CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/16

In the matter between:

LAWYERS FOR HUMAN RIGHTS	Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
MINISTER OF POLICE	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
BOSASA (PTY) LIMITED t/a LEADING PROSPECTS TRADING	Fifth Respondent
and	
PEOPLE AGAINST SUFFERING, OPPRESSION AND POVERTY	Amicus Curiae

Neutral citation:	*Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	JAFTA J (unanimous)

Heard on: 14 March 2017

Decided on: 29 June 2017

Summary: Section 34(1)(b) and (d) of the Immigration Act 13 of 2002 — inconsistent with sections 12(1) and 35(2)(d) of the Constitution — invalid

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. The order issued by the High Court of South Africa, Gauteng Division, Pretoria is set aside.
2. Section 34(1)(b) and (d) of the Immigration Act 13 of 2002 is declared to be inconsistent with sections 12(1) and 35(2)(d) of the Constitution and therefore invalid.
3. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defect.
4. Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.
5. Illegal foreigners who are in detention at the time this order is issued shall be brought before a court within 48 hours from the date of this order or on such later date as may be determined by a court.
6. In the event of Parliament failing to pass corrective legislation within 24 months, the declaration of invalidity shall operate prospectively.

7. The Minister of Home Affairs and the Director-General: Department of Home Affairs shall, within 60 days from the date of this order, file on affidavit a report confirming compliance with paragraph 5, at the High Court of South Africa, Gauteng Division, Pretoria.
8. The High Court of South Africa, Gauteng Division, Pretoria may determine any dispute arising from that report.
9. The appeal is dismissed.
10. The Minister of Home Affairs and the Director-General: Department of Home Affairs must pay costs of the appeal and the confirmation application, including costs of two counsel.

JUDGMENT

JAFTA J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J concurring):

Introduction

[1] Personal freedom was one of the rights routinely violated during the apartheid era. Arrest and detention without trial were commonly used to suppress opposition to the laws and policies of the government of that time.[1] Many detainees were arrested in the dead of the night and whisked away to undisclosed locations where they were detained for indefinite periods. While in detention, sometimes in solitary confinement, they would be deprived of any contact with the outside world. No contact was permitted with their families, doctors, lawyers and even pastors.[2]

[1] Section 17(1) of the General Law Amendment Act 37 of 1963 (Amendment Act).

[2] Section 17(2) of the Amendment Act provides:

> "No person shall, except with the consent of the Minister of Justice or a commissioned officer as aforesaid, have access to any person detained under sub-section (1): Provided that not less

[2] In most cases those detentions were beyond the reach of judicial oversight.[3] As a result detainees were at the mercy of their captors who would subject them to interrogations accompanied by torture and other forms of violence for purposes of extracting information on matters relating to state security.

[3] To outlaw abuse of power and deprivation of personal freedom, the framers of our Constitution included section 12 in the Bill of Rights that guaranteed everyone physical freedom and protection against detention without trial. The link between the arbitrary deprivation of personal liberty under apartheid and section 12 of the Constitution was pointed out in *De Lange*.[4] In that case Didcott J said:

> "Those words, the words 'detained without trial', ought not in my opinion to be construed separately. They comprise a single and composite phrase which expresses a single and composite notion and must therefore be read as a whole. Both the usage of the phrase in this country and the provenance here of the notion are unfortunately familiar to us all. Neither should be viewed apart from our ugly history of political repression. For detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an arbitrary one, set in motion by the police alone on grounds of their own, controlled throughout by them, and hidden from the scrutiny of the courts, to which scant recourse could be had. And it was marked by sudden and secret arrests, indefinite incarceration, isolation from families, friends and lawyers, and protracted interrogations, accompanied often by violence. Detentions without trial of that nature, detentions which might be disfigured by those or comparable features, were surely the sort that the framers of the Constitution had in mind when they wrote section 12(1)(b)."[5]

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than once during each week such person shall be visited in private by the magistrate or an additional or assistant magistrate of the district in which he is detained."

[3] Section 17(3) of the Amendment Act provides:

> "No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody."

[4] *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[5] Id at para 115.

[4] This matter concerns the validity of legislation that authorises administrative detention without trial for purposes of deportation. The legislation was impugned on the ground that it was not consistent with the rights guaranteed by sections 12 and 35 of the Bill of Rights. The matter comes before this Court as an appeal and an application for confirmation of the order of invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria (High Court).[6] The Minister of Home Affairs and the Director-General: Department of Home Affairs (jointly the State) oppose the confirmation and seek to appeal against that order. The other respondents did not take part in the proceedings.[7] People Against Suffering, Oppression and Poverty (PASSOP) was admitted as amicus curiae.

