THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 139/08

In the matter between:

ISMAIL EBRAHIM JEEBHAI	**FIRST APPELLANT**
YASMIN NAIDOO	**SECOND APPELLANT**
ZEHIR OMAR	**THIRD APPELLANT**

v

MINISTER OF HOME AFFAIRS	**FIRST RESPONDENT**
MICHAEL SIRELA	**SECOND RESPONDENT**

Neutral citation: ***Jeebhai v Minister of Home Affairs*** **(139/2008) [2009] ZASCA 35 (31 March 2009).**

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

Heard: **16 February 2009**

Delivered: **31 March 2009**

Summary: **Immigration Act 13 of 2002 read with Immigration Regulations - lawfulness of arrest, detention and deportation of illegal foreigner.**

ORDER

On appeal from: Pretoria High Court (Ngoepe JP, Pretorius J, Snijman AJ).

The following order is made:

1 The appeal is upheld with costs;

2 The convictions and sentences of the appellants for contempt of court are set aside;

3 The respondents are to pay the costs occasioned by their opposition to the application for the admission of the *amicus curiae*;

4 The order of the court below is set aside and in its place the following is substituted:

‘a the detention of Khalid Mahmood Rashid at Cullinan Police Station and his subsequent removal and deportation are declared to have been unlawful;

b The respondents are to pay the costs of the application;

c The counter-application is dismissed with costs.’

JUDGMENT

CACHALIA JA (Mpati P concurring)

[1] This is an appeal from the Full Court, Pretoria (Ngoepe JP, Pretorius J and Snijman AJ sitting as a court of first instance) in which it dismissed with costs an application to declare unlawful the arrest, detention and subsequent removal from the country of one Khalid Mahmood Rashid (including certain

ancillary relief) and granted a counter-application by the respondents declaring the appellants to have been in contempt of court.[1] The full court refused the appellants leave to appeal against its judgment but this court granted the necessary leave to them.

[2] The first appellant is Mr Ismail Ebrahim Jeebhai who is a businessman from Lenasia. Rashid was arrested in Estcourt at the home of Jeebhai's brother, Mr Mohamed Ali, in circumstances that are described in greater detail below. As Rashid was unable to instruct attorneys or depose to an affidavit, Jeebhai, the first appellant, instituted proceedings on his behalf. Mr Zehir Omar, who is the attorney of record in these proceedings and his professional assistant Ms Yasmin Naidoo were found guilty of having been in contempt of court by the full court, along with Jeebhai. Jeebhai was cautioned and discharged but Omar and Naidoo were each sentenced to a fine of R2 000 or six months' imprisonment suspended for a period of three years on condition that they are not convicted of contempt of court committed during the period of suspension – hence their interest in the present proceedings (as the third and second appellants respectively). The first respondent is the Minister of Home Affairs and the second respondent a senior immigration officer in the Department of Home Affairs. They are cited in their official capacities.

[3] The events surrounding this appeal span more than three years. I set them out in some detail so that the issues that arose from them are understood in their proper context.

[4] On the evening of 31 October 2005, at about 22h00, a senior immigration officer, Mr Anthony de Freitas, and several members of the South African Police Service descended on Mohamed Ali Jeebhai's home in Fordeville, Estcourt in the Province of KwaZulu Natal. The police were armed and clad in protective bullet-proof vests. The police first gained entry to the house and, having established that it was safe to enter, De Freitas also entered. They found Mohamed Ali and Rashid, a Pakistani national, on the

[1] The judgment of the full court is reported as *Jeebhai v Minister of Home Affairs & another* 2007 (4) SA 294 (T).

premises. De Freitas asked them for their identification papers. Rashid was not able to produce any permit authorizing his stay in the country. De Freitas arrested both as illegal foreigners and accompanied them with the police to the Cullinan Police Station in Pretoria where they were detained. De Freitas played no further role in the events that unfolded.

