"PAY DAY" FOR ILLEGAL FOREIGNERS

Rahim v The Minister of Home Affairs (965/2013) [2015] ZASCA 92 (29 May 2015)

1 Introduction

People from across the African continent continue to make their way to South Africa to escape violence and poverty in their own countries. South Africa is also seen as a beacon of stability and economic growth on the continent (*How South Africa became the World's #1 Asylum Destination*, LGBT Asylum News, November 2011 http://madikazemi.blogspot.com/2010/09/how-south-africa-became-worlds-1asylum.html; and see also Hathaway *Reconceiving International Refugee Law* (1997) 8). There has been growing concern that the illegal influx of foreigners in search of a better life, and the failure by the South African Government to control its porous borders, have led to a high degree of animosity and resentment, directed at foreigners (Pretorius "Political Refugees as Victims of Prejudice, Discrimination and Abuse" 2004 17(2) *Acta Criminologica* 131). International law and South African law affirm that South Africa is a constitutional state that subscribes to the principle of legality, an incident of the rule of law. It is against this backdrop that The Supreme Court of Appeal (SCA) handed down a landmark ruling in *Rahim v The Minister of Home Affairs* ((965/2013) [2015] ZASCA 92 (29 May 2015)), where the Court awarded damages to illegal immigrants who were illegally held by the Department of Home Affairs (hereinafter "the Department"), following a failure by the Department to designate a proper holding facility for non-citizens in South Africa. One of the implications of this judgment is that the Department will have to conduct a proper determination of holding facilities so as not to be liable for claims such as the one in the present case.

2 Facts

The fifteen appellants were all foreign nationals, fourteen of them are Bangladeshis, except for the eleventh, who is a Ghanaian (*Rahim v Minister of Home Affairs* 2013 JDR 1578 (ECP) par 1 (High Court judgment)). They instituted separate delictual actions for damages against the respondent, the Minister of Home Affairs (hereinafter "the Minister"), alleging that each had been unlawfully arrested and detained by servants of the respondent, acting in the course and scope of their employment (par 1). The appellants were asylum seekers who had applied for asylum in terms of section 21 of the Refugees Act 130 of 1998 (hereinafter "the RA"), and had, in terms of section 22(1) of the RA, been granted an asylum seeker permit (par 3). The appellants attended the Port Elizabeth office of the Department at regular intervals to have their permits extended in contemplation of the finalisation,

not just of a decision in respect of the application for asylum, but also of an appeal to an appeal board in terms of section 26 of the RA (par 4).

The appellants alleged that when they were taken into custody, they were not informed of the statutory provisions under which they were arrested. They also complained that their rights: (i) to use further processes provided for in the Immigration Act 13 of 2002 (hereinafter "the IA") to resist deportation and; (ii) under the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") (especially s 35 which deals with the rights of arrested, detained and accused persons); and (iii) to Consular access and assistance in terms of Article 36(1)(b) of the Vienna Convention on Consular Relations, 1963, were not explained to them, rendering their detention unlawful. The appellants invoked the principle of legality in relation to section 34(1) of the IA, contending that they could only, as prescribed by that section, be detained in a manner and at a place determined by the Director-General of the Department, which they were adamant had not occurred (par 1 of the High Court Judgment). The submission was that this requirement in section 34 of the IA was in appreciation of the right of illegal migrants, recognised in civilised states, namely, that they should, because of their vulnerability, be treated as a separate category of detainees and be completely separated from the general prison population. The appellants submitted that their detention at either Kwazakhele police station, St Albans prison, New Brighton Police station, or other police station or prison (as fourteen of the fifteen appellants had spent the greater part of their detention at a prison or police station), or even at Lindela deportation facility, was in contravention of the provisions of section 34 of the IA, as these were not places determined by the Director-General, thus rendering their detention unlawful (par 6). The respondent denied the unlawfulness of both the arrest and detention, and pleaded that the appellants had been lawfully arrested and detained for deportation to their countries of origin, pursuant to the provisions of section 34 of the IA (par 1 of the High Court Judgment).

