CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 18/03

LAWYERS FOR HUMAN RIGHTS	First Applicant
ANN FRANCIS EVELETH	Second Applicant
versus	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent

Heard on : 19 August 2003

Decided on : 9 March 2004

JUDGMENT

YACOOB J:

[1] The first applicant is Lawyers for Human Rights, a non-governmental, non-profit organisation working in South Africa. The second applicant is Ann Francis Eveleth, a foreign national. The first and second respondents are the Minister of Home Affairs and the Director-General of that department. They are referred to in this judgment as the government.

[2] The applicants seek confirmation of a High Court order declaring certain provisions of the Immigration Act[1] (the Act) unconstitutional.[2] The government opposes the application and appeals against the judgment.

[3] A brief description of the way in which relevant provisions of the Act to be considered inter-relate will facilitate an understanding of the issues to be decided. The provisions are all part of section 34 of the Act. That section is concerned with the way in which illegal foreigners are to be removed from the country and the way in which they are to be treated pending their removal or deportation. Since all the provisions are concerned with illegal foreigners it is useful to start by considering who illegal foreigners are.

[4] The Act distinguishes between "foreigners" and "illegal foreigners". A foreigner "means an individual who is neither a *citizen* nor a *resident*, but is not an *illegal foreigner*".[3] An illegal foreigner "means a *foreigner* who is in the *Republic* in contravention of *this* Act and includes a *prohibited* person".[4] Section 10 of the Act provides that a foreigner may be admitted, enter and sojourn in this country only if in possession of a temporary residence permit. Sections 11 to 23 thereafter make provision for the circumstances in which various categories of people may get

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[1] Act 13 of 2002.

[2] The judgment is reported as *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T).

[3] Section 1(1) of the Act.

[4] Id

temporary residence permits for numerous purposes including holiday, work, study, asylum and medical treatment. Illegal foreigners therefore constitute a limited category of people. An illegal foreigner is either a prohibited person[5] or a person who comes into the country or tries to enter without any permit at all or any consent or authorisation. It may be mentioned that the scheme of the Act is such that all permits and authorisations[6] must be issued in writing.

[5] Subsections (1), (2), (8) and (9) of section 34 of the Act are important. Subsection (1) provides:

> "Without need for a warrant, an immigration officer may arrest an *illegal foreigner* or cause him or her to be arrested, and shall, irrespective of whether such *foreigner* is arrested, deport him or her or cause him or her to be deported and may, pending his or her *deportation*, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the *Department* determined by the *Director-General*, provided that the *foreigner* concerned -
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> (*a*) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of *this Act*;
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> (*b*) may at any time request any officer attending to him or her that his or her detention for the purpose of *deportation* be confirmed by warrant of a *Court*, which, if not issued within 48 hours of such request, shall cause the immediate release of such *foreigner*;

[5] A list of prohibited persons is set out in section 29 and includes for example people with infectious diseases.

[6] There are other laws that make provision for foreigners being in South Africa. Some of them are South African Citizenship Act 88 of 1995 section 5; Defence Act 42 of 2002 section 20; Statistics and Identification Act 68 of 1997 section 6; and Diplomatic and Immunities Privileges Act 37 of 2001.

(*c*) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(*d*) may not be held in detention for longer than 30 calendar days without a warrant of a *Court* which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and

(*e*) shall be held in detention in compliance with minimum *prescribed* standards protecting his or her dignity and relevant human rights."

Section 34(2) provides:

"The detention of a person in terms of *this* Act elsewhere than on a *ship* and for purposes other than his or her *deportation* shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day."

Subsection (8) provides:

"A person at a *port of entry* who has been notified by an immigration officer that he or she is an *illegal foreigner* or in respect of whom the immigration officer has made a declaration to the *master* of the *ship* on which such *foreigner* arrived that such person is an *illegal foreigner* shall be detained by the *master* on such *ship* and, unless such *master* is informed by an immigration officer that such person has been found not to be an *illegal foreigner*, such *master* shall remove such person from the *Republic*, provided that an immigration officer may cause such person to be detained elsewhere than on such *ship*, or be removed in custody from such *ship* and detain him or her or cause him or her to be detained in the manner and at a place determined by the *Director-General*."

Section 34(9) to the extent relevant provides:

> "The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the *master* of such *ship* and not of the immigration officer or the *Department*, and such *master* shall be liable to pay the costs of the detention and maintenance of such person while so detained if the *master* knew or should reasonably have known that such person was an *illegal foreigner* . . . ."

[6] As I have already mentioned, section 34 is concerned only with illegal foreigners and their treatment. The distinction between subsection (1) and subsection (8) is that the former applies to illegal foreigners inside the country while the latter is confined to illegal foreigners who have not yet formally entered South Africa but are still at "ports of entry".

[7] There are two kinds of ports of entry through which people can enter South Africa. We have airports and seaports on the one hand, and border posts on the other. The distinction between the two is this. People arriving by air or sea are already physically inside the country when their conveyance arrives but they cannot go beyond a restricted area until and unless the immigration officer allows them to do so. At border posts, however, the position is less clear. The person wishing to enter our country is arguably outside the country until let in by the immigration officer. In both categories of ports of entry, however, the immigration officer checks whether a foreigner has the necessary valid document to enter. A person who has must be allowed to enter South Africa formally. If not, other steps must be taken.

[8] Section 34(1) empowers an immigration officer to ensure that an illegal foreigner who has already entered the country in the sense of being beyond the

restricted area at a port of entry is deported. To that end, the person concerned may be arrested and detained. People arrested and detained for the purpose of deportation must be notified of the decision to deport them and of their right to appeal. They may request their detention be confirmed by an order of court and must be informed of these rights. Finally, an illegal foreigner already inside the country may not be held for more than 30 days without a confirmatory court order and must be held in compliance with certain "minimum prescribed standards".

[9] Sections 34(8) and (9), concerned with illegal foreigners at ports of entry, are different. The immigration officer at the port of entry must notify the people concerned or declare to the master of the ship on which they arrive that they are illegal foreigners. The master of the ship is then obliged to detain those people on the ship and remove them from the country unless the master is informed by the immigration officer that the people have been found not to be illegal foreigners. The immigration officer may, as an alternative to detention on the ship, cause the people to be detained elsewhere than on a ship. Subsection (9) provides that people detained in terms of subsection (8) are deemed to have been detained by the master.

