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THE DETENTION OF UNDOCUMENTED FOREIGNERS - *MINISTER OF HOME AFFAIRS V ABDUL RAHIM AND OTHERS*

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On 18 February 2016, the Constitutional Court (the Court) handed down a resounding unanimous judgment regarding the detention of unsuccessful asylum applicants, as well as other groups of undocumented foreigners upon the breach of migration provisions. The provision concerned is section 34(1) of the *Immigration Act*, which requires that the concerned individuals be arrested and detained in a manner as well as place determined by the Director-General of Home Affairs.

The case concerns a group of foreign nationals who entered the country and applied for asylum in terms of section 21 of the *Refugees Act*. They were then granted asylum-seeker permits as per section 22(1) of the *Refugees Act*, which allows one to remain in the country pending the outcome of an application. Their permits were extended from time to time but their final applications for asylum were eventually unsuccessful, as were their appeals against the rejections. By law, they were then required to leave the Republic. They did not.

This failure resulted in their arrest and detention pending deportation. This was purportedly done under the authority conferred upon immigration officers by section 34(1). However, as already stated, this provision requires the place of detention to be pre-determined by the Director-General of the Department of Home Affairs.

During the period of detention, which varied for all the applicants, they were held either at a police station or in a prison, or both. Upon release, the respondents approached the High Court in Port Elizabeth contesting a number of points. For this discussion the only pertinent point is that the places at which they were held were not determined by the Director-General for purposes of detaining undocumented foreigners. In fact, the Director-General had not determined any place or manner for such detention as is required by the Act. This claim was successful before the Supreme Court of Appeal (SCA) and the respondents were awarded damages depending on the period of detention.

Before the Court the Department of Home Affairs applied for leave to appeal against the order of the SCA. As was ruled in the SCA, asylum-seekers have a peculiar status and require detention for reasons other than having been so placed by the justice system. In the ruling, the Court noted the reference to international norms such as the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (amongst others) which states that any migrant who is in violation of provisions relating to migration should be held separately from convicted persons. Whilst these norms may not be binding on South Africa as was asserted by the Department of Home Affairs (the Department), the Court found that "*it is an international norm that refugees and others caught up in migratory regulation have a peculiar status that differentiates them from those who are imprisoned by the criminal justice system*".

These norms were used to highlight why the *Immigration Act* expressly required the Director-General to apply his/her mind to what places could be deemed appropriate for the detention of undocumented foreigners who fall foul of migration laws in the country. On the other hand, the Department asserted that section 34(1) did not impose an obligation on the Director-General to determine specific spaces for the detention concerned. Rather - it was sufficient for any state-owned or controlled facilities to be used as detention facilities.

The Court ruled unanimously that section 34(1) unambiguously obliged the Director-General to predetermine places for the purpose of detaining illegal foreigners. Because this was not done, the respondents were held unlawfully and thus owed damages for the unlawful conduct. Furthermore, such unlawful detention amounts to unlawful deprivation of freedom which is proscribed by section 12 of the Constitution. The right to freedom and security of the person is not restricted to those of South African origin but is extended to everyone who finds him/herself within the country.

It is clear that the failure of the Director-General to carry out the instructions in the *Immigration Act* creates a lacuna that allows for individuals to have their rights violated. To illustrate the significance of this issue, the Court allowed People Against Suffering, Oppression and Poverty (PASSOP), a community-based, non-profit organisation, which promotes and protects the rights of all refugees, asylum-seekers and immigrants in South Africa, to join the matter as *amicus*. It is also evident that this is not the first incidence of this nature. If the Director-General has yet to identify places for this detention, it follows that there are high volumes of foreign nationals being held together with convicted criminals at any given time. This is a breach of international norms, as well as our own Constitution. In the wake of the tumultuous times the country has faced with regard to the treatment of foreign nationals, this judgment comes as a welcome affirmation of the commitment to a just and equal human rights culture. Importantly, the case illustrates that the rights and freedoms enshrined (save for citizenship and political rights) in the Constitution are not just for South African nationals, but for all individuals within the nation's borders.