2 1 Proceedings in the court a quo

In cases where the conditions of a detainee's/prisoner's confinement amount to a denial of such person's fundamental personality rights, such an infraction could, *per se*, render the detention unlawful (see *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) par 39A–C; and see also *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (AD) 139H–142C). The respondent (the defendant in the court *a quo*) bore the onus to prove that, not only was the arrest justified by operation of law, but that the conditions in which the appellants (the plaintiffs in the court *a quo*) had been detained in the prisons and police cells, did not violate any of their fundamental rights so as to render the detention unlawful (par 6 of the High Court Judgment). Mr Beyleveld argued on behalf of the appellants, that in order to establish the lawfulness of the arrest, the respondent had to prove not only that the appellants were illegal foreigners, but that the institutions in which they had been incarcerated were places determined by the Director-General of Home Affairs for their detention. As part of his armoury on the latter requirement, he relied principally on the unreported judgment of Raulinga J in *Lawyers for Human Rights v Minister of Safety and Security and 17 Others* (SMG) (Case

No 5824/2009 (North Gauteng Province) (par 6–7 of the High Court Judgment).

Chetty J in the court *a quo*, rejected the submissions on behalf of the appellants that they were not illegal foreigners because their asylum seeker permits had not expired at the time that they were arrested. It was held that upon a proper construction of section 34(1) of the IA the temporary permits are valid, pending the outcome of the application and lapse upon final rejection. It was further held that the evidence established that each of the appellants' applications for asylum had been refused by the refugee status determination officer, a decision which was subsequently ratified by the failure of the review and appeal procedures. According to Chetty J, none of the appellants availed themselves of the appeal procedure envisaged by section 26 of the RA, and the rejection of the application for asylum rendered them illegal foreigners, liable for deportation in terms of section 34(1) of the IA (par 9 of the High Court Judgment).

Chetty J rejected the appellants' claims that they were not properly informed of their rights in terms of subsection 34(1)(a) and (b) of the IA, section 35 of the Constitution and section 36(1)(b) of the Vienna Convention on Human Relations, 1963 (par 18–19 of the High Court Judgment). Chetty J unreservedly accepted the evidence of the respondent that the interpreters were able to communicate with the appellants who fully understood the import of the various rights and warnings conveyed to them, and that, in those instances, where the documents themselves contained anomalous entries, they took the added precaution of enlisting the assistance of the interpreters to once more advise the appellants of their constitutional rights (par 19 of the High Court Judgment). The appellants' attack on the integrity of the interpreter who was employed by the respondent was also rejected (par 9 of the High Court Judgment).

Chetty J held that the language employed in section 34(1) of the IA is clear and unambiguous. The subsection cannot be interpreted in isolation but contextually (par 14 of the High Court Judgment). It was held that section 34(7) of the IA provides a clear indication that the detention of an illegal foreigner in a prison is the place which the Director-General had determined where an illegal foreigner had to be detained, pending his or her deportation. Although the term "prison" is not defined in the IA, its meaning is hardly obscure. By necessary implication, it includes a police cell or lock-up (par 14 of the High Court Judgment). Chetty J held further that section 34(1)(e) of the IA merely prescribes that an illegal foreigner "shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights" (par 15 of the High Court Judgment). Thus, the court rejected the finding by Raulinga A in *Lawyers for Human Rights v Minister of Safety and Security and 17 Others* (*supra*) that the IA is aimed at setting in place a new system of immigration control which ensured, *inter alia*, that immigration control is conducted within "the highest applicable standards of human rights protection". Chetty J held that the finding by Raulinga J that the place of detention contemplated by section 34(1) has to be designated as such in order to render an illegal foreigner's detention lawful, was clearly wrong. Chetty J held that the appellants were lawfully

detained at the prisons or police stations for purposes of deportation (par 16 of the High Court Judgment).

Chetty J also dealt with the submission on behalf of the appellants that the arresting officials were imbued with a discretion and were required to consider arrest as a last resort in the deportation process, and that in respect of the appellants they did not apply their minds to each individual case, but rather arrested all of the appellants on the basis of a blanket policy that all illegal foreigners were subject to arrest (par 22 of the High Court Judgment). The contention on behalf of the appellants was that the arresting officials could have considered requiring the appellants to report regularly, or they could have employed other means to monitor their position until deportation was imperative, that is, arrest should have been a final resort after all other processes available to them were exhausted. Chetty J considered the evidence and held that it was clear that the decision to arrest and deport the appellants was not arbitrary, but effected against the background of all material factors (par 22 of the High Court Judgment).