[10] Section 34(2) in effect provides, subject to certain exceptions, that people arrested in terms of the Act must be released within 48 hours.[7] This protection is not applicable to illegal foreigners detained on a ship in terms of subsection (8). The five

[7] There is a qualification not relevant to this judgment.

safeguards expressly mentioned in section 34(1)[8] as applying to people already in the country and detained in terms of subsection (4) are also not expressly mentioned in section 34(8).

[11] Two further matters must be mentioned to complete this overview of the provisions relevant to the predicament of illegal foreigners at ports of entry. The first is that the word "ship" is widely defined and includes, at the very least, all modes of transport by which people may arrive at ports of entry.[9] I will, in the rest of this judgment use the word "ship" in this wider sense. Secondly, section 8(1) and (2) of the Act require the Department of Home Affairs to inform people of any determination adverse to them and of the "related motivation". That person then has a right to "make representations" against that determination before it is finally made and, if finally made, to appeal against it to the Director-General and, ultimately, to the Minister of Home Affairs.[10] Subsection (4) provides that a person may not be

[8] Paragraphs (a) to (e) of subsection (1) quoted in full in para 5 above.

[9] Section 1(1) defines ship as including "any vessel, boat, aircraft or other *prescribed* conveyance".

[10] Subsections (1) and (2) of section 8 provide:

> "(1) Before making a determination adversely affecting a person, the *Department* shall notify the contemplated decision and related motivation to such affected person and give such person at least 10 calendar days to make representations, after which the *Department* shall notify such person that either such decision has been withdrawn or modified, or that it shall become effective, subject to subsection (2).
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> (2) Within 20 calendar days of its notification, the person aggrieved by an effective decision of the *Department* may appeal against it -
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> (*a*) to the *Director-General*, who may reverse or modify it within 10 calendar days, failing which the decision shall be deemed to have been confirmed; or
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> (*b*) within 20 calendar days of modification or confirmation by the Director-General, if any, to the *Minister*, who may reverse or modify it within 20 calendar days, failing which the decision shall be deemed to have been confirmed, and be final, provided

deported until the relevant decision is final.[11] However, although subsection (5)[12] expressly preserves the subsection (2) right of appeal, it renders the decision of an immigration officer refusing a foreigner entry into the country (at a port of entry and therefore in terms of section 34(8)) final for purposes of deportation.

Proceedings in the High Court

[12] The proceedings in the High Court were impelled by the detention of the second applicant at a time when the Aliens Control Act,[13] the predecessor of the Act, was in force. The Act had been passed by Parliament but had not yet been brought into force. The High Court application therefore challenged the constitutional validity of provisions in both the Aliens Control Act and the Act still to come into force. By the time the case was argued however, the Aliens Control Act had been repealed and the Act had come into force. The Aliens Control Act challenges therefore fell away.

> that in exceptional circumstances or when such person stands to be deported as a consequence of such decision -
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> (i) the *Minister* may extend such deadline; and
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> (ii) at the request of the *Department*, the *Minister* may request such person to post a bond to defray his or her *deportation* costs, if applicable; or
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> (*c*) within 20 calendar days of modification or confirmation by the *Minister*, if any, to a *Court*, which may suspend, reverse or modify it in accordance with its rules."

[11] It reads:

> "(4) Any person adversely affected by a decision of the *Department* shall be notified in writing of his or her rights under this section and other *prescribed* matters, and may not be deported before the relevant decision is final."

[12] The section provides:

> "(5) Notwithstanding subsection (1), as soon as notified to the person concerned in terms of subsection (4), the decision of an immigration officer refusing entry into the *Republic* shall be effective for the purpose of subsection (1), and final for purposes of *deportation*, but subject to subsections (2) and (3)."

[13] Act 96 of 1991.

[13] In argument before the High Court the applicants attacked the constitutionality of subsections 1, 2, 8 and 9 of section 34 of the Act. The government disputed the standing of both first and second applicants and contended for the constitutional validity of all the impugned provisions. The High Court concluded that both applicants did have standing conferred upon them by section 38 of the Constitution.[14] It held that the challenges to sections 34(1) and 34(9) were without merit. The judgment interpreted section 34(8) to mean that the detention of an illegal foreigner is triggered solely by an immigration officer informing the person who has arrived at the port of entry, or the master of the ship, that he or she is an illegal foreigner, regardless of the absence of any justification for the statement. The High Court found section 34(8) to be arbitrary, to infringe section 12 of the Constitution and to be constitutionally invalid. This declaration of invalidity was suspended for a year. Finally, the High Court held that section 34(2) was also constitutionally invalid, but only in that it did not confer the right for detainees on a ship to be released within 48 hours.

Standing

[14] Section 38 of our Constitution introduces a radical departure from the common law in relation to standing. Indeed, the terms of the section limit considerably the degree to which an analysis of the standing jurisprudence in other countries can be of real assistance. The section provides:

[14] This section will be discussed in more detail later.

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
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> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[15] Subsection (d) expressly allows court proceedings by individuals or organisations acting in the public interest. Public interest standing is given in addition to those provisions that allow for actions to be instituted on behalf of other persons and on behalf of a class. Subsection (d) therefore connotes an action on behalf of people on a basis wider than the class actions contemplated in the section. The meaning and reach of the standing conferred by this paragraph must be determined against this background.

[16] In her judgment in *Ferreira v Levin*[15] O'Regan J advocated the following approach to determine the reach of the provision in the interim Constitution equivalent to section 38(d) of the Constitution as well as whether and when a person or

[15] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

organisation could be said to have been acting in the public interest in a particular case:

> "This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case." [16]

[17] I agree in substance with this approach. Although it forms part of a minority judgment it is not inconsistent with anything said in the majority judgment on the issue of standing. The majority affirmed that courts should adopt a broad rather than a narrow approach to standing to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.[17] It was not necessary for them, however, to deal with public interest standing, for in their view the applicant in that case had the right under section 7(4)(b) of the interim Constitution to bring the constitutional challenge in his own interest. The standing provisions in the interim Constitution and section 38 of the Constitution are for all practical purposes the same and the approach advocated by O'Regan J is therefore equally applicable to section 38(d).

[16] Id para 234.

[17] Id para 165.

[18] The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis.

