

Note for the editors:

Director-General, Department of Home Affairs & 2 Ors v Link & 3 Ors (A324/18)

(Full bench: WCC)

Administrative law- administrative action -review -domestic remedies -duty in terms of S 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 to exhaust domestic remedies before instituting legal proceedings -remedies of review and appeal in terms of S 8 of the Immigration Act 13 of 2002

Immigration law- S 8(3) of the Immigration Act 13 of 2002, right to reasons- meaning of: the right to reasons in terms of s 8(3) is a right to adequate reasons which are intelligible and informative

Immigration law - Ss 8(4) and 8(6) of the Immigration Act 13 of 2002- meaning of the phrase ‘a decision contemplated in’

Immigration law- Ss 8(3)-8(6) of the Immigration Act 13 of 2002- Scope of review or appeal remedy in terms thereof- no right of review or appeal to the Minister from the decision of the Director-General at first instance, only in respect of a decision on appeal to the Director-General from a functionary of a ranking below the level of Director-General

In terms of s 8(4) of the Immigration Act of 2002 a person aggrieved by a decision as ‘contemplated in subsection (3)’ of the Act may within 10 working days from receipt of notification thereof apply to the Director-General for the review or appeal of such decision.

S 8(3) in turn provides that any decision by an immigration official in terms of the Act (other than one refusing entry to any person or declaring him/her to be an illegal foreigner) which materially and adversely affects a person’s rights shall be accompanied by the ‘reasons’ for that decision.

Held: 1) The reference to reasons in s 8 (3) is to be read as a reference to adequate reasons ie reasons which are intelligible and informative and which set out an explanation for why the decision-maker arrived at the decision which he/she did, in such a manner as will allow the person who is affected thereby to determine whether the decision was based on an incorrect factual premise or an error of law--Merely setting out the conclusion to which the decision-maker came is not sufficient. The decision-maker should set out his understanding of the relevant law, the findings of fact on which his conclusions are based and the reasoning process which led to them, in clear and unambiguous language.

Held: 2) Where the decision-maker does not furnish any reasons at all, or the reasons furnished are not adequate within the meaning set out above the decision is not one ‘contemplated’ in terms of s 8(3) of the Act and is consequently not a decision in respect of which the affected person is obliged to exercise his/her internal remedies of review or appeal before proceeding to Court for review in terms of the Promotion of Administrative Justice Act 3 of 2000

3) a person affected by such a decision cannot be compelled to review or appeal it in terms of S 8 of the Immigration Act and may be exempted from complying with the provisions of s 7 (2) (a) of the Promotion of Administrative Justice Act 3 of 2000 and s 8 of the Immigration Act 13 of 2002.

Held: Where a decision is taken at first instance by the Director-General, it is not one in respect of which there exists a right of review or appeal to the Minister in terms of s 8 (6)- the appeal and review available in terms of that subsection is only one that lies in respect of a decision of the Director-General on appeal to him in terms of s 8(4) read together with s 8(3).