



CONSTITUTIONAL COURT OF SOUTH AFRICA

Lawyers for Human Rights v Minister of Home Affairs and Others

CCT 38/16

Date of hearing: 14 March 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 14 March 2017 at 10h00, the Constitutional Court will hear an application for confirmation of an order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court), together with an application for leave to appeal against that order. The order declared section 34(1)(b) and (d) of the Immigration Act (Act) unconstitutional and invalid.

Lawyers for Human Rights (applicant), acting on behalf of persons detained in terms of section 34(1) of the Act, brought an application against the Minister of Home Affairs (first respondent) alleging that the procedures and safeguards governing the detention of people suspected of being illegal foreigners under section 34(1) of the Act were unconstitutional and invalid.

Before the High Court, the applicant argued that section 34(1)(b) of the Act did not afford a detained person the automatic right to appear before a court within 48 hours for the court to confirm the lawfulness of their detention. The applicant submitted that this violated the detained person's rights under in section 35(1)(d) and section 12(1) of the Constitution. The applicant also argued that a warrant obtained from a magistrates' court in terms of section 34(1)(b) and (d) of the Act occurred without the detainee appearing in person before the magistrate concerned. The applicant contended that this was unconstitutional in that it violated the detained person's constitutional rights contained in section 12(1) and 35(2)(d) of the Constitution.

The first respondent argued that the purpose of an arrest in terms of the Act was for deportation and not for the alleged commission an offence as contemplated by section

35(1) of the Constitution. The first respondent also argued that section 34(1)(b) of the Act entitled an illegal immigrant to request his detention to be confirmed through a warrant of a court and section 34(1)(d) makes a warrant by a court a prerequisite for purposes of further detention.

The High Court held that the power to detain fell squarely within the terrain of the judiciary, and that where persons may be detained at the behest of administrators, judicial oversight is vital. The Court further held that an appearance in open court bestows legitimacy on the detention and provided a certain measure of security and comfort to the detainee. The Court found that section 34(1)(b) and (d) of the Act limited the section 35(2)(d) rights of a detained person and that the first respondent failed to provide any justification for the limitation of the fundamental right contained in section 35(2)(d). The Court declared the section to be constitutionally invalid and inconsistent with section 35 of the Constitution.

Before the Constitutional Court, the applicant seeks an order confirming the orders of the High Court making similar submissions. The applicant further appeals against the High Court's refusal to grant certain ancillary relief requested before it.

The first respondent's submissions are also similar to the ones made before the High Court. In addition, a preliminary point of non-joinder is raised. The first respondent submits that the South African Human Rights Commission ought to have been joined because its input in this matter would have been helpful.

People Against Suffering, Oppression and Poverty (PASSOP) was admitted as an *amicus curiae* (friend of the Court). PASSOP addresses the application of international and foreign law in South Africa's domestic setting and the applicability of both binding and non-binding international law instruments. PASSOP also argues that international and comparative law must be consulted when interpreting section 34(1) of the Act. It further contends that the failure of the impugned provisions to provide for minimal procedural safeguards is inconsistent with international guidelines and standards applicable to immigration detention. It supports the order of unconstitutionality granted by the High Court.