[19] The rights implicated here are those in section 12 and section 35(2) of the Constitution. Section 12 provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right —
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> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
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> (2) Everyone has the right to bodily and psychological integrity, which includes the right —
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> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent."

Section 35(2) provides:

"(2) Everyone who is detained, including every sentenced prisoner, has the right —

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's —

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner."

[20] The provisions challenged in the High Court are of immense public importance, being concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned

if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.

[21] Moreover, many of the people who arrive at a port of entry without being entitled to any of the large variety of residence permits allowed by the Act may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa. Their understanding of the South African legal system, its values, its laws, its lawyers and its non-governmental organisations may be limited indeed. Finally, it is apparent that in most cases, the ship that brought the affected person into the country would depart within a few days, and in many cases in under twenty four hours of its arrival.

[22] In these circumstances, the possibility that the people affected by these provisions will challenge their constitutionality is remote. They may well have left the country before the constitutional challenge could or would materialise even if it is assumed that they would have the resources, knowledge, power or will to institute appropriate proceedings. If section 34(8) of the Act is unconstitutional, hundreds of vulnerable people could be detained unconstitutionally for short times before their removal from South Africa without the constitutionality of these provisions ever being tested. This is not in the public interest. It is therefore, objectively speaking, in the public interest for these proceedings to be brought. The constitution of the first applicant records commitment to a principal objective which is to "promote, uphold, foster, strengthen and enforce in South Africa all human rights, including civil rights,

political rights and socio-economic rights". The first applicant accordingly acts genuinely in the public interest and has standing.

[23] The involvement of the second applicant in the proceedings would have resulted only in a minimal increase in the costs of the proceedings. There is therefore no need to determine whether she has standing.

[24] It may in any event be incumbent on this Court to deal with the substance of a dispute concerning the constitutionality of legislation that reaches this Court pursuant to section 172(2) of the Constitution. This is because a High Court has already declared a particular provision to be inconsistent with the Constitution. There are good public policy reasons to suggest that the uncertainty in relation to constitutional consistency ought not to be allowed to prevail. There is therefore a strong argument that the purpose of section 172(2) of the Constitution is to ensure that the uncertainty generated by the High Court decision of unconstitutionality is eliminated and that the substance of the debate raised by the declaration is finally determined. I need say no more about this.

Applicability of the Bill of Rights

[25] The government contended that our Bill of Rights does not accord protection to foreign nationals at ports of entry who have not yet been allowed formally to enter the country. It was accordingly suggested that the provisions in issue cannot be found to be inconsistent with the Constitution. The government relied on section 7(1) of the

Constitution which enshrines the rights of all the people "in our country".[18] We were urged to find that people at ports of entry who have not yet been allowed formally to enter South Africa, are not "in our country" within the meaning of the subsection.

[26] It is neither necessary nor desirable to answer the general question as to whether the people to whom section 34 of the Act applies are beneficiaries of all the rights in the Constitution. It is apparent from this judgment that the rights contained in section 12 and section 35(2)[19] of the Constitution are implicated. The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court.

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[18] Section 7(1) provides:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[19] See above para 19.

[27] Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why "everyone" in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2). It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country.

High Court's interpretation of Section 34(8)

[28] The High Court's interpretation of the section has been referred to earlier. It is that the immigration officer need only 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 is an illegal foreigner. According to the High Court, the dire consequences of subsection (8) follow 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, is not only the dominant consideration, but one which without more, results in the detention and removal of the person about whom the statement is made.

[29] The applicants supported this interpretation of the subsection by the High Court. If this construction is correct, any section 34(8) detention would be arbitrary and the subsection would be unconstitutional. In my view, however, this is not the way in which the section should be interpreted.

[30] A determination that a person is an illegal foreigner adversely affects that person. Section 8 of the Act requires the Department of Home Affairs, and the immigration officer on duty on behalf of the department at the port of entry, to inform the person of the determination and the reasons for doing so.[20] If the say-so of the officer can by itself trigger the detention, the officer would be hard put to give any reasons at all for the determination. An immigration officer can give reasons for the determination only if there are reasons for that determination. There can be no adequate reason for the determination unless there are factors sufficient for the immigration officer to reasonably suspect that the person who has just arrived at the port of entry is an illegal foreigner. Interpreted this way, the section requires, at the very least, that there must be reason to suspect that the person concerned is an illegal foreigner. Any other interpretation would be inconsistent with the very purpose of the legislation.

[31] If there is a reasonable interpretation which, without unduly straining the language preserves the constitutionality of the section, this Court should embrace it.[21]

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[20] Above para 11.

[21] *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

This Court should also adopt a reasonable interpretation that results in unconstitutionality to a limited extent as opposed to one that results in the provision being wholly unconstitutional. The section can reasonably be construed as requiring the immigration officer to have reason to suspect that the person in respect of whom a declaration is made, is indeed an illegal foreigner. I am satisfied for reasons that follow that if that construction of the section is adopted, its provisions will not be wholly inconsistent with the Constitution, but inconsistent only to a limited extent. It is therefore the interpretation that should be adopted.

Arguments by applicants and the justification analysis

[32] The applicants contend that section 34(8) offends the rule of law in that it allows arbitrary detention at the instance of an immigration officer. The contention would have had substance on the interpretation afforded to the subsection by the High Court. However, it has no substance in the context of the section as it has been interpreted in this judgment. It is not arbitrary to cause the detention of a person who has just arrived at a port of entry in South Africa, and who is 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 constitutes just cause for the detention.

[33] The applicants also rely on that part of section 12 of the Constitution which guarantees the right to freedom and security of the person and prohibits the detention

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(CC); 2000 (10) BCLR 1079 (CC) paras 22-26; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) para 24.

of any person without trial. They are right when they contend that section 34(8) limits the right to freedom and the right not to be detained without trial. The person who arrives in the country can be detained once the immigration officer reasonably suspects that that person is an illegal foreigner. The justification analysis is therefore necessary.

[34] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
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> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[35] This Court has held that section 36 requires a proportionality analysis. The nature and importance of the right must be measured against the purpose and extent of the limitation taking into account whether a less severe limitation might have been sufficient adequately to serve the government's purpose.[22]

[22] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 104; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) paras 32-33; *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) para 45; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2003 (12) BCLR 1333 (CC) para 56.