[5] On 2 November 2005, Mr Joseph Swartland, a Chief Immigration Officer, interviewed Rashid. Rashid, Swartland says, admitted to being an illegal foreigner and also that he had fraudulently obtained documents purporting to authorize his presence in the country. Swartland handed him a 'Notice of Deportation' as contemplated in regulation 28(2) of the Immigration Regulations.[2] The notice states that as the person is an illegal foreigner he is notified that he is to be deported to his country of origin – in this case Pakistan. The cryptic reason given for the deportation was that he is 'illegal'. The notice then states:

'In terms of section 34(1)(a) and (b) of the Act, you have the right to –

(a) appeal the decision to the Director-General in terms of section 8(4) of the Act within 10 working days from the date of receipt of this notice; and
(b) at any time request any officer attending to you to have your detention for the purpose of deportation confirmed by a warrant of the court.

NB: Should you choose not to exercise the rights mentioned above, you shall be detained pending your deportation. Should you however choose to exercise the rights mentioned above, you shall remain in custody and may not be deported pending the outcome of the appeal or the confirmation of the warrant of detention by the court.

. . .

ACKNOWLEDGMENT OF RECEIPT OF NOTIFICATION OF DEPORTATION

I hereby acknowledge receipt of the original notification of deportation in which my rights in terms of section 34(1)(a) and (b) of the Act were explained to me.

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[2] 'Immigration Regulations, GN R616, *GG* 27725, 27 June 2005.' The notice complies with Form 29.

After due consideration, I have decided to –

Await my deportation at the first reasonable opportunity, whilst Remaining in custody.	Yes	No
Appeal the decision to deport me.	Yes	No
Have my detention confirmed by a warrant of the court.	Yes	No

……..…….

Signature of Detainee Date

. . .'

Swartland states that after handing this form to Rashid he informed him of his right to appeal against the decision to deport him and to have his detention confirmed by a warrant of the court. Rashid, he says, read the form and placed a tick in the 'yes' column, indicating his wish to be deported at the first reasonable opportunity, whilst remaining in custody. He also signified that he did not wish to appeal the decision or have his detention confirmed by a warrant of the court by placing a cross in the relevant 'no' column. Swartland avers that Rashid signed the document in the space provided for the detainee's signature and said that he consented to being sent back to Pakistan immediately so that he could receive treatment for a skin problem.

[6] On 6 November 2005 Rashid was handed over to five Pakistani law enforcement officials at Waterkloof Military Air Base in Pretoria from where he was flown to Islamabad Airport in Pakistan and held in custody.[3] His removal from the country was apparently effected secretly – without his relatives or friends having been apprised of what had happened to him. In the meantime Mohamed Ali was transferred to Lindela Repatriation Centre – a facility that the Department of Home Affairs uses to detain illegal immigrants pending their deportation. It appears that he contacted his family from Lindela. The first

[3] See judgment of the full court below cited above at n1 para 11.

appellant then instructed his attorneys to commence legal proceedings in the Pretoria High Court both for his and Rashid's release. (They were at this stage unaware of Rashid's removal.) The application was set down for hearing on 15 November 2005.

[7] On that day the application was postponed after the respondents consented to an order for Mohamed Ali's immediate release and to disclose where Rashid was 'upon such information being available' by 6 December 2005. Mohamed Ali was released but the respondents failed to provide any information concerning Rashid. On 25 January 2006 the respondents delivered a notice to the first appellant's attorneys that reads as follows:

'Mr Mahmood Rashid Khalid was deported to Pakistan, in terms of s 34 of the Immigration Act, no 13 of 2002, on 6 November 2005. As Mr Khalid is outside the Republic, the first and (second) respondents are unable to say what his present whereabouts are.'-

[8] On 14 February 2006 the matter again came before Legodi J. The appellants contested whether Rashid had indeed been deported because his family in Pakistan had not heard of his arrival in that country. They also persisted in their claim that the respondents were in contempt of court for not having disclosed his 'whereabouts'. The judge postponed the application indefinitely to allow the respondents to file a further affidavit within 10 days dealing with both issues.

