

## IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Lawyers for Human Rights and Another v Minister of Home Affairs and Others** **CCT 18/03**

**Decided on 9 March 2004**

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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.*

The Constitutional Court today decided a case about two provisions of the Immigration Act 13 of 2002, which are concerned with how illegal foreigners at ports of entry must be treated pending their removal from our country. Section 34(8) says that illegal foreigners can, if an immigration officer so decides, be detained on the vehicle in which they arrived to be removed from South Africa by that vehicle. Section 34(2) provides for certain detained illegal foreigners to be released from detention within forty eight hours except those detained on a vehicle to be taken to court within forty eight hours of their arrest and detention. The High Court interpreted section 34(8) to mean that immigration officers could have people detained by simply saying that they were illegal foreigners even if they were South African citizens who had valid documents showing this. It was accordingly held that the section was arbitrary and unconstitutional. The High Court also held that section 34(2) was invalid to the extent that the section did not oblige detainees on a vehicle to be released within forty eight hours.

The government took a preliminary point in the case. It disputed the standing of Lawyers for Human Rights, an applicant before the High Court and the Constitutional Court, who claimed to be acting in the public interest. Yacoob J writing for the majority held that the organisation did act in the public interest for two main reasons. The provisions challenged are of immense public importance, and could affect the freedom and dignity of human beings. Second, the people affected may be vulnerable and poor and therefore unlikely to have knowledge, resources or the inclination to challenge the constitutionality of these provisions themselves. The Court also rejected the government's argument that illegal foreigners who were not formally in the country could not be beneficiaries of the Constitution. It held that the right to freedom and security in section 12 of the Constitution and those of arrested and detained persons in section 35(2) are integral to the values of our Constitution and to deny them to illegal foreigners would be a negation of our Constitution's underlying values.

Yacoob J concluded that section 34(8) in fact required the immigration officer to reasonably suspect that people were illegal foreigners before they could be detained and removed and that the protection accorded to detained people by section 35(2) of the Constitution did apply to people who were detained on a vehicle. The Court held that the section did limit the rights of illegal foreigners but that it was justifiable in our society to provide that they can be detained in and removed in the vehicle in which

they came. It also held, however, that section 34 was inconsistent with the Constitution because it did not provide for a court to confirm a detention on a vehicle if the detention lasted more than thirty days. The Court cured this defect by reading appropriate words into it. Finally, the Court found that the failure to grant to a person detained on a vehicle the right to be released within forty eight hours was a justifiable limitation of the right to freedom.

Madala J in a minority judgment found that the provisions governing the detention and deportation of illegal immigrants must be read together, and not in isolation, in order to make sense. To that extent, procedural safeguards afforded to a person detained in terms of one subsection, should be understood as applying to a person detained in terms of the other subsections. This is in line with the Constitution and does not violate the applicants' rights as contended. Detention and deportation procedures under the Act are intended to ensure that a person to be deported is deported as effectively, efficiently and expeditiously as possible if found to be an illegal immigrant.