3 Issue

The issue before the SCA was the interpretation of section 34(1) of the 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 the illegal foreigners was lawful, where there no such determination of detention facilities had been made by the Director-General (par 7). The SCA had to also consider the quantum of damages that each of the appellants was entitled to in relation to the time each of the appellants spent in detention (par 27).

4 Judgment

The Court, per Navsa ADP (Majiedt, Mbha and Zondi JJA and Meyer AJA concurring) upheld the appeal. It was held that in light of the wording and context of section 34(1) of the IA, and with reference to the applicable international law framework, it was clear that the "determination" contemplated is a formal identification of places which are administered in accordance with international norms, and which are appropriate for the detention of illegal foreigners, pending deportation. Navsa ADP held that no evidence was placed before the Court of any such determination, and accordingly the detentions of the appellants were in contravention of section 34(1) of the IA and thus were unlawful. In the light of this, the Court granted damages to the appellants, calculated in relation to the duration of their unlawful detentions (par 27–28).

5 Discussion

5 1 International perspectives

It is accepted internationally that illegal foreign nationals are particularly vulnerable, and that international best practice requires that these people

should be kept apart from the general population (see *Report of the Special Rapporteur of the Human Rights Council of the United Nations on the rights of migrants for 2012, François Crèpeau, A/HR/C/20/24* 2 April 2012 par 13 http://www.ohchr.org/Documents/HRBodies/HRCouncil/Regular Session/Session20/A-HRC-20-24_en.pdf (hereinafter "The Report"').

The mandate of The Report on the Human Rights of Migrants was created in 1999 by the Commission on Human Rights, pursuant to resolution 1999/44. Since then, the mandate of The Report has been extended by Commission on Human Rights resolutions 2002/62 and 2005/47 and Human Rights Council resolutions 8/10, 17/12 and 26/19, each for a period of three years. The mandate of The Report covers all countries, irrespective of whether a state has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990. The main functions of the Report are:

> "(a) To examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children and those undocumented or in an irregular situation;
> (b) to request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families;
> (c) to formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur;
> (d) to promote the effective application of relevant international norms and standards on the issue;
> (e) to recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants;
> (f) to take into account a gender perspective when requesting and analysing information, and to give special attention to the occurrence of multiple forms of discrimination and violence against migrant women;
> (g) to give particular emphasis to recommendations on practical solutions with regard to the implementation of the rights relevant to the mandate, including by identifying best practices and concrete areas and means for international cooperation;
> (h) to report regularly to the Human Rights Council, according to its annual programme of work, and to the General Assembly, at the request of the Council or the Assembly" (see http://www.ohchr.org/EN/Issues/Migration/ SRMigrants/Pages/SRMigrantsIndex.aspx (accessed 2015-06-18)).

In the 2012 Report of the The Special Rapporteur focus is placed on the detention of migrants in irregular and difficult situations. According to The Report the fact that a person is irregularly in the territory of a state does not imply that he or she is not protected by international human rights standards. The Report also notes that irregular entry, or stay by immigrants, should never be considered criminal offences as they are not *per se* crimes against persons, property or national security. Irregular migrants, according to The Report are not criminals *per se* and should not be treated as such (The Report par 13).

The Report affirmed that deprivation of liberty for reasons, related to migration, should never be mandatory nor automatic. In accordance with international human rights standards it must be imposed as a last resort, only for the shortest time possible and when a less restrictive measure does

not exist. Governments are required to provide in their national legislation a presumption in favour of liberty, considering first alternative non-custodial measures of freedom, evaluating every single case and choosing the less stringent or restrictive measure (The Report par 68).

Likewise, the Committee Migrant Workers, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 of August of 2013 (par 26) has stated that the detention of migrants in the context of immigration proceedings can only exist as a last resort measure, with priority given to less restrictive alternatives, especially non-custodial sanctions. If in criminal law, detention during a procedure is an exceptional measure, in proceedings relating to the entry and stay of persons in a territory, the standard of presumption in favour of liberty must be considered even higher, and should be respected more rigorously, since immigration violations are purely administrative in nature (see *United Nations Treaty Series* Vol 2220 p3 Doc. A/RES/45/158, https://www.ohchr.org/english/law/cmw.htm (accessed 2015-05-27); and see also Inter-*American Commission on Human Rights (IACHR) "Report on Immigration in the United States: Detention and due Process*" March 2011 http://www.oas.org/en/iachr/media_center/PReleases/2011/021.asp). The Report also provides that persons imprisoned under a non-criminal process shall be kept separate from persons who were imprisoned for committing criminal offences (The Report par 33).

