

LAWYERS FOR HUMAN RIGHTS AND ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER 2004 (4) SA 125 (CC)**2004 (4) SA p125**

Citation	2004 (4) SA 125 (CC)
Case No	CCT 18/2003
Court	Constitutional Court
Judge	Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'regan J, Sachs J and Yacoob J
Heard	August 19, 2003
Judgment	March 9, 2004
Counsel	Anton Katz (with him J R Minnaar and D Borgstrom) for the applicants. D N Unterhalter SC (with him A Annandale) for the respondents.

I

Flynote : Sleutelwoorde

Constitutional law - Human rights - Rights of detainees - Constitutionality of ss 34(1), (2), (8) and (9) of Immigration Act 13 of 2002 - Illegal j

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foreigners - Section 34(1) applying to illegal foreigners inside country while ss (8) confined to illegal foreigners who had not a yet formally entered country - Immigration officer empowered by s 34(1) to arrest and detain illegal foreigner who had already entered country - Immigration officer may in terms of ss (8) and (9) cause people, as alternative, to be detained elsewhere than on ship - Provision in s 34(2) for release within 48 hours not applicable to illegal foreigners detained on ship b in terms of ss (8) - On proper interpretation of s 34(8), no substance in contention that it offended rule of law in that it allows arbitrary detention at instance of immigration officer - Not arbitrary to cause detention of person who had just arrived at port of entry and who was reasonably suspected by immigration officer to be illegal foreigner - Reasonable suspicion by immigration officer constituting just cause for c detention - Reasonable and justifiable for person who arrived on ship at port of entry to be detained on it in order to leave when ship left - Section 35(2) safeguards of Constitution of the Republic of South Africa Act 108 of 1996 available to person detained on ship avoiding detention in intolerable or inhumane d circumstances - If circumstances of detention on ship rendering it impossible for s 35(2) to be complied with, immigration officer having no option but to cause detention at State facility in exercise of s 34(8) choice - Of some concern that no obligation on State to seek confirmation of detention by court order regardless of length of period of detention - No legitimate governmental purpose served by ensuring that this safeguard e was not applicable to person detained on ship in terms of s 34(8) - To extent that this had not been done, Court considering limitation not justified - No justification for striking down whole section - Reading-in making provision for obtaining Court order if detention for longer than 30 calendar days - Constitutional validity of s 34(2) having to be considered in context of this remedy having been f granted - Detention of illegal foreigners on ship not being limited to 48 hours reasonable in context of s 34(1)(a) safeguard being applicable - Sections 34(1), (2), (8), as amended, and (9) not unconstitutional.

Headnote : Kopnota

The applicants sought confirmation of a High Court order declaring certain provisions of the Immigration Act 13 of 2002 (the Act) g unconstitutional. The government opposed the application and appealed against the judgment. The relevant provisions were all part of s 34 of the Act, which was concerned with the way in which illegal foreigners were to be removed from the country and the way in which they were to be treated pending their removal or deportation. The distinction between ss (1) and ss (8) was that the former applied to illegal h foreigners inside the country, while the latter was confined to illegal foreigners who had not yet formally entered South Africa but were still at 'ports of entry'. Ports of entry through which

people could enter South Africa were airports and seaports on the one hand, and border posts on the other. The distinction between the two was that people arriving by air or sea were already physically inside the country when their conveyance arrived but they could not go beyond a restricted area until and unless the immigration officer allowed them to do so. At border posts, however, the position was less clear. The person wishing to enter our country was arguably outside the country until let in by the immigration officer. Section 34(1) empowered an immigration officer to ensure that an illegal foreigner who had already entered the country in the sense of being

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beyond the restricted area at a port of entry was deported. To that end, the person concerned might be arrested and detained. Sections 34(8) and (9), concerned with illegal foreigners at ports of entry, were different. The immigration officer might, as an alternative to detention on the ship, cause the people to be detained elsewhere than on a ship. Subsection (9) provided that people detained in terms of ss (8) were deemed to have been detained by the master. Section 34(2) in effect provided, subject to certain exceptions, that people arrested in terms of the Act must be released within 48 hours. This protection was not applicable to illegal foreigners detained on a ship in terms of ss (8). The five safeguards expressly mentioned in s 34(1) as applying to people already in the country and detained in terms of ss (4) were also not expressly mentioned in s 34(8).