The scheme of section 34 of the Immigration Act

[5] The provisions which were declared invalid by the High Court form part of section 34 of the Immigration Act.[8] This section empowers an immigration officer to deport an "illegal foreigner" (the term the statute uses) who is within the boundaries of South Africa. In addition, the section authorises the arrest and detention of such foreigners for purposes of deporting them. A foreigner arrested in terms of this section may be detained at a place designated for this purpose by the Director-General.

[6] Upon arrest, or soon thereafter, a detainee must be informed in writing of the decision to deport him or her and of his or her right to appeal against such decision in terms of the Immigration Act. Once detained, he or she may, through an immigration officer, ask that the detention be confirmed by a warrant of a court which must be

[6] Section 172 (2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[7] The third respondent is the Minister of Police; the fourth respondent is the Minister of Justice and Constitutional Development and the fifth respondent is Bosasa (Pty) Limited t/a Leading Prospects Trading.

[8] 13 of 2002.

issued within 48 hours from the time when the request is made. If the warrant is not issued within that period, the foreigner must be released immediately from detention.

[7] The arrested foreigner must be informed of all these rights in a language that he or she understands unless this is not practicable. The detention must be for a period of no longer than 30 calendar days unless extended on good and reasonable grounds by a court for a further period not exceeding 90 calendar days. In total, an illegal foreigner detained under section 34 cannot be held in custody for more than 120 calendar days. Such detention must comply with minimum prescribed standards protecting the foreigner's dignity and other relevant human rights.

[8] If a foreigner is detained elsewhere than on a ship and for purposes other than his or her deportation, he or she must be brought before a court within 48 hours from his or her arrest. But if the period expires on a non-court day, it is extended to 4:00 pm on the next court day.

Litigation background

[9] Lawyers for Human Rights (applicant) is a non-governmental organisation whose objectives are to "promote, uphold, foster, strengthen and enforce all human rights in South Africa". The applicant seeks to achieve these objectives by invoking the Constitution and the law. It offers legal assistance free of charge to indigent and vulnerable people whose constitutional rights are violated. It litigates on behalf of arrested and detained foreigners who are facing deportation. To this end, the applicant has instituted no fewer than 115 cases against the State since 2009.

[10] Based on the familiarity with conditions under which illegal foreigners are detained before deportation, the applicant decided to impugn certain provisions of section 34 in terms of which the detentions are effected. These conditions included a failure to inform foreigners of the rights the section requires them to be notified of, the inability to exercise these rights owing to lack of resources and legal assistance and the detentions for periods in excess of 120 calendar days in contravention of the

Immigration Act. In some instances these periods stretched up to six months or longer.

[11] The applicant's papers paint an unfortunate picture of a widespread disregard for statutory requirements which leads to a violation of rights of vulnerable people. These lapses reveal shortcomings in the system enacted by the Immigration Act. A system that was designed to promote their "dignity and relevant human rights". The applicant sought to address the failures in the system by attacking the constitutionality of provisions which provided inadequate protection of foreigners' rights.

[12] In its attack the applicant singled out section 34(1)(b) and (d) of the Immigration Act. It contended that, by omitting to provide for automatic judicial oversight before the expiry of 30 calendar days, that section was inconsistent with sections 12(1), 35(1)(d) and 35(2)(d) of the Constitution. The challenge against section 34(1)(d) was based on the contention that it did not permit a detainee to appear in person before a court and impugn the lawfulness of his or her detention.

[13] The applicant sought from the High Court an order declaring that section 34(1)(b) and (d) of the Immigration Act is inconsistent with the Constitution and invalid. The invalidity was said to be to the extent that these provisions permitted detention of foreigners for a period of 30 days without automatic judicial intervention and an extension of the initial period of detention without the detainee appearing in person before the court that grants the extension.

[14] The State filed papers in opposition of the claim. It disputed the contention that the impugned provisions were inconsistent with the sections of the Constitution on which the applicant relied. In the alternative, it denied that foreigners arrested and detained in terms of section 34 enjoy the constitutional rights which the applicant claimed were infringed.

