

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

President of the Republic of South Africa and another v Hugo

Case CCT 11/96

Decided on 18 April 1997

Media Summary

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

The President, acting in terms of his constitutional powers to pardon and reprieve offenders had granted release to prisoners in certain categories. One of the categories was certain 'mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years'. The respondent, a single father of a child under twelve at the relevant date, challenged the constitutionality of the pardon in the court a quo, saying that it unfairly discriminated against him and his son on the ground of sex or gender in violation of s 8 of the interim Constitution. The court a quo (the Durban and Coastal Local Division) held the Act unconstitutional and ordered its correction by the President within six months of the date of judgment. The President and the Minister of Correctional Services appealed against the judgment.

The Court first considered the status of the President's powers to pardon or reprieve offenders in terms of s 82(1) of the interim Constitution, which had historically been considered a prerogative power of the head of state. The Court held that operating as they do from an executive organ of state, acts of the President under s 82(1) are subject to review by courts of appropriate jurisdiction in the same way as the exercise of other constitutional powers by the President would be subject to review. While it would be difficult to conceive of a case where a constitutional attack could be mounted against a decision of the President to pardon an individual prisoner, here the power of pardon was exercised in general terms to benefit a group of prisoners. The exercise was accordingly subject to review for compliance with the Fundamental Rights Chapter.

The Court then considered the argument that the Act violated the right against unfair discrimination. The majority of the Court held that while the Act discriminated against the respondent on the basis of sex this discrimination was not unfair. The establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups lies at the heart of the prohibition of unfair discrimination. In deciding whether or not the discrimination was unfair regard had to be had to the impact of the discrimination on the people affected. In assessing whether the impact was unfair it was necessary to look at the group who had been disadvantaged, the nature of the power used and the nature of the interest which had been affected by the discrimination.

Regarding the impact upon fathers of young children who were not released the majority of the Court held that, although the pardon may have denied men an opportunity it afforded women, it could not be said that it fundamentally impaired their sense of dignity and equal worth. Moreover, the pardon merely deprived them of an early release to which they in any event had no legal entitlement since the grant of a pardon is a matter purely within the discretion of the President. It was held that the pardon did not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their special circumstances. Therefore, the pardon was not unfairly discriminatory.

The judgment of the majority of the Court was delivered by Goldstone J and was concurred in by Chaskalson P, Mahomed DP, Ackermann J, Langa J, Madala J, and Sachs J. Mokgoro J and O'Regan J delivered separate concurring judgments. Didcott J and Kriegler J delivered dissenting judgments.