[36] The rights relied upon have both a procedural and substantive component.[23] The importance of the right to freedom and, in particular, not to be detained without trial can never be over-stated. The right has particular significance in the light of our history during which illegitimate detentions without trial of many effective opponents of the pre-1994 government policy of apartheid abounded.[24] We must never again allow a situation in which that is countenanced.

[37] Section 34(8) applies only to people reasonably suspected of being illegal foreigners. The purpose of the provision is plain. It is to prevent people from gaining entry into the country illegally. The importance of the purpose of the provision can also not be gainsaid.

[38] The applicants contended that the provision was particularly invasive because a person suspected of being an illegal foreigner would not have the protection either of the safeguards mentioned in section 34(1) of the Act[25] or of the protection afforded by section 35(2) of the Constitution.[26] The government submitted on the other hand that the protection afforded by both provisions is applicable to a section 34(8) detainee. The applicability of each must be separately determined.

[23] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) para 22.

[24] Id para 26.

[25] Above para 5.

[26] Above para 19.

[39] Section 34(1) is concerned with a situation different from that contemplated by section 34(8). Subsection (8), in part, is concerned with and authorises the detention of people suspected of being illegal foreigners on a ship by which they arrived. It will be remembered that section 34(8) gives immigration officers a choice. They can either be content with the detention of the people concerned on the ship, or cause people to be detained elsewhere. Section 34(1) is designed to cater for the situations in which illegal foreigners are detained in a facility over which the government has control and which is serviced or frequented by state officers. Thus, for example, people detained on a ship cannot "at any time request any officer attending" to them that their detention be confirmed by a court in compliance with section 34(1)(b). There is no officer attending to them on a ship. The government correctly concedes that section 34(1)(c) cannot be applied because the person detained on a ship cannot be said to have been arrested.[27] There is also the consideration that subsection (e) of section 34(1) refers to prescribed standards of detention which again suggests a state facility. Finally, the provisions in section 34(8) do not expressly make the section 34(1) protection available to a person detained on a ship.

[40] It was submitted on behalf of the government that the section 34(1) protection or conditions apply to any person who is caused to be detained by the immigration officer. The argument goes that it is the immigration officer who causes the detention of the suspected illegal foreigner on a ship in terms of section 34(8). It is true that

[27] Section 34(1)(c) provides that an illegal foreigner arrested for the purpose of deportation:

> ". . . shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands".

immigration officers cause the detention of people on a ship in a broad sense. All the officer does is to make the relevant statement after forming a reasonable suspicion. But the question we have to answer is whether immigration officers who make such a statement cause the detention of people within the meaning of section 34(1). Section 34(1) authorises immigration officers to cause the detention of illegal foreigners at a place under the control of the administration of the department. Immigration officers must be responsible for the detention in the sense that they must make arrangements for that detention to take place within a state facility. This is confirmed by the use of the words "cause such person to be detained" in the second half of section 34(8) which has nothing to do with detention on a ship. The subsection makes a distinction between the detention of suspected people by the master on a ship on the one hand and detention at the instance of the immigration officer who "may cause such person to be detained elsewhere" in a state facility on the other. Section 34(1) applies to detention in a state facility but it does not apply to detention on a ship.

[41] The next issue is whether section 35(2) of the Constitution is applicable.[28] Section 35(2) applies to "everyone" and the High Court was correct in finding that its protection extends to illegal foreigners. Otherwise the subsection would be inconsistent with the Constitution. The rights of the person are therefore limited in that a suspected illegal foreigner may be detained on a ship and denied the safeguards provided for in section 34 except that mentioned in 34(1)(a). It will be recalled that

[28] See above para 19.

section 8 requires the immigration officer to provide information as to the adverse determination and the reasons for it although this is not required to be done in writing.

[42] It is reasonable and justifiable for a person who arrives on a ship at a port of entry to be detained on it so that she or he leaves the country when the ship leaves. The fact that the section 35(2) safeguards of the Constitution are available to the person detained on a ship avoids detention in intolerable or inhumane circumstances. If the circumstances of detention on a ship render it impossible for section 35(2) to be complied with, the immigration officer will have no option but to cause the detention of the suspected illegal foreigner at a state facility in the exercise of the section 34(8) choice.

[43] It is however of some concern that there is 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 is detained on the ship. In other words, there is no section 34(8) equivalent to the section 34(1)(d) requirement that a detention which goes beyond 30 days must be confirmed by a court order obtained at the instance of the state. It is true that, in most cases, ships at ports of entry would depart much less than 30 days after arrival. A ship would rarely remain at a port of entry for longer than 30 days. But this rarity is really a factor against the government. The less frequently the period of 30 days is likely to be exceeded, the less burdensome it is for a requirement of this kind to be imposed upon the government and the more unreasonable it is that the government is not obliged to approach a court if the detention went beyond 30 days.

On balance, no legitimate governmental purpose is served by ensuring that this safeguard is not applicable to a person detained on a ship in terms of section 34(8). To the extent that this has not been done, I consider that the limitation is not justified. The section is in this way inconsistent with the Constitution.

[44] The second half of section 34(8) which authorises the immigration officer to cause the detention of a suspected illegal foreigner in a state facility is subject to the provisions of section 34(1). All the safeguards are applicable and the conditions of section 36 of the Constitution are satisfied.

Remedy

[45] Section 34(8) has been found to be inconsistent with the Constitution in a very limited way. There is no justification for striking down the whole section. The least invasive course[29] is to read in the following sentence at the end of section 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."

[46] The constitutional validity of section 34(2) must be considered in the context of this remedy having been granted. The section has the consequence that a person detained on a ship in terms of section 34(8) will not be released after 48 hours. This is reasonable and justifiable bearing in mind that it applies to persons who have not

[29] *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 (CC) para 74.

formally entered South Africa and have no right to do so. It is reasonable that people who arrive 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 is not under the control of the South African authorities. That the detention of illegal foreigners on a ship is not limited to 48 hours is therefore also reasonable particularly in the context that, according to this judgment, the section 34(1)(a) safeguard will be applicable.

[47] The following order is made:

1. The appeal succeeds.

2. The order of the High Court is set aside and replaced by the following order:

    2.1 Section 34(8) of Act 13 of 2002 is inconsistent with the Constitution because it does not allow the protection afforded to a detainee in terms of section 34(1)(d) to a person detained on a ship in terms of subsection (8).

    2.2 The following sentence is to be read in at the end of section 34(8) of Act 13 of 2002:

    "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."