[15] With regard to section 35(1)(d) of the Constitution[9], the High Court upheld the State's submission that this section does not cover foreigners detained for purposes of deportation. The High Court accepted the State's contention that section 35(1)(d) of the Constitution applies where a person has been arrested for committing an offence and the purpose of the arrest was to bring him or her to trial.

[16] But the High Court held that section 34(1)(b) was inconsistent with section 35(2)(d) of the Constitution to the extent that it did not allow a detained foreigner to challenge the lawfulness of his or her detention in court or have the detention confirmed by a warrant of court.[10] With regard to section 34(1)(d), that Court held that it too was not in line with section 35(2)(d) because it did not permit a detainee to appear in person before a court when the request for extending the detention is considered. An appearance in open court, it was held, "bestows legitimacy on the detention and provided a certain measure of security and comfort to the detainee". The High Court considered it unnecessary to determine the alternative claim based on the violation of the right not to be detained without trial, entrenched in section 12(1)(b) of the Constitution.

[17] Having concluded that there was a limitation of the rights guaranteed by section 35(2)(d) of the Constitution, the High Court proceeded to consider whether the State had justified the limitation. The Court evaluated the State's evidence on justification and held that it fell short of the required standard. Put differently, the evidence failed to show that the limitation in question was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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[9] Section 35(1) provides:

> "Everyone who is arrested for allegedly committing an offence has a right—
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> . . .
>
> (d) to be brought before a court as soon as reasonably possible but not later than—
>
> (i) 48 hours after the arrest."

[10] *Lawyers for Human Rights v Minister of Home Affairs* [2016] ZAGPPHC 45; 2016 (4) SA 207 (GP) (High Court judgment) at para 16.

[18] Accordingly, the High Court declared the impugned provisions to be inconsistent with the Constitution and invalid. In order to cure the defect, that Court opted for a different formulation of section 34(1)(b). This was suggested by the applicant. In endorsing the reformulation the Court said:

> "In my view, the suggestion supra will prevent an unduly strained application of the severance and reading-in techniques. The gist of the section is saved through a reshuffling of words in order to ensure compliance with the Constitution."[11]

[19] It is apparent from this statement that the High Court did not apply the remedies of severance and reading-in to craft section 34(1)(b) so that it is in line with the Constitution. Nor did it follow guidelines laid down by this Court on the application of those remedies.[12] On the contrary, the High Court held that severance and reading-in will not result in a just and equitable relief.

[20] The High Court held:

> "The present wording of section 34(1)(b) does provide that the detention of a detainee may be confirmed by a warrant of court. To tailor the section to comply with the constitutional rights of detainees, is, however, not a simple matter of severance and reading-in as envisaged in *Shinga v The State,* supra. In order to retain the clear intention of the Legislator and still comply with the requirement that the remedy provided herein must be just and equitable, the applicant proposed that the section provides as follows:
>
> > '(b) must be brought before a court in person within 48 hours of his or her detention, in order for the Court to determine whether to confirm the detention, failing which the foreigner shall immediately be released.'"[13]

[11] Id at para 40.

[12] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 64-76 and *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 45.

[13] High Court judgment above n 10 at para 39.

[21] The reformulated provision with which the High Court replaced the original section 34(1)(b)[14] is wholly different from the original one. Regarding section 34(1)(d), the High Court severed the words "a warrant of court which" from the provision and read-in the words "appearing in court in person, which court". This meant that this provision would read thus:

> "(d) may not be held in detention for longer than 30 calendar days without appearing in court in person, which court on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days."

[22] Here, unlike in section 34(1)(b), the High Court applied the severance and reading-in remedies to cure the defect.

In this Court

[23] As mentioned the applicant seeks confirmation of the High Court's order declaring the impugned provisions to be invalid. The State opposes this relief and appeals against the declaration of invalidity. For this Court to confirm the order in question it must be satisfied that the declaration of invalidity was rightly made. This requires us to consider whether the impugned provisions limit the rights on which the applicant relied. And if they do, the next issue would be whether the limitation is justified in terms of section 36 of the Constitution.[15]

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[14] The full text of section 34 is quoted in [46] below.

[15] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose."

[24] But before we consider these issues, we must determine one antecedent question. This is whether illegal foreigners arrested under section 34 of the statute enjoy the rights invoked in challenging the validity of the impugned provisions. This is so because these provisions apply to illegal foreigners only. If the guaranteed rights do not afford them protection, then an attack based on these rights may not be successful.

