THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 320/08

In the matter between:

MANJAR ALI SHAIK YUSUF ULDE **APPELLANT**

v

MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

PERSON IN CHARGE – LINDELA DETENTION CENTRE **SECOND RESPONDENT**

LAWYERS FOR HUMAN RIGHTS ***AMICUS CURIAE***

Neutral citation: *Ulde v Minister of Home Affairs* (320/2008) [2009] ZASCA 34 (31 March 2009).

Coram: Mpati P, Streicher, Ponnan, Cachalia JJA et Hurt AJA

Heard: 16 February 2009

Delivered: 31 March 2009

Summary: An arrest of an illegal foreigner under s 34(1) of the Immigration Act 13 of 2002 is subject to the exercise of a discretion by an immigration officer. The discretion is to be construed *in favorem libertatis*. Where a magistrate had granted bail to a suspected illegal foreigner, an immigration officer could not ignore this fact in the exercise of his discretion.

ORDER

On appeal from: High Court, Johannesburg (Sutherland AJ sitting as court of first instance).

The following orders are made:

(1) The appeal is upheld and the respondents are ordered to pay the appellant's costs;

(2) The appeal against the referral of Mr Zehir Omar to the Law Society of the Northern Provinces is dismissed;

(3) Paragraphs (1) and (2) of the order of the court below are set aside and in their place the following order is made:

'(a) It is declared that the detention of the applicant is invalid and is set aside.

(b) The respondents are to pay the costs of the application.'

JUDGMENT

CACHALIA JA (Mpati P, Streicher, Ponnan JJA, Hurt AJA concurring)

[1] This is an appeal against the judgment of the Johannesburg High Court (Sutherland AJ) dismissing an application by the appellant for his detention at the

Lindela Detention Centre at the respondents' instance to be declared unlawful.[1] The appellant has since been deported to India. The high court granted the appellant leave to appeal to this court on the grounds that if he returns lawfully he may contemplate a claim for damages for his alleged unlawful detention and that its judgment could be an impediment. The appellant is represented by Mr Zehir Omar in this appeal as he was in the court below. I mention this because, as appears from the concluding paragraph in this judgment, Mr Omar has a personal interest in the order that is being appealed against.

[2] The high court considered two grounds to support the averment that the detention was unlawful: First, that the question of the appellant's status as an illegal immigrant was the subject of criminal proceedings in the Kempton Park Magistrate's Court and that those proceedings disqualified the respondents from dealing with him through the machinery of the immigration laws, and, secondly that the appellant's detention was invalid because the respondents had not complied with the provisions of s 8 of the Immigration Act 13 of 2002 before detaining him. It dismissed both. In the judgment of this court in *Jeebhai v Minister of Home Affairs*,[2] which will be delivered together with the judgment in the present case, the second issue was decided in favour of the respondents.

[3] Before us, Mr Katz, on behalf of the *amicus curiae*, raised a new point which is indirectly related to the first ground. He submitted that in arresting the appellant, and then detaining him, the immigration officer failed to exercise any discretion, or to the extent that he did, failed to do so properly. Accordingly, so he submitted, the appellant's arrest and subsequent detention was unlawful.

[4] The facts that are relevant to deciding this issue are these. The appellant was arrested on 15 January 2008, it having been alleged that he had obtained a passport and identity documents given to him by the Department of Home Affairs

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[1] *Ulde v Minister of Home Affairs* 2008 (6) SA 451 (W).
[2] *Jeebhai v Minister of Home Affairs* (139/2008) [2009] ZASCA 35 (31 March 2009) in citation.

fraudulently. The documents were seized and remained in the possession of an immigration official, Mr Moodley. The appellant faced criminal charges relating to alleged contraventions of the Immigration Act in the Kempton Park Magistrate's Court. On 4 February 2008, the magistrate released him on bail despite the respondents' vigorous opposition. In this regard they filed a detailed affidavit by an immigration officer, Willem Vorster, setting out the grounds for their opposition. These included the strength of the case against him and the likelihood that he would not stand trial if he was released on bail.

[5] Two days later, while on a visit at Lindela Detention Centre the appellant was confronted by an immigration official, Mr Matone Peter Madia, who asked him to produce proof of his entitlement to be in the country. Madia's version of what happened appears from his answering affidavit:

'5.1 After initially, in terms of s 41 of the Immigration Act requesting the applicant to produce documentation or any other form of proof of his entitlement to be lawfully within the borders of the Republic of South Africa, the applicant informed me of the fact that his travel document was in possession of a certain Mr R Moodley who is an employee of the Department of Home Affairs in the special Investigations Branch. I then informed the applicant that I would communicate with Mr Moodley to assess what the position was regarding his passport.