In terms of the Resolution 03/08 of the IACHR International Standards and the Return Directive of the EU (25 July 2008), migrants should not be detained in prison facilities, and that the detention of asylum-seekers and persons charged with civil immigration violations in a prison environment, would be incompatible with basic human rights guarantees (see *Resolution 03/08 of the Inter-American Commission on Human Rights of Migrants, International Standards and the Return Directive of the EU*, *United Nations Treaty Series* Vol 2220 p3 Doc25 A/RES/45/158, July 2008 https://www.ohchr.org/english/law/cmw.htm (accessed 2015-05-27).

Article 17(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (although it must be noted that South Africa is not a signatory), provides that:

> "Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication" (*see United Nations Treaty Series* Vol 2220 p3 Doc. A/RES/45/158 https://www.ohchr.org/english/law/cmw.htm (accessed 2015-05-27).

Article 17 (3) further provides that:

> "that any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial".

The Report has provided that "the right to personal liberty and security requires the States to consider in the first place alternatives to deprivation of

liberty of migrants that are less stringent" (The Special Rapporteur par 50). Alternatives to imprisonment can be defined as the laws, policies or practices that allow asylum seekers, refugees and migrants to reside in the community and move freely, while their status as migrants is being resolved or while they are awaiting their deportation (The Report par 56). The obligation to consider alternatives to detention (non-custodial freedom) before resorting to privation of liberty, must be established by law. Detailed guidelines and appropriate training for judges and other officials, such as police, border guards and immigration officials, in order to ensure consistent application of non-custodial measures of freedom instead of detention, should be provided (The Report par 53).

If a state decides to apply an alternative to a detention measure all guarantees of due process must be ensured, irrespective of nationality, immigration status or residence, or any other status (The Special Rapporteur par 34). There must be procedures in place to ensure that the arrested person is informed in a language in which the person understands the reasons for the arrest, and be immediately informed of their rights, verbally as well as in writing (see *Working Group on Arbitrary Detention, deliberation* No. 5 principles 1 and 8 http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf; see also *Principles and Best Practices on the Protection of Persons Deprived of Liberty, principle 10*; *International Covenant on Civil and Political Rights, Article 9, par 2; Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* Article 16 http://www2.ohchr.org/english/bodies/cmw/cmw.htm Accessed 22 June 2015; Committee on Migrant Workers, General Comment No. 2 par 28; and Principles and Best Practices on the Protection of Persons Deprived of Liberty, Principle 13). It also implies that the person should be put into immediate communication with an attorney and be provided with free legal aid; they should be given the services of an interpreter or translator, have the means to contact their families, as well as the resources to challenge the detention through an effective remedy (*International Law Commission, Expulsion of Aliens, text of the projects of articles approved provisionally in first reading for the Drafting Committee, 66th Session period*, UN DOC A/CN4/L.797, Articles 19 and 26, May 2014 http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_12_2014.pdf).

Asylum seekers and migrants have a right to consular assistance which must be communicated to them. This comprises of: (i) the right to be notified of their rights under the Vienna Convention; (ii) the right of effective access to communicate with a consular officer, and (iii) the right to the same assistance (see Committee on Migrant Workers, General Comment No. 2, par 30; Principles and Best Practices on the Protection of Persons Deprived of Liberty, principle 16.2; Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 16; and The Report par 20).

It must be noted that when it is necessary to detain migrants, the detention may be implemented if it meets certain conditions. For instance, the arrest must be made in the shortest possible time, it should not be indefinite under any circumstances, and the law must fix a maximum period of detention, which must also meet the criteria of reasonableness, necessity

and proportionality. Furthermore, as stated in the Convention on the Rights of All Migrant Workers, migrants should not be detained in places for the detention of persons accused or convicted of criminal offences (The Report par 21–23).