[25] Whilst the High Court held that the rights in section 35(1)(d) of the Constitution do not apply to persons arrested for the purpose of deportation in terms of section 34 of the Immigration Act, it concluded that those people enjoy the protection and rights entrenched in section 35(2)(d) of the Constitution. This conclusion is supported by authority of this Court.

[26] In *Lawyers for Human Rights* this Court held that the denial of rights in sections 12 and 35(2) of the Constitution to people inside this country would constitute a negation of the values of human dignity, equality and freedom on which our Constitution was founded. In that case Yacoob J said:

> "Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why 'everyone' in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2)."[16]

[27] In light of this conclusion and the view I take of the matter on the challenge based on sections 12 and 35(2)(d) of the Constitution, it is not necessary to determine whether the High Court was correct in holding that section 35(1)(d) of the Bill of Rights does not apply to foreign nationals arrested for the purpose of deportation under section 34(1) of the Immigration Act.

[16] *Lawyers for Human Rights* above n 12 at para 27.

Issues

[28] The enquiry on whether the impugned provisions are inconsistent with sections 12(1) and 35(2)(d) of the Constitution must, I think, begin with a determination of the content and scope of the rights guaranteed. Once this is established, the interpretation of the impugned provision would follow: it is the meaning of those provisions which will help us determine whether the provisions concerned are constitutionally compliant. If the impugned provisions limit guaranteed rights, then a justification analysis would be undertaken before confirming the High Court's declaration of invalidity.

Meaning of section 12(1) of the Bill of Rights

[29] Section 12(1) provides:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[30] Happily this provision has already been interpreted by this Court.[17] In *De Lange* Ackermann J observed:

> "When formulating in section 12(1) the 'right to freedom and security of the person' and including therein (in paragraphs (a) and (b) respectively) the right 'not to be deprived of freedom arbitrarily or without just cause' and 'not to be detained without trial' the Constitutional Assembly chose to do so in broad and unqualified terms. It did not, in the description or definition of these rights, exclude from the ambit of their

[17] Its equivalent under the interim Constitution was construed in *Bernstein v Bester* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC);and *Nel v Le Roux NO* [1996] ZACC 6; 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

> protection specific cases of detention, as was done in article 5.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."[18]

[31] What is apparent from this statement is that the rights entrenched by section 12(1) safeguard individual physical freedom against any form of detention. In the context of section 12(1) the word "detention" carries a wide meaning so as to afford individuals maximum protection. Indeed in *De Lange* this Court said:

> "Although administrative detention without trial for purposes of political control (or for that matter completely arbitrary detention without trial) might very well be the most serious infringement of section 12(1)(b), the protection afforded by the right guaranteed thereunder goes considerably further. In its ordinary grammatical sense 'detention' is a word of wide meaning and relates to 'keeping in custody or confinement; arrest. Used *spec* of the confinement of a political offender . . . bodily restraint.' In legal use its meaning is determined by the context and can relate to a variety of physical restraints. In fact section 66(3) of the Insolvency Act itself describes the committal to prison as being 'detained'. The context in which it is used in section 12(1)(b) does not require it to be given a strained or limited meaning. It applies to the restriction of physical movement."[19]

[32] But, more importantly, the right to freedom and security of the person enshrined in section 12(1) has been taken as incorporating two aspects, the substantive and procedural aspects. The purposes served by these aspects differ and yet the purpose of each must be met. In *De Lange* it was pronounced:

> "The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must in other words be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact

[18] *De Lange* above n 4 at para 45.

[19] Id at para 28.

> alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one."[20]

[33] The substantive aspect requires that a detention of an individual be done for constitutionally acceptable reasons only. This right outlaws arbitrary detentions. There must be a rational connection between the detention and an objectively determinable and legitimate governmental purpose. Absence of that connection would mean that the substantive aspect of the right is breached. A breach of this aspect of the right may also occur where a rational connection exists but the purpose or cause for the detention is not just.

[34] The procedural aspect of the right is implicit in section 12(1)(b) which guarantees protection against detention without trial which was commonplace under the apartheid government. Then, arbitrary administrative detention was used to suppress dissent and serious violation of human rights occurred during the detention in respect of which judicial oversight was excluded. In *De Lange* the Court affirmed that section 12(1)(b) must be interpreted against this historical background:

> "When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in section 12(1)(b) is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country."[21]

[20] Id at para 23.

[21] Id at para 26.