5.2 I then telephonically communicated with Mr Moodley who thereupon informed me that, after investigations by the relevant sections of the Department of Home Affairs, it was found that the applicant's entire sojourn, from the outset, in the Republic of South Africa is based upon fraudulent documentation . . .

5.3 I was then also informed of the content of the affidavit of Mr W Vorster which was tendered during the recent bail proceedings (which I have, subsequent to the lodging of this application had sight of).

5.4 I then confronted the applicant on the allegations made by Mr Moodley and which are contained in the affidavit of Mr Vorster, upon which the applicant was unable to

furnish me with satisfactory answers, as a consequence whereof I was of the opinion that I was not satisfied that the applicant is entitled to be in the Republic of South Africa and thereafter proceeded to detain the applicant in terms of s 34 of the Immigration Act, as is the Department of Home Affairs' obligation when regard is had to s 32 of the Immigration Act. (Emphasis added)

. . .

8.1 I should also respectfully point out that the decision to detain the applicant is based solely upon the seriousness of the allegations levelled against the applicant regarding the applicant's fraudulent conduct, as well as the nature and extent of such fraudulent conduct.

8.2 I verily believe that the applicant, should he be released, and regard being had to the extent to which the applicant is prepared to defraud or, *alternately* be party to a fraudulent scheme, that in the event the applicant would simply have, as is usually the case, "*gone under the radar*" of the officials of the Department of Home Affairs and simply disappeared . . .

8.3 My motivation to detain the applicant was based upon the premise that, regard being had to the content of the affidavit of Vorster which I had at my disposal on 6 February 2008, the applicant's chances of succeeding in regularising his stay in the Republic of South Africa, are highly improbable.'

[6] In *Jeebhai* this court confirmed that an officer who decides that an illegal immigrant is liable to be deported has a discretion whether or not to arrest and detain the person pending his deportation. There is no obligation to do so.[3] In *Lawyers for Human Rights v Minister of Home Affairs*[4] Du Plessis J described the discretion that an immigration officer has not to arrest a person as 'limited' having regard to the fact that s 34(1) applies only to foreigners who are by definition in the country illegally. He went on to state:

[3] At para 29.
[4] 2003 (8) BCLR 891 (T).

'As such the Act renders their personal freedom subject to restriction . . . The immigration officer's limited discretion therefore amounts to no more than not to arrest persons who are by reason of their transgression of the law liable to arrest. In its effect the immigration officer's limited discretion operates in favour of the individual concerned. The absence of guidelines where the discretion is so limited does not in my view violate the rule of law. The section merely allows an immigration officer to be humane'.[5]

[7] What the learned judge said about the nature of an immigration officer's discretion concerning an arrest of an illegal foreigner is clearly also applicable to the discretion to detain the foreigner concerned. But his description of the discretion not to arrest (or detain) as being 'limited' in that it allows the immigration officer to merely be humane is, however, misleading because this may be read to mean that the illegal foreigner ought presumptively to be arrested (or detained) unless the immigration officer decides not to do so for humane reasons. Bearing in mind that we are dealing here with the deprivation of a person's liberty (albeit of an illegal foreigner's), the immigration officer must still construe the exercise of his discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under s 34(1) – and be guided by certain minimum standards in making the decision.[6] Our courts have over the years stated these standards as imposing an obligation on the repository of a discretionary power to demonstrate that he has 'applied his mind to the matter' – in the celebrated formulation of Colman J in *Northwest Townships (Pty) Ltd v The Administrator of the Transvaal*[7]

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[5] See *Lawyers for Human Rights* above at 896 G-H.

[6] Cf s 41(1). Section 41(1) read with s 34(2) confers on an immigration officer a discretion to detain a suspected illegal foreigner for a period not exceeding 48 hours for the purposes of conducting an investigation into his status – but only if the detention is *necessary*. The requirement of necessity (and the concomitant element of proportionality) connotes that an immigration officer must consider whether there are sufficient grounds for the detention and also whether there are other less coercive measures to achieve the objective (*Saadi v United Kingdom* 13229/03 [2008] ECHR 80 (29 January 2008)). However, the prerequisite for the detention to be necessary in s 41(1) is omitted from s 34(1) thus relieving the immigration officer of this more onerous justificatory requirement in the latter instance. The constitutionality of this omission is not before us.