In argument before the High Court the applicants attacked the constitutionality of ss (1), (2), (8) and (9) of s 34 of the Act. The High Court had found s 34(8) to be arbitrary and to be constitutionally invalid. This declaration of invalidity was suspended for a year. The High Court further held that s 34(2) was also constitutionally invalid, but only in that it did not confer on detainees on a ship the right to be released within 48 hours. The High Court's interpretation of the section was that the immigration officer needed only to say to the person recently arrived at the port of entry, or to the person in charge of the ship by which the person arrived, that the person concerned was an illegal foreigner. According to the High Court, the dire consequences of ss (8) followed inexorably upon a mere statement to this effect by an immigration officer. On this interpretation of the subsection, it would matter not whether the person had a valid South African passport, or whether the person, if a foreigner, was in possession of unchallengeable documentation authorising his or her presence inside South Africa. The say-so of the immigration officer, even if baseless and wholly untrue, was not only the dominant consideration, but one which, without more, resulted in the detention and removal of the person about whom the statement was made. The applicants supported this interpretation of the subsection by the High Court. If this construction was correct, any s 34(8) detention would be arbitrary and the subsection would be unconstitutional.

Held, that this was not the way in which the section should be interpreted. Section 8 of the Act required the Department of Home Affairs and the immigration officer on duty to inform the person of the determination and the reasons for doing so. If the say-so of the officer could by itself trigger the detention, the officer would be hard put to give any reasons at all for the determination. An immigration officer could give reasons for the determination only if there were reasons for that determination. There could be no adequate reason for the determination unless there were factors sufficient for the immigration officer reasonably to suspect that the person who had just arrived at the port of entry was an illegal foreigner. Interpreted in this way, the section required, at the very least, that there had to be reason to suspect that the person concerned was an illegal foreigner. Any other interpretation would be inconsistent with the very purpose of the legislation. (Paragraphs [29] and [30] at 139E - H.)

Held, further, that, if there was a reasonable interpretation that, without unduly straining the language, preserved the constitutionality of the section, this Court should embrace it. The section could reasonably be construed as requiring the immigration officer to have reason to suspect that the person in respect of whom a declaration was made, was indeed an illegal foreigner. (Paragraph [31] at 139H - 140B.)

Held, further, that the applicants' contention that s 34(8) offended the rule of law in that it allowed arbitrary detention at the instance of an immigration

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officer had no substance in the context of the section as it had been interpreted in this judgment. It was not arbitrary to cause the detention of a person who had just arrived at a port of entry in South Africa, and who was reasonably suspected by an immigration officer on duty at the port of entry to be an illegal foreigner. Indeed, reasonable suspicion by an immigration officer constituted just cause for the detention. (Paragraph [32] at 140C - E.)

Held, further, that s 34(1) was concerned with a situation different from that contemplated by s 34(8). Subsection (8), in part, was concerned with and authorised the detention of people suspected of being illegal foreigners on a ship by which they arrived. Section 34(1) was designed to cater for the situations in which illegal foreigners were detained in a facility over which the government had control and which was serviced or frequented by State officers. Thus, for example, people detained on a ship could not 'at any time request any officer attending' to them that their detention be confirmed by a court in compliance with s 34(1)(b). There was no officer attending to them on a ship. The government had correctly conceded that s 34(1)(c) could not be applied because the person detained on a ship could not be said to have been arrested. There was also the consideration that ss (e) of s 34(1) referred to prescribed standards of detention which again suggested a State facility. Finally, the provisions in s 34(8) did not expressly make the s 34(1) protection available to a person detained on a ship. (Paragraph [39] at 141D/E - 142A.)

Held, further, that s 35(2) of the Constitution of the Republic of South Africa Act 108 of 1996 applied to 'everyone' and the High Court was correct in finding that its protection extended to illegal foreigners. The rights of the person were therefore limited in that a suspected illegal foreigner might be detained on a ship and denied the safeguards provided for in s 34 except that mentioned in 34(1)(a). (Paragraph [41] at 142E/F - F/G.)

Held, further, that it was reasonable and justifiable for a person who arrived on a ship at a port of entry to be detained on it so that she or he left the country when the ship left. The fact that the s 35(2) safeguards of the Constitution were available to the person detained on a ship avoided detention in intolerable or inhumane circumstances. If the circumstances of detention on a ship rendered it impossible for s 35(2) to be complied with, the immigration officer would have no option but to cause the detention of the suspected illegal foreigner at a State facility in the exercise of the s 34(8) choice. (Paragraph [42] at 142G - I.)