[35] Implicit in the procedural aspect of the right is the role played by courts. Judicial control or oversight ensures that appropriate procedural safeguards are followed. That is why even where there is a derogation from the right during a state of emergency, section 37 of the Constitution requires that a court must review the detention as soon as reasonably possible but not later than 10 days from the date the person was detained.

[36] Section 37(6) of the Bill of Rights provides:

> "Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:
> . . .
> (e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
> (f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
> (g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
> (h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention."

[37] This provision reveals that the Constitution regards judicial oversight to be crucial to detention of individuals, even during a state of emergency. It lays down procedural safeguards which must be followed in times of extraordinary circumstances justifying the declaration of a state of emergency. There can be no justification for not applying those guidelines and allowing judicial review during normal and peaceful times.

[38] With regard to the right not to be detained without trial under the interim Constitution this Court said:

> "The section 11(1) right relied upon by the applicants is the 'right not to be detained without trial'. The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards. In its most extreme form, the mischief exhibits itself in the detention of a person pursuant to the exercise by an administrative official of a subjective discretion without any, or grossly, inadequate, procedural safeguards."[22]

[39] It is precisely against this "most extreme form" of the mischief that the Constitution seeks to protect individuals by proclaiming conditions under which detentions may be conducted in this country. At the centre of these conditions is judicial control or oversight which must be triggered as soon as reasonably possible from the first day of detention. In *De Lange* this Court proclaimed:

> "History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost unsuitably flow from such judicially uncontrolled detention."[23]

[40] It is apparent from the Bill of Rights in our Constitution and the jurisprudence of this Court on the matter that automatic judicial control or review forms an integral part of safeguards guaranteed against detention without trial.

Interpretation of section 35(2)(d) of the Bill of Rights

[41] Section 35(2) of the Constitution provides:

> "Everyone who is detained, including every sentenced prisoner, has the right—
> (a) to be informed promptly of the reason for being detained;

[22] *Nel* above n 17 at para 14.

[23] *De Lange* above n 4 at para 27.

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's-

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner."

[42] In plain language this section applies to illegal foreigners detained in terms of section 34(1) of the Immigration Act. It confers on the detained foreigners a number of rights. These rights range from the right to be informed of the reason for detention to the right to be detained under conditions that are consistent with human dignity and provision at State expense of adequate accommodation, nutrition, reading material and medical treatment. In addition, the detainees are entitled to be visited by their spouses or partners, next of kin, and chosen religious counsellor or medical practitioner.

[43] Over and above those rights the section also confers specific rights designed to protect the procedural aspect of the right to physical freedom. In this regard the section guarantees a detainee the right to choose and consult with a legal practitioner of his or her choice. If the detainee cannot afford the fees of a legal practitioner, one must be assigned to them at State expense if substantial injustice would otherwise result. Most importantly section 35(2) of the Bill of Rights provides that a detainee is entitled to challenge the lawfulness of his or her detention in person before a court and to be released immediately if the court finds that the detention is unlawful.

[44] To afford maximum protection, this section too is couched in broad terms and its scope extends to every detention, including the detention of sentenced persons.

[45] It is now convenient to construe the impugned provisions with a view to determine if they conform to the rights set out above.

Meaning of section 34(1) of the Immigration Act

[46] Section 34(1) provides:

> "Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—
>
> (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
>
> (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
>
> (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
>
> (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and
>
> (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."

[47] This provision grants drastic powers to an administrative official, the immigration officer. It empowers the officer to deport an illegal foreigner without the need for a warrant authorised by a court. To ameliorate the harshness of the exercise of this power, the provision requires the immigration officer to give the affected

foreigner a written notice of the decision to deport and his or her right to appeal against the decision.

[48] Notably, the very same provision authorises an immigration officer to arrest and detain an illegal foreigner, pending his or her deportation. The exercise of this power is not subject to any objectively determinable conditions. Nor does the section lay down any guidance for its exercise. There can be no doubt that in present form section 34(1) offends against the rule of law by failing to guide immigration officers as to when they may arrest and detain illegal foreigners before deporting them. More so because this power may be exercised without the need for a warrant of a court. The detention is quintessentially administrative in nature.