In cases where migrants can be exceptionally detained, it is important to note that the nature is not aimed at correctional, but in the case of persons seeking to enter and/or remain (that is, live, work, seek protection) in a country or territory, the conditions on daily activities or disciplinary rules, among others, should be substantially different. In this regard, sanction mechanisms and other procedures related to punitive and social reintegration aspects of criminal policy, should be banned (see the *Inter-American Commission on Human Rights (IACHR), Resolution 1/08* 13 March 2008 http://www.refworld.org/docid/48732afa2.html Accessed 18 June 2015). The centres that detain these persons must ensure adequate standards of various rights, including: the right to adequate food, the right quality and timely health care, the right to information, to communicate with family and visits to recreational activities, communicate regularly with an attorney and to practice their religion in appropriate conditions (The Report par 34).

The Report notes that there is no empirical evidence that indicates that detention deters, neither reduces irregular migration nor discourages persons from seeking asylum. This is despite some countries adopting harsh detention policies. This may be due to the fact that migrants have been accustomed to detention on their arrival, or see it as an inevitable part of their journey (The Report par 8).

5 2 South African perspective

In light of the international laws endorsed above, the legislature adopted section 34 of the IA. A proper interpretation of section 34(1) of the IA requires that courts adopt any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (Le Roux *et al* "In Search of Alternatives to Pre-emptive Immigration Detention (or Not): A Review of Recent South African Case Law" 2011 44(2) *Comparative and International Law Journal of Southern Africa* 145). In terms of section 34 the Director-General is required to make a determination regarding the manner and place of the detention of the illegal foreigners. Section 34 is prescriptive and the detention can only take place as prescribed by the subsection, and in accordance with international best practice (par 20). Section 34(1) regulates the detention of the illegal foreigners subject to deportation in circumstances such as in the present case, and is not subject to the Criminal Procedure Act 51 of 1977. The exercise of public power is constrained by the principle of legality which is foundational to the rule of law (see *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374; [1998] ZACC 17 (CC) 399B–C; and *Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674; [2000] ZACC 1 (CC) par 40).

Section 34 (1) deals with the deportation and detention of illegal foreigners. The section provides as follows:

> "(1) Without the 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 a place 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 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."

According to the appellants, the respondent, in terms of the above provisions had to establish the lawfulness of the arrest of the appellants, that the appellants were illegal foreigners and that the institutions in which they had been incarcerated and detained were places determined by the Director-General of Home Affairs. The respondent accepted that he bore the onus to justify the detention (par 16). The Chief Director of Immigration Inspectorate referred to by counsel on behalf of the respondent was unable to verify whether there was a service-level agreement between the Department and a private company for the provision of a deportation facility at the Lindela Dentetion facility, at which four of the fifteen appellants spent a limited pending their detention elsewhere. Furthermore there was no *viva voce* evidence by the Director-General with regard to this issue, and no documents of any kind purporting to be a determination in terms of section 34(1) was presented (par 16). It was argued by the respondents that section 34(1) does not prescribe how the determination by the Director-General is to be made. According to the respondent, the everyday use of the word "determine" indicated that nothing more is required of the Director-General than a firm or conclusive decision about where illegal foreigners may be detained (par 17). The respondents contended that Lindela Dentention Facility is the only facility in the country whose sole purpose is to detain illegal foreigners for purposes of their deportation. Therefore, it was argued by the respondents, that Lindela, together with police and prison cells, is a place that the Director-General has determined as a place, where illegal foreign nationals may be detained until their deportation. The respondents argued that the detention of the appellants was in accordance with section 34(1) IA because they were detained as a means to an end in the course of facilitating their deportation (par 17). In Lawyers *for Human Rights v Minister of Home Affairs* (2004 (4) SA 125) Yakoob J stated that the subsection

"refers to prescribed standards of detention which again suggests a state facility". Cachalia JA in *Jeebhai v Minister of Home Affairs* (2009 (5) SA 54 (SCA)) adopted similar interpretation (par 24 B), where the Judge stated that:

> "The detention contemplated in s 34(2) must be by warrant addressed to the station commissioner or head of a detention facility. Thereafter the suspected illegal foreigner may either be released or, if he is in fact an illegal foreigner, detained further under s 34(1) for the purpose of facilitating the person's deportation."