    2.3 There is no order as to costs.

3. The order of the High Court is not confirmed except to the extent indicated by paragraph 2 of this order.

4. There is no order as to costs.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J concur in the judgment of Yacoob J.

MADALA J:

Introduction

[48] The applicants approach this Court seeking confirmation in terms of section 172(2)(a) of the Constitution, of the following order made by the Pretoria High Court (the court *a quo*):[1]

> "1. That the words "*elsewhere than on a ship and*" in section 34(2) of the Immigration Act 13 of 2002 are declared inconsistent with the Constitution and therefore invalid.
>
> 2. Section 34(8) of the Immigration Act 13 of 2002 is declared inconsistent with the Constitution and therefore invalid
>
> 3. That the Order of invalidity is suspended for a period of one year from the date of the order.

[1] The judgment is reported as *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T).

4. That the Respondents are ordered to pay the Applicants' costs."

[49] The first applicant in this matter, Lawyers for Human Rights, is a juristic person who claims to be acting in the public interest in terms of section 38(d) of the Constitution. It has its head office in Pretoria. It is a non-profit, non-governmental organisation, whose principal aims and objectives as stated in its constitution are to promote, uphold, foster, strengthen and enforce human rights in South Africa.

[50] The second applicant, Ann Francis Eveleth, is a foreign national who was arrested and detained without trial for some seven days in terms of certain provisions of the now repealed Aliens Control Act,[2] but who has since been released pending the determination of her status.

[51] The first respondent is the Minister of Home Affairs and the second respondent the Director-General of the Department of Home Affairs. They oppose the relief sought by the applicants and have further sought leave to appeal against the decision of the High Court.

The High Court Judgment

[52] In the court *a quo* the applicants attacked the constitutional validity of sections 34(1), 34(1)(d), 34(2), 34(8) and 34(9) of the Immigration Act 13 of 2002 (the IA). They also attacked certain provisions of the now repealed Aliens Control Act. Certain

[2] Act 96 of 1991.

words only in section 34(2) and the whole of section 34(8) of the IA were held to be inconsistent with the Constitution and were thus declared invalid. The court *a quo* further ordered that the invalidity of section 34(8) be suspended for a period of one year from the date of the said order. It is the order made in respect of those sections that the applicants seek to confirm in these proceedings.

[53] The respondents' grounds of appeal, among others, are the following:

(a) Section 34(8) of the IA does not offend against the procedural safeguards which form part of the rights in section 12(1)(a) and (b) of the Constitution, nor is it arbitrary.

(b) The court *a quo* failed to have regard to Regulation 39 promulgated under the IA when interpreting section 34(8).

(c) The court *a quo* failed to appreciate that the powers which an immigration officer enjoys are exercised subject to the constraints of the Constitution, so that section 34(8) does not violate the rule of law.

(d) The court *a quo* erred in finding that there is nothing in the IA which ensures that notification or a declaration is made only in respect of persons who are at least reasonably suspected of being illegal foreigners. The powers given to immigration officers to convey such information or make such declarations are thus arbitrary, because, the purpose of the power given to immigration officers to notify or make a declaration is not rationally related to the purpose of ensuring that illegal foreigners do not enter the country.

(e) The court *a quo* erred in failing to find that it is proper to differentiate between the constitutionality of the power as conferred in legislation and the exercise of that power. The mere fact that there could be an improper exercise of the power, such as would make the conduct unconstitutional, does not mean that the enabling legislation automatically falls foul of the Constitution.

(f) The court *a quo* erred in finding that any declaration or notification made by an immigration officer in terms of section 34(8) of the IA, must be made with reference to the definition of such person in section 1.

(g) The court *a quo* also erred in failing to appreciate that Section 34(8) of the IA does not offend against the procedural safeguards which form part of the rights conferred in section 12(1)(b) of the Constitution.

(h) The learned judge in the court *a quo* failed to appreciate that the provisions of section 34(2) were not inconsistent with the Constitution.

[54] I now turn to the issues raised by this case.

Applicability of the Constitution

[55] The respondents contended that the Constitution had no application to "illegal foreigners" as defined in the IA. This submission is in line with the respondents' submission that the rights contained in the Constitution are available only to citizens of the Republic. The respondents sought to distinguish the cases of *Patel and Another v Minister of Home Affairs and Another*[3] and *Larbi-Odam and Others v Member of the*

[3] 2000 (2) SA 343 (D&CLD).

Executive Council for Education (North-West Province) and Another[4] on the basis that the applicants in those cases were within the Republic, and had been so resident for some time on the strength of residence permits.

[56] They contended further that a person cannot be "in our country" according to section 7 of the Constitution until he or she has been given authority to enter either in terms of the IA itself or by an immigration officer.

[57] The Constitution applies to the exercise of all public power within the Republic. In my view the Constitution also applies in this case.

Impugned Provisions

[58] Specifically, the sections which are challenged in this Court are section 34(2) and 34(8).

Section 34(2)

[59] Section 34(2) provides that:

> "The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day." (My emphasis.).

[4] 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

Section 34(8)

[60] The next impugned provision is section 34(8) which provides that:

> "A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General."

[61] These impugned sections form part of a cluster of provisions which deal with the enforcement and monitoring of the implementation of the IA. Section 34 deals with the detention and deportation of illegal foreigners. The applicants contended in the court *a quo*, and repeated the same assertions in this Court, that these provisions violate fundamental rights to freedom and security of the person; not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial,[5] and the rule of law. They further contended that there is no justification for the deprivation or limitation of these fundamental rights.

[5] Section 12(1) provides that:

> "Everyone has the right to freedom and security of the person, which includes the right -
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial."

[62] In respect of section 34(2) the words "elsewhere than on a ship and" were declared to be inconsistent with the Constitution. Section 34(8) was struck down as a whole.

Standing

[63] It was contended on behalf of the respondents that the applicants did not have standing to bring these proceedings to the High Court or to this Court. As stated earlier the applicants submitted that they were bringing the application in the public interest, in terms of section 38(d) of the Constitution.[6] The respondents argued that the first applicant had not set out a sufficient basis for claiming to act in the public interest, that it was not genuinely acting in the public interest, and further that the inference was unavoidable that the first applicant was merely championing the cause of the second applicant.