[49] In *Dawood* this Court struck down a statutory provision that conferred wide discretionary powers on immigration officers without any guidelines. There O'Regan J said:

> "We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.
>
> Such guidance is demonstrably absent in this case. It is important that discretion be conferred upon immigration officials to make decisions concerning temporary permits. Discretion of this kind, though subject to review, is an important part of the

> statutory framework under consideration. However, no attempt has been made by the Legislature to give guidance to decision-makers in relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional rights of spouses and family members."[24]

[50] Circumstances in the present matter are similar, if not identical, to those found in *Dawood*. Whether an illegal foreigner is arrested and detained depends entirely on the whims of the immigration officer. But here the exercise of the discretionary power results in more serious consequences of arrest and detention.

[51] Moreover, section 34(1) does not require that a detainee be informed of the rights enumerated in section 35(2) of the Constitution, apart from being told of the reason for detention. It will be recalled that section 35(2) demands that a detainee be informed of his or her right to legal representation by a lawyer of his or her own choice and to be assigned one at State expense if substantial injustice would otherwise result.

[52] But significantly, section 34(1)(b) does not require an automatic judicial review of a detention before 30 calendar days expire. It merely grants a detainee the right to request an immigration officer to cause the detention to be confirmed by a warrant of a court. Such warrant may be obtained only during the currency of the detention and at the instance of the immigration officer. The nature and scope of the information to be placed before the court is to be determined by the immigration officer. The provision does not allow the detainee to make any representations to the court, either orally or in writing. Nor does it permit him or her to appear in person.

[53] It is highly unlikely that an immigration officer who wishes that the detention be confirmed would place before the court information adverse to that objective. If information of this kind is omitted, the detainee would not know and would have no

[24] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 54-5.

recourse. The court too would be disadvantaged from making a proper decision by the absence of such information.

[54] Another flaw in section 34(1)(b) is that it allows a detention to continue for at least 48 hours before the detainee may be released in circumstances where an immigration officer fails to ask for confirmation. This may occur even where the failure is occasioned by the absence of valid grounds.

Section 34(1)(d)

[55] Section 34(1)(d) of the Immigration Act permits an extension of a detention beyond 30 days. It empowers a court to extend a detention for an adequate period but not exceeding 90 calendar days. The applicant for the extension must establish good and reasonable grounds for the extension. What are good and reasonable grounds in a given case is left entirely in the discretion of the court before which the application is made. The phrase "good and reasonable grounds" is not defined. However, it must mean reasonable grounds which justify an extension for a particular period.

[56] Section 34(1)(d) too does not permit the detainee to make any representations to the court on whether the grounds advanced by an immigration officer meet the standard of good and reasonable grounds. The court considering the application is under no duty to offer the detainee a hearing. Contrary to section 35(2)(d) of the Constitution, section 34(1)(d) denies a detainee the right to challenge the lawfulness of his or her detention in person before a court.

[57] Indeed the State in its supplementary submissions on the postponed date of argument conceded that the impugned provisions do not afford a detainee the right to appear in person before a court and accepts that a detainee must be entitled to appear in person and make oral representations to the court. To this end, the State undertakes to ensure that if a detainee wishes to appear in person he or she will be afforded the opportunity to do so. This undertaking, however, does not cure the defect in the provisions.

[58] Accordingly, I am satisfied that the impugned provisions limit the constitutional rights enshrined in sections 12(1) and 35(2) of the Constitution.

Justification

[59] In an attempt to justify the limitation, the State raised the issue of increased costs which will result from judicial reviews involving appearances in court. The State averred that in the 2013/2014 financial year 131 907 foreign nationals were deported from this country. Based on this figure, the State contended that 500 foreigners would appear in court daily, countrywide. It claimed that apart from the increased costs in the running of courts, the 500 daily appearances would create logistical obstacles. With regard to financial resources, the State alleged that there will be a need to employ a "massive number of additional magistrates who will be required to consider these warrant confirmations".

[60] The High Court rightly gave these reasons short shrift. The Court reasoned that the Minister of Justice, who was cited as a respondent, did not oppose the relief claimed by the applicant. Instead, he had filed a notice to abide the decision of the Court.

[61] A limitation of rights like physical freedom cannot be justified on the basis of general facts and estimates to the effect that there will be an increase in costs. The mere increase in costs alone cannot be justification for denying detainees the right to challenge the lawfulness of their detention. Moreover, section 34(1) requires that the arrested foreigners be informed of the right to challenge the decision to deport them on appeal and ask that their detention be confirmed by warrant of a court. If each foreigner decides to exercise these rights, an increase in costs would be unavoidable. Therefore, the State must have budgeted for these costs which are necessitated by the implementation of the Immigration Act.