Section 48 of the IA does make it an offence to enter, remain or depart from South Africa with a concomitant punitive sanction. However, this not in issue in the present case. In this case the appellants were detained pending their deportation (par 18).

According to Navsa ADP the reliance by the court *a quo* and the respondents on section 34(7) of the IA was misplaced (par 20). Section 34(7) IA regulates the removal or release of a detained illegal foreigner on the basis of a warrant to be presented to "the person in charge of the prison". It does not follow that the prison referred to, does not have to be determined by the Director-General as a place at which an illegal foreigner may be detained, pending deportation. Navsa ADP stated that there is nothing to prevent a determination by the Director-General that a discrete part of a prison or other State detention facility which meets international standards, is to be used as a place at which illegal foreigners can be detained, pending their deportation (par 20). The respondents argued that a detention facility which the State services, and over which it has control would suffice, without a specified determination having to be made by the Director-General. The respondents relied on the *dictum* made in Lawyers *for Human Rights v Minister of Home Affairs supra* (par 39) which stated that:

> "Section 34(1) is concerned with a situation different from that contemplated by s 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 s 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."

In that case the Court was concerned with the validity of subsection 34(2) and (8) of the IA. Section 34(8) provides for the detention of a person at a port of entry or on a ship. Section 34(1) was referred to by the Constitutional Court by way of contrast. Section 34(2) deals with the maximum period of detention of a person detained in terms of the IA for purposes other than his or her deportation. The issue in the present case was not raised or dealt with by the Constitutional Court in that case. Navsa ADP also stated that it would be tenuous to interpret the above *dictum* of the Court in *Lawyers for Human Rights v Minister of Home Affairs* (*supra*) because the Constitutional Court was explaining the general context of one section, and contrasting it against the general context of another, as conclusively determining the substantive requirements laid down by those provisions (par 21).

The respondents argued that any detention facility would suffice for the detention of the illegal foreigners, pending their deportation, without it being necessary for a specific determination having be made by the Director-General (par 22; see also the minority judgment by Cachalia JA in *Jeebhai v Minister of Home Affairs supra* par 24). In *Jeebhai v Minister of Home Affairs* (*supra*) the SCA was concerned with an individual who fell within the definition of illegal foreigner, and who was therefore subject to arrest in terms of section 34 of the IA. The decision of the Court flowed from the failure of the respondent to secure a warrant for his detention and deportation in terms of the applicable regulation. The Court in *Jeebhai v Minister of Home Affairs* (*supra*) was not there dealing with the point presently under discussion (par 22).

The burden was on the respondent to show that the Director-General had made the determinations contemplated in section 34(1) of the IA. In *Zealand v Minister of Justice and Constitutional Development* (2008 (4) SA 458; [2008] ZACC 3 (CC)), the Constitutional Court reaffirmed this principle. In *Zealand v Minister of Justice and Constitutional Development* (*supra*) the Constitutional Court had to decide whether the detention of Mr Jonathan Zealand (the applicant) between 23 August 1999 and 30 June 2004 as a sentenced prisoner in the maximum security section of St Albans Prison, was unlawful, for the purpose of a claim for delictual damages (par 1). The Constitutional Court held (par 25) that:

> "This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground for justification" (see *Jeebhai v Minister of Home Affairs supra* par 63; *Ingram v Minister of Justice* 1962 (3) SA 225 (WLD) 227; [1962] 3 All SA 76 (W) 79; *Boland Bank Bpk v Bellville Munisipaliteit* 1981 (2) SA 437 (C) 444; [1981] 2 All SA 9 (C) 14; *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) 559; [1982] (4) All SA 153 (C) 155; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) 589; [1986] 2 All SA 428 (A) 443; *During NO v Boesak* 1990 (3) SA 661 (A) 673–674; [1990] 2 All SA 347 (A) 355; *Masawi v Chabata* 1991 (4) SA 764 (ZH) 771–772; [1991] 4 All SA 544 (ZH) 550; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 153; [1993] 2 All SA 232 (A) 244; *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) 520; [1995] 3 All SA 98 (C) 98; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 (4) SA 168 (T) 172; and *Bentley v McPherson* 1999 (3) SA 854 (E) 857; [1999] 2 All SA 89 (EC) 91).