[7] 1975 (4) SA 1 (T) p 8F-G.

'(A) failure by the person vested with the discretion to apply his mind to the matter (includes) capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and the application of wrong principles.'

[8] The approach I have outlined is now subsumed under s 12(1)(a) of the Constitution which provides that freedom may not be deprived 'arbitrarily or without just cause'. Simply put a person may not be deprived of his freedom for unacceptable reasons.[8] However, once the decision-maker has demonstrated that the discretion has been properly exercised, a court will not interfere, even if it appears that the wrong decision was made.

[9] Before examining whether, or how, Madia exercised his discretion to detain the appellant I must point out that the appellant did not in terms raise this as a ground of review in his founding affidavit. He asserted merely that his detention was unlawful because it arises from the very complaint for which the magistrate had ordered his release. In *Northwest Townships* parlance this complaint relates, in my view, to 'a failure to direct [the immigration officer's] thoughts to the relevant data'. The appellant has therefore put in issue Madia's exercise of his discretion, albeit somewhat obliquely.

[10] The *amicus* submitted that the appellant's detention was unlawful because it was carried out pursuant to a blanket policy to detain all persons found to be illegal foreigners. There is merit in the submission. It is clear from the extract from Madia's affidavit quoted above that he believed that he had an obligation to detain the appellant 'when regard is had to s 32 of the Immigration Act'. But s 32 imposes an obligation on an immigration officer to 'deport' an illegal foreigner – it is not concerned with the power to detain.[9] By assuming that he had an

[8] *S v Coetzee* 1997 (3) SA 527 (CC) para 159, quoted in *De Langa v Smuts* 1998 (3) SA 785 (CC) para 18.
[9] Section 32: 'Illegal foreigners

obligation to detain the appellant, Madia was not exercising any discretion – he was carrying out what he believed to be a 'blanket policy' which by definition precludes the exercise of a discretion.

[11] However, to the extent that Madia may be said to have exercised a discretion this also was not done properly. The factors he says he took into account (and contradict his assertion that he had an obligation to detain the appellant) when deciding to detain the appellant were 'the seriousness of the allegations' against him; that he would simply have 'gone under the radar' and that 'the chances of succeeding in regularizing his stay in the Republic of South Africa, are highly improbable'. These are the very considerations that the magistrate was asked to consider in the bail application. It seems to me that once the respondents had elected to charge the appellant, and the magistrate then decided to release him on bail, this should have been taken into account as a relevant and material factor in any further decision to detain him. Madia makes no mention, in his affidavit, that he considered the fact that the appellant was released on bail. He must have known of this fact because, on his own version, he had sight of Vorster's affidavit made to support opposition to bail being granted to the appellant and would therefore have been aware that the appellant had been granted bail despite Vorster's opposition. The magistrate's order could not simply be ignored – which is what happened. The appellant was therefore detained for unacceptable reasons – thus rendering his detention unlawful.

[12] I wish to express our gratitude to the *amicus curiae* for its most helpful submissions.

[13] In its order dismissing the application for the appellant's release from detention, the learned judge in his order also referred to the Law Society of the Northern Provinces, Mr Omar's conduct in failing to inform the court of authority

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(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.
(2) Any illegal foreigner shall be deported.'

adverse to the appellant's case and directed the Society to report the outcome of the referral to the Deputy-Judge President of the Johannesburg High Court. Mr Omar seeks to appeal that part of the order. However, while an order may be appealed against, a referral of an attorney's conduct to the Law Society may not – it is not a judgment or order as contemplated in s 21A(1) of Supreme Court Act 59 of 1959.

The following order is made:

(1) The appeal is upheld and the respondents are ordered to pay the appellant's costs;

(2) The appeal against the referral of Mr Zehir Omar to the Law Society of the Northern Provinces is dismissed;

(3) Paragraphs (1) and (2) of the order of the court below are set aside and in their place the following order is made:

'(a) It is declared that the detention of the applicant is invalid and is set aside.

(b) The respondents are to pay the costs of the application.'

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES:

COUNSEL FOR APPELLANT:	Z Omar (Attorney)
Amicus Curiae:	A Katz; M du Plessis; J van Garderen
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