

UNCONSTITUTIONALITY OF DETENTION WITHOUT TRIAL FOR THE PURPOSE OF DEPORTATION - *LAWYERS FOR HUMAN RIGHTS V MINISTER OF HOME AFFAIRS AND OTHERS*

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On 29 June 2017, the Constitutional Court (the Court) reaffirmed in *Lawyers for Human Rights v Minister of Home Affairs (Lawyers for Human Rights matter)* that the constitutional right to not to be deprived of personal freedom has two built-in constitutional aspects. First, the deprivation must be for a lawful, rationally-connected cause. Second, and of importance to the matter at hand, the conditions of the deprivation must be procedurally fair and cannot be above the scrutiny of the Courts. Judicial oversight is still required, even if there are lawful reasons for depriving a person of their personal freedom.

The *Lawyers for Human Rights* matter in specific concerned the constitutional validity of section 34(1)(b) and (d) of the *Immigration Act* of 2002 (the Act), which regulates the admission for foreigners residing in South Africa, and their departure. The Court confirmed that the challenged sections were inconsistent with sections 12(1) and 35(2)(d) of the Constitution. However, unlike the North Gauteng High Court, which had previously essentially redrafted section 34(1)(b) of the Act, the Court suspended the order of invalidity, on certain conditions, for 24 months, in order for Parliament to correct the defect.

Section 12(1) of the Constitution guarantees everyone “...*the right to freedom and security of the person, which includes the right...(b) not to be detained without trial*”. The concept of ‘detention without trial’ was a powerful weapon used by the apartheid regime for political suppression and section 12(1)(b) was broadly drafted to protect an individual against any form of detention. Furthermore section 35(2)(d) of the Constitution also guarantees the upholding of the Rule of Law by providing that a detainee, including every sentenced prisoner, has the right “*to challenge the lawfulness of the detention in person before a court...*”.

The impugned section 34 of the Act, stipulates the process for deportation and detention of “illegal foreigners” as referred to in the Act and further referred to as ‘unlawful foreigners’. In essence, this section provides that an immigration officer may arrest an unlawful foreigner without the need for a warrant, deport them and detain them pending the deportation. It vaguely requires the unlawful foreigner to be notified of the decision of deportation, the right to appeal and to be detained under humane conditions considering the unlawful foreigner’s right to dignity. It is only on the request of the unlawful foreigner in

terms of section 34(1)(b) that their detention can be confirmed by a warrant of a Court. Furthermore, section 34(1)(d) of the Act only briefly states that the detention may not be longer than 30 calendar days without a warrant of the Court, which can then again vaguely be extended on “good and reasonable grounds” for a period but not exceeding 90 calendar days. These specific subsections, the applicants argued, were in clear contravention of sections 12(1) and 35(2)(d) of the Constitution.

The Court firstly emphasised that sections 12(1) and 35(2) of the Constitution are not limited to South African citizens. If the rights were to only apply to South African citizens the Constitution would have specifically provided so. The Court also examined the historical scope of these rights and stated that the abuse of power by the police during apartheid, which precluded judicial oversight of conditions of detention, is exactly why judicial control has to be present as soon as reasonably possible after a person is being detained.

Furthermore, the Court confirmed that the right “*not to be detained without trial*” has both a procedural and substantive aspect that needs to be complied with and judicial control is a core aspect of the procedural aspect to this right. On analysis of section 34(1) of the Act, the Court found in general that the wide discretionary powers afforded to the immigration officer, an administrator, are neither subject to any judicial oversight nor are any guidelines provided to the immigration officer in this section. This is in clear conflict with the Rule of Law. In specific the Court confirmed that section 34(1)(b) and 34(1)(d) of the Act were in conflict with sections 12(1)(b) and 35(2)(d) of the Constitution. Section 34(1)(b) makes no provision for the automatic judicial review of a detention before the 30 calendar days expire and section 34(1)(d) of the Act is silent on the unlawful foreigner’s right to challenge the lawfulness of their detention in person before a Court. The Court also held that the State’s reliance on estimated increased costs of additional reviews in circumstances where the State would have had to budget for it - in the event an unlawful immigrant requests a warrant - cannot justify a limitation to these important constitutional rights.

This matter once again reaffirmed that the constitutional right “*not to be detained without trial*” was a hard-fought right in South Africa. The right has universal application and is not just limited to South African citizens. Furthermore, the upholding of the Rule of Law requires that the detention of unlawful foreigners also be subject to judicial oversight. Importantly, the judgment creates a further layer of protection for unlawful foreigners, who find themselves detained in terms of unfamiliar laws, which create a further opportunity for abuse and exploitation. The judgment not only emphasises the need for section 34 of the Act to be in line with sections 12 and 35 of the Constitution, it also gives effect to the principle of separation of powers by allowing Parliament to correct the infringement.