



25 February 2021

SUMMARY OF THE PUBLIC PROTECTOR'S REPORT ON THE NATURALISATION OF GUPTA FAMILY MEMBERS

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REFERENCES

1. INTRODUCTION

The Portfolio Committee (PC) on Home Affairs will host a virtual meeting with the Department of Home Affairs (hereafter the Department/DHA) on 26 February 2021. One of the agenda items is the briefing by the Department on the Public Protector's Report on the investigations into allegations of a violation of the executive member's ethics code and the South African Citizenship Act (No 88 of 1995) by the former Minister of Home Affairs, Mr Malusi Knowledge Gigaba, MP. The purpose of this brief is to summarise the Public Protector's report, in particular, the findings and highlight issues for consideration by Parliament. The brief further intends to assist the PC on Home Affairs to ensure that the Public Protector's remedial actions are implemented by the Department unless set aside by the Court of law as provided for by Section 182 (1) of the Constitution.

2. ALLEGATIONS AGAINST THE FORMER MINISTER OF HOME AFFAIRS

The allegations against the former Minister of Home Affairs, Mr Gigaba, were reported to the Public Protector's office by two Members of Parliament. The following are the allegations against the former Minister of Home Affairs, and by extension, the Department of Home Affairs:

- On 3 November 2017, Mr H. Hoosen, Member of Parliament (MP) and member of the Democratic Alliance, reported to the Public Protector the allegations that former Minister Gigaba failed to comply with the provisions of section 5(9)(b) of the South African Citizenship Act (No 88 of 1995) which requires the Minister of Home Affairs "*within 14 days after the commencement of the sittings of Parliament in each year*", should table in Parliament the names of persons granted South African citizenship because of "*under*

exceptional circumstances..." and in doing so, violated the Executive Ethics Code, to which all Cabinet Members are bound.¹

- The second allegations were reported on 13 March 2018 by Mr N.F. Shivambu, MP and member of the Economic Freedom Fighters. Mr Shivambu, MP, alleged that former Minister Gigaba abused the provisions of the South African Citizenship Amendment Act (No 17 of 2010) when he granted his acquaintances, the Gupta family, early naturalisation.²
- In addition to the two alleged bridges of the law, it was alleged that on the 6th of March 2018, the former Minister called a press conference to continue spreading fabrications and dishonesties regarding the Guptas' citizenship status. Together with the Director-General of Home Affairs, the former Minister told the media that Mr Atul and Ajay Gupta are not South African citizens.³

3. WHAT DID THE PUBLIC PROTECTOR INVESTIGATE?

Based on the reported allegations by Mr Hoosen, MP and Mr Shivambu, MP, the Public Protector investigated the following:

- Whether former Minister Gigaba, in his capacity as Minister of Home Affairs, abused his powers afforded in terms of the South African Citizenship Amendment Act (No 17 of 2010) when granting certificates of early naturalisation to his alleged acquaintances, Mr Ajay Gupta and family, without proper validation of the requisite exceptional circumstances;
- Whether former Minister Gigaba, in his capacity as Minister of Home Affairs, failed to table in Parliament the names of those persons granted South African citizenship "...under exceptional circumstances..." contrary to section 5(9)(b) of the South African Citizenship Act, 1995, and in doing so violated the provisions of the Executive Ethics Code; and
- Whether former Minister Gigaba misrepresented facts in a press conference held on 6 March 2018, when he informed the media that Mr Atul and Ajay Gupta were not citizens of the Republic of South Africa.

4. KEY LAWS TAKEN INTO CONSIDERATION TO DETERMINE THE OUTCOME OF THE INVESTIGATION

The following are the key laws that were taken into account to determine whether former Minister Gigaba has violated the Ethics Code and abuse the South African Citizenships Amendment Act (No 17 of 2010):

The first piece of legislation which the Public Protector relied on to investigate the allegation is the **Executive Members' Ethics Act (No 82 of 1998)** provides for a code of ethics governing the ethical conduct of Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils.