[64] In response to the respondents' contention that on a proper interpretation of section 38(d) only citizens are entitled to bring proceedings to a court in terms of this subsection, it was argued that the rights contained in the Bill of Rights were also available to foreign nationals who are in the Republic unless the Constitution

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[6] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

specifically states otherwise. Accordingly, it was contended that if she was not acting in the public interest, she was at the very least acting in her own interest.

[65] The respondents contested the correctness of the decision of the court *a quo* in holding that the first applicant was acting in the public interest. While accepting that nothing precludes an individual whose rights are or may be affected from challenging the provisions of the alleged offending legislation in the normal way, the respondents contended that the second applicant has no standing to challenge the impugned legislation in this case in the public interest.

[66] The respondents further argued that since the second applicant was already in the country, the provisions sought to be challenged in this Court could hardly affect her. Therefore, the first applicant could not be said to be acting in the public interest, there being no member of the public who was directly affected by the impugned provisions.

[67] In other words the applicants, so it was argued, were embarking on an abstract or academic exercise. No individuals could be said to have had their rights infringed or threatened in this application, and because of that the applicants had not established that they have standing. It is indeed the position that it may not necessarily be in the public interest to determine abstract questions where there is no evidence that conduct amounting to an infringement of the Constitution has or is likely to be committed.

[68] This brings me to a consideration of the meaning and import of public interest standing. It is difficult to lay down hard and fast rules for the test of public interest standing, precisely so because the words "in the public interest" are often not capable of being defined in a precise and objective manner. Therefore, each case or situation will require a thorough and careful consideration of the impact of the alleged violation upon the particular persons, or groups of persons concerned.

[69] Does this mean that anyone can bring any action at any time on any matter and ask a court to adjudicate such action in the public interest? If this were to be allowed, would there be an end to litigation allegedly in the public interest? How has the question of standing been handled in other jurisdictions?

[70] At common law, standing in the public interest required that the person who sues must have an interest in the subject-matter of the suit, and that that interest had to be a direct and not a remote interest. This pre-constitutional position was based on a restrictive approach to standing in general and public interest standing in that an applicant could not approach the court on the basis that the respondent is contravening the law and that it is in the public interest that the court should grant appropriate relief.[7]

[7] Chaskalson *et al. Constitution of South Africa*, revision service 3 1998 at 8-4. See also *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop.), Ltd* 1933 AD 87 at 101.

[71] With the advent of our constitutional democracy more vistas have been opened as more and more people become aware of their constitutional rights and become vigilant to infringements or threats of infringement of such rights.[8] Even before the new Constitution came into being our courts had started to be accommodative of the rights of people by adopting a less restrictive approach to standing. In *Wood and Others v Ondangwa Tribal Authority and Another*,[9] the Appellate Division granted standing to church leaders by allowing them to claim an interdict on behalf of, and in the interests of a large, vaguely defined group of persons who feared summary punishment as a result of illegal arrests based on their political affiliation. The court was of the opinion that it would be impractical to expect the people under threat to approach the court themselves. This less restrictive approach was however limited to matters involving violation of life, liberty or physical integrity.[10]

[72] The applicants submitted that this Court should follow the wider approach suggested in *Ferreira v Levin.*[11] The respondents on the other hand argued for a narrower approach that takes into account the importance of the factual matrix of each particular case. The factual matrix, according to the respondents, is a basis of what would determine what public interest is. Although the need for the development of

[8] See *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (ECD).

[9] 1975 (2) SA 294 (A).

[10] Id at 310G. Another decision which manifested the courts' willingness to depart from the traditional restrictive approach to public standing in particular, is *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (CPD) at 400F- 401B-H.

[11] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

the test was emphasised, I am inclined to endorse the suggestion that we follow the broader approach. As to whether a person is genuinely acting in the public interest, O'Regan J, in *Ferreira v Levin* held that, it would not be necessary to point to the infringement or threat to the right of a particular person for public interest standing, but that it will be sufficient to allege objectively speaking, that the impugned statute is in breach of a right. She held further:

> "This Court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."[12]

[73] To these guidelines, I would add that a further and important factor to be taken into account in deciding whether a party has public interest standing is the egregiousness of the conduct complained of.

[74] Section 38 introduces far-reaching changes to our approach to standing which takes account of, among other things, the vulnerability of the people previously disadvantaged by apartheid, their socio-economic plight and a concomitant desire to correct the wrongs perpetrated against them over a long period of time.

[12] Id at para 234.

[75] Hogg[13] maintains that:

> "Restrictions on standing are intended to:
>
> (i) avoid opening of the floodgates to unnecessary litigation;
>
> (ii) to ration scarce judicial resources by applying them to real rather than hypothetical disputes;
>
> (iii) to place limits on the exercise of judicial power by precluding rulings that are not needed to resolve disputes;
>
> (iv) to avoid the risk of prejudice to persons who would be affected by a decision but are not before the court;
>
> (v) to avoid the risk that cases will be inadequately presented by parties who have no real interest in the outcome; and
>
> (vi) to avoid the risk that a court will reach an unwise decision of a question that comes before it in a hypothetical or abstract form, lacking the factual context of a real dispute."

[76] Canadian courts will as a general rule grant standing as a matter of discretion[14] to a plaintiff who establishes that:

(a) the action raises a serious legal question;

(b) the plaintiff has a genuine interest in the resolution of the question; and

(c) there is no other reasonable and effective manner in which the question may be brought to court.

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[13] Hogg, *Constitutional Law of Canada*, 3 ed (1992) at 1263.

[14] See, for example *Canada* (*Minister of Justice v Borowski*) (*Borowski No. 1*), [1981] 2 SCR. 575, 64 CCC (2d) 97, 130, DLR (3d) 588. See also *Canadian Council of Churches v The Queen* (1992) 88 DLR (4th).

[77] In India, the traditional rule regarding standing is that judicial redress is available only to a person who has suffered a legal injury as a result of a violation of his or her legal right or legally protected interest by the impugned action of the state, public authority, or any other person; or to a person who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest.[15]

[78] I do not think that this preliminary objection by the respondents that the applicants have no standing is well founded and must, as a consequence, be rejected. I have no doubt that the first applicant is genuinely acting in the public interest and therefore has standing to bring these proceedings in the public interest.

