



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE ___ May 2015

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Rahim v The Minister of Home Affairs (965/2013) [2015] ZASCA (###)

MEDIA STATEMENT

Today, the Supreme Court of Appeal (SCA) upheld the appeal by Abdul Rahim and 14 others (the appellants) and overturned the decision of the Eastern Cape Division of the High Court, Port Elizabeth, in terms of which the claims of the appellants for damages flowing from an asserted unlawful detention were dismissed with costs. In the result, it declared that the detention of each of the appellants was unlawful, and awarded them damages as a consequence.

The issue before the SCA was the interpretation of s 34(1) of the Immigration Act 13 of 2002 (IA), which provides that illegal foreigners must be detained 'in a manner and at a place determined by the Director-General'. The question the SCA was called upon to decide was whether the detention of illegal foreigners was lawful where there had been no such determination of detention facilities by the Director-General.

The Minister of Home Affairs (the respondent) claimed that the appellant were all illegal foreigners who had been arrested by immigration officers in the employ of the respondent, and were each detained for various periods at various facilities, including police stations and ordinary prison cells. The appellants had instituted action in the court a quo to have their arrests and detentions declared unlawful and for consequential damages, which claims, as were stated before, were dismissed on the basis that both the arrests and the detentions were lawful.

Before the SCA, a number of arguments were advanced. However, the primary issue was whether the Director-General had 'determined' the places at which the appellants had been detained in compliance with s 34(1) of the IA. It was argued on behalf of the respondent that there was no

particular form which the 'determination' had to take, and provided that the facilities in question were under state control, the lack of a formal determination did not render their use unlawful.

In rejecting this argument, the SCA explained that the case was adjudicated against a sensitive backdrop. South Africa has kilometre upon kilometre of porous borders which the Department of Home Affairs has difficulty controlling, and there is public concern about the illegal influx of foreigners. This has caused a degree of animosity to be directed at them, and more recently has led to what have been described as xenophobic attacks on foreigners. It is vital in this context, the SCA held, to affirm that we are a constitutional state subscribing to the principle of legality, an incident of the rule of law, and that we are bound by the normative standard demanded by our Constitution.

The SCA then referred to a number of international conventions which emphasise the vulnerability of asylum seekers and migrants, who are often unable to understand or communicate with immigration officials, or to obtain the help of interpreters or legal advisors, and are not aware of their rights and the appropriate procedures to enforce them. The SCA also noted that international best practice, precisely because of this vulnerability, is to ensure that illegal foreign nationals are kept apart from the general prison population.

Consequently, having regard to the wording of s 34(1) of the IA in its context and with reference to the applicable international law framework, the SCA held that it was clear that the 'determination' contemplated is a formal identification of places which are run in accordance with international norms and which are appropriate for the detention of illegal foreigners pending deportation. No evidence was placed before the SCA of any such determination, and accordingly the detentions of the appellants were in contravention of s 34(1) of the IA and thus unlawful.

In the light of this, the SCA upheld the appeal and granted damages to the appellants, calculated in relation to the duration of their unlawful detentions.

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