- Section 2.1 of the Executive Ethics Code states that "Members [of the Executive] must... (a) perform their duties and exercise their powers diligently and honestly and (d) act in all respects in a manner that is consistent with the integrity of their office or the government."

¹ Public Protector (2020).

² Ibid.

³ Ibid

- Paragraph 2.1(b) of the Executive Ethics Code states that "Members must...fulfil all the obligations imposed upon them by the Constitution and law;"
- Paragraph 2.3 of the Executive Ethics Code states that "Members may not act in a way that is inconsistent with their position".⁴
- The second piece of legislation which the Public Protector relied upon is the **South African Citizenship Amendment Act** (No. 17 of 2010) which states that the Minister may under exceptional circumstances grant a certificate of naturalisation as a South African citizen to an applicant who does not comply with the requirements of subsection (1)(c) relating to residence or ordinary residence in the Republic.⁵
- Furthermore, the Public Protector relied on **Regulations on the South African Citizenship Act** (No 88 of 1995), which states that the period of ordinary residence referred to in section 5(1)(c) of the Act is ten (10) years immediately preceding the date of application for naturalisation.⁶
 - Sub-regulation (b) states that any person who lodges an application for naturalisation must, at the time of his or her application, not have been absent from the Republic for a period of more than 90 days in any year during the five-year period of ordinary residence immediately preceding the date of application for naturalisation.
 - In terms of sub-regulation (c), any person who has been absent from the Republic for a period of more than 90 days in any year during the five-year period of ordinary residence immediately preceding the date of application for naturalisation does not qualify for naturalisation.

5. FINDINGS OF THE PUBLIC PROTECTOR' S INVESTIGATION

Below is the summary of the findings of the Public Protector:

Regarding whether former Minister Gigaba, in his capacity as Minister of Home Affairs, abused his powers afforded in terms of the South African Citizenship Amendment Act (No of 2010) when granting certificates of early naturalisation to his alleged acquaintances, Mr Ajay Gupta and family, without proper validation of the requisite exceptional circumstances, the Public Protector finds the following:

- The allegation that the former Minister Gigaba "...abused his powers afforded in terms of the South African Citizenship Amendment Act (No 77 of 2010) when granting certificates of early naturalisation to his alleged acquaintances, Mr Ajay Gupta and family, without proper validation of the requisite exceptional circumstances, **is unsubstantiated**.
- Section 5(9)(a) of the South African Citizenship Amendment Act (No 77 of 2010) bestows upon the Minister of Home Affairs the discretion to waive the requirements of section 5(1)(c) **if, in his opinion, exceptional circumstances** exist that warrants the applicants continued residence within the Republic of South Africa.
- The information obtained during the investigation indicates that the former Minister exercised his discretion in terms of section 5(9) of the Act, to waive the requirements set out in section 5(1)(c), following him taking into consideration the motivation submitted by officials of the Department, who were responsible for processing the early naturalisation application of the Gupta family, namely, the **Deputy Director: Travel**

⁴ Public Protector (2020).

⁵ Ibid.

⁶ Ibid.

Documents and Citizenship, Mr Richard Sikakane, the Chief Director, Back Office Status Services, Mr N Ramashia, the former Deputy Director-General, Mr Vusumuzi Mkhize and the former Director-General, Mr Mkuseli Apleni.

- It was established that the verification process, undertaken by the department, upon instructions of the Portfolio Committee on Home Affairs, revealed material misrepresentations and inaccuracies with the information contained in the motivation, relied upon by the former Minister, in approving and granting the certificates for naturalisation in terms of section 5(9)(c) of the South African Citizenship Act, to Mr Ajay Gupta and family.
- It was further established that Home Affairs officials who were tasked with the processing of the early naturalisation application of the Gupta family, **failed to inter alia, exercise due diligence, in that, they failed to verify the accuracy of the information contained** in the motivation which was relied upon by the former Minister, in approving and granting the certificates for naturalisation to Mr Ajay Gupta and family.
- In the circumstances, the Public Protector found that the former Minister exercised his discretion in terms of the provisions of section 5(9) of the Act, and in the process, did not abuse his powers. Nonetheless, The Public Protector found that **the failure by the officials of the Department to exercise due diligence and verify the accuracy of the information contained in the motivation which was relied upon by the former Minister amounts to maladministration** and in violation section 195(1)(f) of the Constitution, 1996 and regulation C4.9 of the Public Service Regulations, 2001.