[79] Every government needs to be able to regulate the entry, continued residence of foreign nationals within its borders, and to have the power to deal with illegal immigrants who are in the country. In terms of South African law and the Constitution, persons within the Republic of South Africa are either citizens or non-citizens. Those that are non-citizens are either in the country lawfully — that is they have the necessary permits to remain in the country or are in the country without valid papers. It is this group of persons, so-called illegal immigrants who are targeted by the impugned provisions. The Constitution[16] provides that rights contained in the Bill

[15] *S.P. Gupta & ORS. ETC. ETC v Union of India & ORS. ETC. ETC* [1982] 2 S.C.R. 365 at 520.

[16] Section 7(1) provides that:

of Rights are guaranteed to foreign nationals as well as citizens unless the contrary emerges from the Constitution.[17] Foreign nationals will have standing where rights are threatened or infringed. In the circumstances, I conclude that the second applicant has standing to launch these proceedings.

[80] Even in spite of the foregoing it must be borne in mind that these are confirmation proceedings. The application must be dealt with on its merits so that finality can be reached in respect of the Court *a quo*'s findings.

The Scheme of the Immigration Act

[81] The IA is designed to provide for the regulation of admission of persons to the Republic and their departure from the Republic and for matters connected therewith. It is intended to put in place a new system of immigration control within a culture of human rights. It is further intended to ameliorate the harshness of immigration laws which obtained during the apartheid regime and which were therefore forged in the crucible of racial exclusion. It is intended to mark a departure of the new democratic order from South Africa's unsavoury past.

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[17] Above n 3 at 349I; *Tettey and Another v Minister of Home Affairs and Another* 1999 (3) SA 715 (D&CLD) at 727C-729E.

[82] Section 8[18] contains an appeals procedure which has been instituted to adjudicate on decisions of the Department which may culminate in deportation, with the exception only that those decisions taken at the port of entry, preventing entry, are not stayed pending the various levels of appeal contemplated in this section.

[18] "Adjudication and review procedures —

(1) Before making a determination adversely affecting a person, the Department shall notify the contemplated decision and related motivation to such affected person and give such person at least 10 calendar days to make representations, after which the Department shall notify such person that either such decision has been withdrawn or modified, or that it shall become effective, subject to subsection (2).

(2) Within 20 calendar days of its notification, the person aggrieved by an effective decision of the Department may appeal against it-

(a) to the Director-General, who may reverse or modify it within 10 calendar days, failing which the decision shall be deemed to have been confirmed; or

(b) within 20 calendar days of modification or confirmation by the Director-General, if any, to the Minister, who may reverse or modify it within 20 calendar days, failing which the decision shall be deemed to have been confirmed, and be final, provided that in exceptional circumstances or when such person stands to be deported as a consequence of such decision-

(i) the Minister may extend such deadline; and

(ii) at the request of the Department, the Minister may request such person to post a bond to defray his or her deportation costs, if applicable; or

(c) within 20 calendar days of modification or confirmation by the Minister, if any, to a Court, which may suspend, reverse or modify it in accordance with its rules.

(3) If not appealed in terms of subsection (2), a decision of the Department is final, subject to section 37 of this Act.

(4) Any person adversely affected by a decision of the Department shall be notified in writing of his or her rights under this section and other prescribed matters, and may not be deported before the relevant decision is final.

(5) Notwithstanding subsection (1), as soon as notified to the person concerned in terms of subsection (4), the decision of an immigration officer refusing entry into the Republic shall be effective for the purpose of subsection (1), and final for purposes of deportation, but subject to subsections (2) and (3)."

[83] Section 10, which has been described as pivotal to immigration control, provides that a foreign immigrant may upon admission enter and sojourn in the Republic if he or she is in possession of a temporary residence permit.

[84] A further section in the IA which must be mentioned is section 34. In section 34(1)[19] are to be found the safeguards that ensure the treatment of foreign nationals with dignity and in a humane manner. It will be noted that it is in this section that a court is specifically involved quite early after the person concerned has been detained. Section 34(1)(b) of the IA indicates that anyone arrested and detained is entitled to have his or her detention confirmed by a warrant of a court issued within 48 hours. In terms of section 34(1) the right to a court warrant applies both in respect of those who are detained by an immigration officer as well as those who have been "caused" by an immigration officer to be detained. Among the latter class of persons are those

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[19] Section 34(1) provides:

> "Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be deported in a manner and at the place under the control or administration of the Department determined by the Director-General, provided that the foreigner concerned—
>
> (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
> (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by a warrant of a Court, which if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
> (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
> (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and
> (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."

contemplated in section 34(8) of the IA, i.e. persons who are "caused" to be detained by an immigration officer.

[85] A significant feature, not unexpected, of the impugned provisions is their inter-relatedness. That demands that they be considered together and not in isolation. This approach is necessitated by the fact that the whole scheme of the IA must be viewed as a whole in order to determine the manner in which it deals with illegal foreigners.

Challenge to section 34(8)

[86] In challenging the constitutionality of this section the applicants submitted that the section was overbroad and gave sweeping powers to the immigration officer. The applicants further alleged that the section unjustifiably infringes or threatens the rights protected in section 12(1)(a) and (b) of the Constitution in that it amounts to arbitrary deprivation of freedom and a procedurally unfair detention without trial. Furthermore, the applicants submitted that the section violated the doctrine of the rule of law protected in section 1 of the Constitution. By reason of the foregoing the applicants submitted that section 34(8) of the IA was unconstitutional and invalid.

[87] The court *a quo* held that the powers of the immigration officers were arbitrary in that there was nothing in the IA to ensure that the notification and declaration of a person to be an illegal foreigner were made only in respect of persons reasonably suspected of being illegal foreigners. It was of the opinion that the discretion was

exercised without any guidelines. It also held that there was no proper sifting mechanism or procedural safeguards such as are found in section 34(1).

[88] In the absence of such safeguards, so the court *a quo* held, section 34(8) limited the right contained in section 12(1)(a) and (b) of the Constitution which seeks to prohibit arbitrary detention without trial. It also held that the provisions of section 34(1)(a) - (e) cannot be applicable to section 34(8) as such an interpretation would unduly strain the context of the two sub-sections.

