



## 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**

**Date of judgment: 29 June 2017**

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#### **MEDIA SUMMARY**

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*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.*

Today the Constitutional Court handed down judgment in a matter that came before it as an appeal and an application for confirmation of an order of invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria (High Court).

Lawyers for Human Rights (applicant), acting on behalf of persons detained in terms of section 34(1) of the Immigration Act (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. In its attack the applicant singled out section 34(1)(b) and (d). It contended that, by omitting to provide for automatic judicial oversight before the expiry of 30 calendar days, section 34(1)(b) and (d) 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.

The applicant sought from the High Court an order declaring that section 34(1)(b) and (d) of the Act is inconsistent with the Constitution and invalid. The invalidity was said to be to the extent that these provisions permitted the 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.

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.

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. With regard to section 34(1)(d), that Court held that this section 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.

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. The High Court declared the impugned provisions to be inconsistent with the Constitution and invalid. In order to cure the defect, the High Court opted for a different formulation of section 34(1)(b). And, in respect of section 34(1)(d), it engaged in some severance and reading-in.

Before this Court, 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. People Against Suffering, Oppression and Poverty (PASSOP) was admitted as an amicus curiae and filed submissions in support of the relief sought by the applicant.

In a unanimous judgment (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J concurring) Jafta J held that, for this Court to confirm the order in question, it must be satisfied that the declaration of invalidity was rightly made. According to the Court, this required a consideration on whether the impugned provisions limit the rights on which the applicant relied. And if the Court found they do, the next issue to be considered would be whether the limitation is justified in terms of section 36 of the Constitution. The Court first had to consider whether illegal foreigners arrested under section 34 of the Act enjoy the rights invoked in challenging the validity of the impugned provisions. The Court, relying on its previous decisions, held that persons arrested for the purpose of deportation in terms of section 34 of the Act enjoyed the protection and rights entrenched in sections 12 and 35(2) of the Constitution.

After an analysis of the impugned provisions the Court was satisfied that the impugned provisions do limit the constitutional rights enshrined in sections 12(1) and 35(2) of the Constitution. On justification, the Court found that the reasons advanced by the State

were woefully short of justifying the limitation. The Court was not convinced that tinkering with the wording of the impugned provisions, including reading-in, would sufficiently address the defects. Therefore, the Court held that a suspension of the declaration of invalidity was appropriate. According to the Court, this would enable Parliament to correct the defects. However, in line with the principle that a successful litigant must be afforded appropriate relief, the suspension was accompanied by conditions which would protect the detainees' rights in the interim. The Court confirmed the order of invalidity made by the High Court and dismissed the appeal by the State.