The respondent failed to discharge the burden placed on him. There was no attempt made by the respondents to show that any part of St Albans prison, or any part of any police holding cells, or indeed even in respect of the Lindela detention centre, was determined by the Director-General, in accordance with international norms to be a place at which illegal foreigners were to be detained pending deportation. The making of a determination by the Director-General under section 34(1) of the IA is at face value a relatively uncomplicated exercise, while at the same time being crucially important in ensuring that the rights of detained foreign persons are upheld. The respondent had not provided a valid justification for the failure to do so (par 24). As a result the detention of all of the appellants was unlawful.

5 3 Assessing the Quantum of Damages

The information the Court had at its disposal in relation to the determination concerning the quantum was limited and sparse. This was so, because the appellants had not provided evidence concerning the conditions under which they were held, and had not testified about the personal impact of the detention (par 25–26). It is difficult in cases of non-patrimonial loss to calculate the precise extent of the damages claimed with any mathematical precision. In such cases the Court will essentially exercise a reasonable discretion (Corbett *The Quantum of Damages in Bodily and Fatal Injury Cases* Vol 1 (1995) 5; and see also Potgieter *et al Visser & Potgieter's Law of Damages* 3ed (2012) 568). This, however, does not prevent a plaintiff from adducing evidence which will enable a court to make an appropriate and fair award. The deprivation of liberty is a serious matter. Article 9 of the Universal Declaration of Human Rights establishes that "no one shall be subjected to arbitrary arrest or detention". In cases involving a deprivation of liberty the Court will be required to make an award in the interests of fairness and justice. The Court, in making such an award will consider the following factors:

(i) circumstances under which the deprivation of liberty took place;

(ii) the conduct of the defendants; and

(iii) the nature and duration of the deprivation (see Erasmus and Gauntlett "Damages" in LAWSA 2ed par 101).

Navsa ADP concluded that, based on the information available to him and the abovementioned factors, it was just to make an award that the department pay the appellants a sum of R176 000 in damages. The amounts awarded to each appellant was determined in relation to the time spent by each of the appellants in detention (par 27).

6 Conclusion

It is clear that South Africa, and specifically the Department of Home Affairs, face great difficulty in dealing with the influx of illegal foreigners. However, when faced with these challenges one cannot lose sight of the normative standards that are imposed by our Constitution, and the duty to implement what is fair and just in accordance with our Constitutional principles (Solomon *Contemplating the Impact of illegal Immigration in The Republic of South Africa*, Centre for International Political Studies, University of Pretoria (2000) http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/2000/solomon.htm). This judgment will cause the Department to take sound and proper measures to ensure that it designates proper detention facilities for illegal foreigners across the country, or run the risk of future claims against the Department. The Department must take steps to ensure that the detention of migrants in the context of immigration proceedings can only exist as a last resort measure, with priority given to less restrictive alternatives, especially non-custodial sanctions (Committee Migrant Workers, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 of

August of 2013). Alternatives to imprisonment can be defined as the laws, policies or practices that allow asylum seekers, refugees and migrants to reside in the community and move freely, while their status as migrants is being resolved, or while they are awaiting their deportation (The Report par 56). The Department must also ensure that migrants should not be detained in prison facilities along with convicted criminals, and that the detention of asylum-seekers, and persons charged with civil immigration violations in a prison environment would be incompatible with basic human rights guarantees (International Standards and the Return Directive of the EU, (25 July 2008; Article 17(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families). There must also be procedures in place to ensure that the arrested person is informed in a language in which the person understands the reasons for the arrest, and be immediately informed of his/her rights, verbally as well as in writing. Where it may be necessary to detain migrants the detention may be implemented if it met certain conditions. For instance, the arrest must be made in the shortest possible time, it should not be indefinite under any circumstances, and the law must fix a maximum period of detention, which must also meet the criteria of reasonableness, necessity and proportionality (The Report par 68). The making of a determination by the Director-General under section 34(1) seems, on its face, to be both a relatively simple exercise, while at the same time being crucially important in upholding the rights of detained foreign persons. Although the issue did not arise for a final determination in this case, it would be prudent for such a determination to be made publicly as this is vital for certainty and effective administration according to constitutional and international standards (par 24).

Darren Subramanien
University of KwaZulu-Natal, Pietermaritzburg