill J, who dismissed both the applicant's application and leave to appeal with costs.

Potterill J found that the point raised concerning who between the Minister and the Director General had taken the decision of deprivation and that no documentary delegation was before court, was a completely new point not raised as a ground of review or canvassed before the court. She also held that the point that the minor children could not have been deprived of their citizenship fell to be dismissed as it was raised for the first time on appeal.

The SCA held that as there was no valid explanation as to how the applicant obtained his permanent residence permit, the inference that it was obtained through fraudulent means, was in the SCA's view, not unreasonable. The SCA held further that the decree of divorce, relied upon by the applicant as proof of his divorce to Ms Nwafor was in fact a 'Decree Nisi', meaning that the earliest possible date of divorce would have been 12 June 2003. Based on this analysis, the SCA held that there was no divorce between the applicant and Ms Nwafor and that when he married Ms Vilankulo on 25 April 2003, his prior marriage to Ms Nwafor in 2000 still subsisted and remained valid.

The issue pertaining to the alleged absence of delegated authority took on a new form before the SCA namely, that the respondents did not follow due legal process in revoking the applicant's citizenship because the notice of deprivation was signed by the second respondent who at the time was not in possession of the delegation of authority in terms of s 8 of the Public Service Act 38 of 1994 requiring, *inter alia*, that a delegation by the Minister to the Director General had to be in writing. The SCA held that this point could not succeed. It was a completely new issue not raised before. The SCA held further that the first respondent may under s 22 of the Citizenship Act delegate any power, conferred to him or her under that Act, this includes the power to deprive citizenship in terms of s 8 of this Act.

The applicant also challenged the validity of the abandonment of Constantinides AJ's judgment. On this point the SCA held that that it was competent and proper for Potterill J to give effect to the applicant's election not to lead oral evidence in the matter, as confirmed in the parties' pre-trial minute. Furthermore, the latter order is purely procedural and not final, it did not grant definite and distinct relief and did not dispose of any portion of the relief sought in the review application. The SCA held that the complaint by the applicant that the deprivation of citizenship was arbitrary and unlawful and was done without being afforded an opportunity to be heard or that he was not afforded sufficient and reasonable time to make representations, had to fail on the basis that letter addressed to the applicant and his family complies with s 3(2) of PAJA.

The applicant failed to show that there are reasonable prospects of success on appeal. Therefore, the SCA dismissed with costs the applicant's application.

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