[89] The suggestion that an immigration officer will act arbitrarily is without foundation. It should be noted that this power, and ultimately the discretion, to notify and declare a person an illegal immigrant finds its roots in the IA. Section 3(1)(g)[20] of the IA sanctions the power to apprehend, detain and deport an illegal foreigner.[21] This discretion when exercised in respect of section 34(8) is narrowly tailored in that it can only be exercised in respect of a person who is in fact an illegal foreigner as defined by the IA. To further ensure that the powers are not arbitrary, the IA provides that any power that is exercised by the immigration officer is an exercise of a discretion which is subject to review by an immigration court which will determine its reasonableness and consistency with the IA.[22] All this constitutes just cause in that the aim is to carry out a legitimate government object of immigration control. I therefore find that the

[20] Section 3 of the IA deals with the powers of the Department.

[21] An illegal foreigner is defined in section 1 (xviii) as "a foreigner who is in the Republic in contravention of this Act and includes a prohibited person".

[22] The Immigration Court is established in terms of section 37 of the IA.

power exercised in terms of this subsection does not offend against section 12(1)(a) of the Constitution.

[90] Earlier on I stated that what is important is that each of the provisions of section 34 should not be read in isolation, but must be read together if they are to make sense. The respondents argued that the procedural safeguards contained in section 34(1) of the IA are accorded to those detained in terms of section 34(8). This, they submitted, is because detention pursuant to section 34(8) is at the behest of an immigration officer; hence it is under the control and administration of the Department. During the hearing the respondents further submitted that the detention in section 34(1) is broad enough in that it is detention for the purposes of prosecution and deportation whereas the detention in section 34(8) was for the purposes of deportation only.

[91] I agree with the respondents in this regard. Indeed, among the persons who have been "caused" by an immigration officer to be detained for purposes of deportation in section 34(1), are persons detained in terms of section 34(8) for the purposes of deportation. This makes the provisions of section 34(1)(a), (b), (d) and (e) applicable to section 34(8). Section 34(1)(c) is not applicable where there has been no arrest.

[92] Section 34 further makes it clear that any person subject to deportation has the right to seek administrative review of the decision and can take the Department on review. The procedure for such review is set out in section 8 of the IA. Both

detainees in terms of sections 34(1) and 34(8) are entitled to this protection. I therefore conclude that section 34(8) does not offend the rights contained in section 12(1)(b) of the Constitution.

[93] Detention under the IA is intended to ensure that a person to be deported is indeed deported as effectively, efficiently and expeditiously as possible if found to be an illegal foreigner. The impugned section seeks to address the problem of illegal immigrants by requiring the detention and removal of such person by the master of the ship that brought them to this country. This, in my view, is a fair and equitable arrangement in the circumstances. The master of the ship, it seems to me, has the responsibility not to bring illegal foreigners to this country. And, indeed, the illegal immigrant has no right to enter the Republic without authorisation.

[94] The continued detention of a person on a ship depends on various factors and in particular, when the ship will leave harbour. But the illegal foreigner is not without remedy, because the IA has built-in safeguards of reasonableness and necessity as well as the precepts of section 35 of the Constitution and the standards of international law.

[95] I am of the view that this impugned provision is not inconsistent with the Constitution. In the result, the challenge to this section fails.

Challenge to section 34(2)

[96] It was argued on behalf of the applicants that, in terms of section 34(2), the exclusion of persons arrested and detained on a ship was unconstitutional and invalid. It was submitted that there was no procedural protection for persons held on a ship and that the exclusion of such persons from the requirements of section 34(2) left such persons without procedural safeguards as required by section 12(1)(b) of the Constitution, and that to that extent, section 34(2) was inconsistent with the Constitution. It was further argued that the 48 hour time limit of any detention, which accords with section 35(1) of the Constitution, is also specifically excluded by section 34(2). Consequently, a person could be detained for a considerable period of time without being brought before a judicial officer.

[97] The respondents sought to meet this challenge by submitting that a person can only be detained on a ship pursuant to the provisions of section 34(8) of the IA. In that regard, so they submitted, the procedural safeguards provided by the IA itself and by the Constitution apply to detention on a ship. The reason for the exclusion referred to and complained about by the applicants in respect of persons detained on a ship, is not far to find. The continued detention of the affected person on the ship is dependent upon when the ship will leave harbour. This may, naturally, depend on a variety of factors, so argued the respondents.

[98] The court *a quo* held that the words "elsewhere than on a ship and" should be deleted from section 34(2) as without the protection of section 34(2) persons on a ship

were deprived of the procedural protections guaranteed by section 12(1)(b) of the Constitution.

[99] I disagree with the findings of the court *a quo* in this regard. A person can only be detained on a ship pursuant to the application of the provisions of section 34(8) of the IA. The IA, it should be noted, has built-in procedural safeguards. Furthermore, there are requirements of section 35 of the Constitution regarding arrested and detained persons. In terms of section 34(1), an immigration officer may detain or cause to be detained an illegal foreigner pending his or her deportation for 30 days without a warrant of a court, and the period can be extended to a period not exceeding 90 days by a court. This protection in my view, relates to all section 34 detainees.

[100] I therefore conclude that the words "elsewhere than on a ship and" in section 34(2) pass constitutional muster.

Rule of Law

[101] The applicants contended that the impugned sections violated the principle of the rule of law espoused in section 1 of the Constitution. They further submitted that it is a principle of the rule of law that laws must be stated in a clear and accessible manner. To this contention, the respondents submitted that the principle of the rule of law is essentially that there must be a rational relationship between the scheme which legislation adopts and the achievement of a legitimate government purpose. They accordingly submitted that the powers granted in section 34(8) are not arbitrary and

are rationally related to the legitimate purpose of ensuring that illegal foreigners do not enter the country. The court *a quo* held the view that the powers given to immigration officers in section 34(8) were arbitrary in that nothing in the IA ensured that notification or declaration is made in respect of people reasonably suspected of being illegal immigrants. It therefore proceeded to rule that the subsections were in conflict with the rule of law and therefore unconstitutional.

[102] The principle of the rule of law will be violated if the powers granted to the immigration officer by section 34(8) are arbitrary. Having found that section 34(8) is constitutionally valid it follows that the challenge based on this principle must also fail.

Order

[103] In the result I would make the following order:

1. The application for leave to appeal is granted.
2. The application for confirmation of the order of the High Court is refused.
3. The respondents' appeal is upheld.
4. Each party is to pay its own costs.

Moseneke J concurs in the judgment of Madala J.

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For the respondents:	DN Unterhalter SC and A Annandale instructed by Larson Falconer Incorporated, Johannesburg.