[62] Dealing with a plea of lack of resources in *Blue Moonlight Properties* this Court stated:

> "The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."[25]

[63] I find that the reasons advanced by the State here are woefully short of justifying the limitation created by the impugned provisions. Consequently, those provisions are inconsistent with the Constitution.

Remedy

[64] Here the High Court held that severance and the reading-in would be inappropriate because their application would be unduly strained. But the Court proceeded to replace the entire section 34(1)(b) with a differently worded provision. The Court reasoned that "the gist of the section is saved through a reshuffling of the words in order to ensure compliance with the Constitution". This was indeed a new remedy that was granted by the High Court.

[65] In so doing the High Court overlooked the principle laid down by this Court.[26] In *Dawood* O'Regan J said:

> "In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* this Court held that it could introduce words into a legislative provision if such an order were appropriate. In deciding whether such an order were

[25] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight Properties*) at para 74.

[26] *National Coalition for Gay and Lesbian Equality* above n 12.

> appropriate, the Court held that there were two primary considerations - the need to afford appropriate relief to successful litigants, on the one hand, and the need to respect the separation of powers, and, in particular, the role of the Legislature as the institution constitutionally entrusted with the task of enacting legislation, on the other."[27]

[66] Having decided that severance and the reading-in were not appropriate, it was not open to the High Court to effectively amend section 34(1)(b) by replacing the invalid provision with the one drafted by the Court. What was done does not accord with the principle of separation of powers. It is the domain of Parliament to amend legislation and not the courts.

[67] I agree that the remedies of severance and reading-in are not appropriate here. It will be recalled that the defect is not restricted to the omission of judicial review and a personal appearance before the court. The problem with section 34(1) of the Immigration Act is way much wider. In the first place the section confers broad discretionary powers without any guidance on how the powers to arrest and detain illegal foreigners must be exercised.

[68] A similar situation arose in *Dawood* and this Court held that it would be inappropriate to seek to remedy the problem. Parliament was considered to be best placed to do so. The Court stated:

> "It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused is primarily a task for the Legislature and should be undertaken by it. There is a range of possibilities that the Legislature may adopt to cure the unconstitutionality."[28]

[27] *Dawood* above n 24 at para 62.

[28] Id at para 63.

[69] Moreover, even where a defect is cured by a reading-in, Parliament retains the power to amend the provision.[29] Since the reading-in here will not address the absence of guidelines, the reading-in may not be employed. Therefore a suspension of the declaration of invalidity appears to be appropriate. This would enable Parliament to correct the defects.

[70] However, in line with the principle that a successful litigant must be afforded appropriate relief, the suspension must be accompanied by conditions which would protect the detainees' rights in the interim. In this regard I intend granting an order with terms similar to the one issued in *Dawood*.[30]

[71] The confirmation of the order of invalidity granted by the High Court effectively means that the appeal by the State must be dismissed. Both in the appeal and its opposition to confirmation, the State relied on the same submissions.

Costs

[72] The application for confirmation has been successful and the appeal by the State was not. It follows that the State must pay costs, including costs consequent upon the employment of two counsel.

Order

[73] The following order is made:

1. The order issued by the High Court of South Africa, Gauteng Division, Pretoria is set aside.
2. Section 34(1)(b) and (d) of the Immigration Act 13 of 2002 is declared to be inconsistent with sections 12(1) and 35(2)(d) of the Constitution and therefore invalid.

[29] *National Coalition for Gay and Lesbian Equality* above n 12 at para 76.

[30] *Dawood* above n 24 at para 70.

3. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defect.
4. Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.
5. Illegal foreigners who are in detention at the time this order is issued shall be brought before a court within 48 hours from the date of this order or on such later date as may be determined by a court.
6. In the event of Parliament failing to pass corrective legislation within 24 months, the declaration of invalidity shall operate prospectively.
7. The Minister of Home Affairs and the Director-General: Department of Home Affairs shall, within 60 days from the date of this order, file on affidavit a report confirming compliance with paragraph 5, at the High Court of South Africa, Gauteng Division, Pretoria.
8. The High Court of South Africa, Gauteng Division, Pretoria may determine any dispute arising from that report.
9. The appeal is dismissed.
10. The Minister of Home Affairs and the Director-General: Department of Home Affairs must pay costs of the appeal and the confirmation application, including costs of two counsel.

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