Held, further, that it was of some concern that there was no obligation on the State to seek confirmation of the detention by a court order regardless of the length of the period for which that person was detained on the ship. In other words, there was no s 34(8) equivalent to the s 34(1)(d) requirement that a detention which went beyond 30 days had to be confirmed by a court order obtained at the instance of the State. On balance, no legitimate governmental purpose was served by ensuring that this safeguard was not applicable to a person detained on a ship in terms of s 34(8). To the extent that this had not been done, the limitation was not justified. The section was in this way inconsistent with the Constitution. (Paragraph [43] at 142I - 143C/D.) (Madala J, Moseneke J concurring, dissented.)

Held, further, that the second half of s 34(8), which authorised the immigration officer to cause the detention of a suspected illegal foreigner in a State facility, was subject to the provisions of s 34(1). All the safeguards were applicable and the conditions of s 36 of the Constitution were satisfied. (Paragraph [44] at 143D.)

Held, further, that s 34(8) had been found to be inconsistent with the Constitution

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in a very limited way. There was no justification for striking down the whole section. The least invasive course was to read in the following sentence at the end of s 34(8): 'A person detained in terms of this section may not be held in detention for longer than 30 calendar days without an order of a court which may extend the detention for an additional period not exceeding 90 calendar days on reasonable grounds.' (Paragraph [45] at 143D/E - F.)

Held, further, that the constitutional validity of s 34(2) had to be considered in the context of this remedy having been granted. The section had the consequence that a person detained on a ship in terms of s 34(8) would not be released after 48 hours. This was reasonable and justifiable bearing in mind that it applied to persons who had not formally entered South Africa and had no right to do so. It was reasonable that people who arrived in South Africa without the necessary documents to enable their admission into the country be sent back to the ship in which they arrived. The date of departure of the ship was not under the control of the South African authorities. That the detention of illegal foreigners on a ship was not limited to 48 hours was therefore also reasonable particularly in the context that, according to the present judgment, the s 34(1)(a) safeguard would be applicable. (Paragraph [46] at 143F - I.) Appeal allowed.

Cases Considered

Annotations

[Reported cases](#)

BEF (Pty) Ltd v Cape Town Municipality and Others 1983 (2) SA 387 (C): referred to E

Canada (Minister of Justice v Borowski) (Borowski No 1) [1981] 2 SCR 575 (64 CCC (2d) 97; 130 DLR (3d) 588): referred to

Canadian Council of Churches v The Queen (1992) 88 DLR (4th) 193: referred to

De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association F Intervening) 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109): dictum in para [24] applied

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) (1998 (7) BCLR 779): dictum in para [22] applied

De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2004 (1) SA 406 (CC) (2003 (2) SACR 445; 2003 (12) BCLR 1333): dictum in para [56] applied G

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1): dictum in para [234] applied

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079): dictum in paras [22] - [26] applied

Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another 1998 (1) SA 745 (CC) (1997 (12) BCLR 1655): referred to

Lawyers for Human Rights and Another v 1 Minister of Home Affairs and Another 2003 (8) BCLR 891 (T): reversed on appeal

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) (2000 (1) BCLR 39): dictum in para [74] applied

Ngxuzza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (E): referred to J

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Patel and Another v Minister of Home Affairs and Another 2000 (2) SA 343 (D): dictum at 349I applied A

Prince v President, Cape Law Society, and Others 2002 (2) SA 794 (CC) (2002 (3) BCLR 231): dictum in para [45] applied

Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87: referred to B

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): dictum in para [104] applied

S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) (2000 (1) SACR 414; 2000 (5) BCLR 491): dictum in paras [32] - [33] applied

S P Gupta and Others v Union of India and Others (1982) 2 SCR 365 (AIR 1982 SC 149): referred to C

Tettey and Another v Minister of Home Affairs and Another 1999 (3) SA 715 (D): referred to

Wood and Others v Ondangwa Tribal Authority and Another 1975 (2) SA 294 (A): referred to.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996, ss 35(2), 36: see *Juta's Statutes of South Africa 2002* vol 5 at 1-148, 1-149

The Immigration Act 13 of 2002, s 34(1), (2), (8) and (9): see *Juta's Statutes of South Africa 2002* vol 5 at 2-63.

Case Information

Application for the confirmation of a High Court order declaring certain provisions of the Immigration Act 13 of 2002 E unconstitutional together with an appeal against such High Court order. The facts and issues appear from the judgment of Yacoob J.

Anton Katz (with him *J R Minnaar* and *D Borgstrom*) for the applicants. F

D N Unterhalter SC (with him *A Annandale*) for the respondents.

Cur adv vult.

Postea (March 9). G

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