Regarding whether former Minister Gigaba, in the execution of his duties and functions, failed to table names in Parliament of persons who were granted South African citizenship under exceptional circumstances contrary to section 5(9)(b) of the South African Citizenship Amendment Act, 2010 (Act No 17 of 2010), and in doing so violated the provisions of the Executive Ethics Code, the Public Protector's findings are summarised below:

- The complaint that former Minister Gigaba acted in breach of the Executive Ethics Code when he failed to comply with the provision of section 5(9)(b) of the South African Citizenship Act, 1995, is **substantiated**.
- Former Minister Gigaba conceded to failing to submit the names of persons who were granted South African citizenship under exceptional circumstances to Parliament every year, as required in terms section 5(9)(b) of the South African Citizenship Act (No 88 of 1995).
- Therefore, by breaching the above provisions of the Executive Ethics Code, **former Minister Gigaba also violated section 96(1) of the Constitution**, which provides that, "Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation."

Regarding whether former Minister Gigaba misrepresented facts in a press conference held on 6 March 2018 when he informed the media that Mr Atul and Ajay Gupta were not citizens of the Republic of South Africa; the Public Protector finds the following:

- The allegation that former Minister Gigaba misrepresented facts in a press conference held on 6 March 2018 when he informed the media that Mr Atul Kumar Gupta was not a citizen of the Republic of South Africa, is **substantiated**.
- Former Minister Gigaba conceded to furnishing incorrect information during the aforesaid press conference, and even though he rectified his error in a press briefing the following day, the former Minister broke the public trust placed upon him to which he was held to uphold in terms of Paragraph 4.1.3 of the Parliament Ethics Code.

6. PROPOSED QUESTIONS AND ISSUES FOR CONSIDERATION

The issues mentioned below are for the PC on Home Affairs considerations and possible questions to the Department.

Issues for consideration and proposed questions to the Department of Home Affairs (

1. The PC on Home Affairs should note that former Minister Gigaba is no longer offering his services to the government; therefore, the Public Protector remedial actions against him cannot be implemented.
2. Did the Minister of Home Affairs note the remedial actions of the Public Protector on this matter? Does the Minister agree with remedial actions, or are there any objections to the recommendation?
3. PC on Home Affairs advised the Department in 2018 to conduct a verification process on the submission of the motivation under review. It was revealed that there was a misrepresentation of facts that the former Minister relied on to approve the naturalisation of the Guptas. Since this revelation, has the Department instituted any disciplinary measures against the employees involved in the matter? If no, why did the Department not institute disciplinary measures? If yes, what was the outcome of the disciplinary enquiry undertaken?
4. The Public Protector's Report directs the Director-General of the DHA to consider taking appropriate action against Departmental officials who were involved in the naturalisation of Mr Ajay Gupta and his family for their failure to exercise due diligence by verifying the accuracy of the information contained in the motivation for early naturalisation which was relied upon by the former Minister, in approving and granting the certificates for naturalisation to Mr Ajay Gupta and family. Is this process already underway, and by when will it be concluded?
5. Is there any adjudication body or committee that oversees that all processes have been followed and the applicant/s meet all the requirements for naturalisation before such an application is taken to the Minister of Home Affairs for consideration or this is decided solely by departmental officials?
6. What measures will the Department put in place to ensure that similar circumstances do not occur again?

REFERENCES

Public Protector of South Africa. Report no 18 of 2020/21. Report of the Public Protector in terms of Section 182 (1) (b) of the Constitution of the Republic of South Africa, 1996 and Section 8 (1) Public Protector Act, 1994: Report on the Investigation into Allegations of a violation of the Executive Members Ethics Code and the South African Citizenship Act (No 88 of 1995) by the former Minister of Home Affairs, Mr Malusi Knowledge Gigaba, MP.