[9] The further affidavit filed by Swartland provided no additional information about Rashid's location. It did, however, provide confirmation from the Pakistani Ministry of the Interior that he had indeed arrived in that country. So, on 15 March 2006 the appellants filed papers to amend the original notice of motion directing the respondents to disclose details of the Pakistani officials who dealt with Rashid during his deportation both in South Africa and in Pakistan, the flight information of the aeroplane that transported him to Pakistan and the airport where he was deported from. The amended notice also included a prayer that all South African officials who had dealt with

Rashid appear in person to answer questions from the court concerning his disappearance.

[10] The matter was enrolled for hearing before Poswa J on the urgent roll on 10 May 2006. On 15 May 2006, having heard argument on the amended application, Poswa J granted an order in the following terms:

'The respondents must within 10 days of this order:

1. Identify the persons/people with whom arrangements were made at the Pakistani Embassy to have Mr Rashid deported;
2. Identify the person in Pakistan who received Mr Rashid, by making appropriate enquiries;
3. Name the airport where the aeroplane, in which Mr Rashid was transported, landed in this country;
4. Furnish the flight number of the aeroplane in which Mr Rashid was transported at the time of his being flown from this country.

. . .'

[11] On 6 June 2006 the respondents furnished the following information:

'No arrangements were made with the Pakistani High Commission in South Africa. Mr Khalid was handed to a Pakistani official by the name of Habib Ullah, by Joseph Swartland, an official of the Department of Home Affairs, at Waterkloof Air Base. Mr Ullah was accompanied by four Pakistani officials whose names appear on Annexure A2. Mr Ullah signed as receiver as is apparent from Annexure A1.The aircraft departed from Waterkloof Air Base on 6 November 2006. The Respondent has no knowledge of the airport at which the aircraft landed in Pakistan. The Respondent is not in possession of the flight number. However, the registration number of the aircraft appears on Annexure A2. The respondent has no knowledge of the time of landing.'

[12] By 12 June 2006, more that seven months after his arrest, the first appellant had still not been able to establish what had happened to Rashid. So he launched another urgent application in which he sought, among other

orders, a declaration that the arrest, detention and 'removal' of Rashid from South Africa were unlawful, inconsistent with the Constitution and constituted an 'enforced disappearance' as envisaged in article 7(2)(i) of the Rome Statute of the International Criminal Court. In their answering affidavit filed in response to the application the respondents applied for the appellants to be committed for contempt of court. (I deal more fully with this issue later at paras 46-49.) On 19 June 2006 Legodi J struck the matter from the roll for want of urgency and ordered that the matter be heard by a full court. (This is the application with which we are concerned in this appeal – the 12 June 2006 application.)

[13] A few days afterwards, on 22 June, yet another application was launched – this time in the name of the 'Society for the Protection of Our Constitution'. The notice of motion sought relief similar to that claimed in the application that Legodi J struck from the roll. The matter came before Southwood J who also struck the matter from the roll.

[14] The matter was duly enrolled before the full court, which directed that the various applications be consolidated so as to be heard together. The appellants filed a consolidated record compromising 12 volumes in compliance with the court's directions. The court heard argument on 25 August 2006 and delivered its judgment on 16 February 2007.

[15] It is apparent that in considering the relief sought by the first appellant, the court below had regard only to the evidence that appeared from the papers in the 12 June 2006 application – not any other evidence that was contained in the various applications that were part of the consolidated record. In this court the appellant filed a consolidated record of all the applications that were consolidated before the full court. On 4 November 2008 the matter was struck from the roll mainly for the reason that the appellants had failed to comply with the rules of this court relating to the record on appeal. During the hearing it emerged that only three of the twelve volumes were relevant for the adjudication of the appeal.[4]

[4] *Jeebhai v Minister of Home Affairs* (139/08) [2008] ZASCA 160 (27 November 2008).

[16] The matter was re-enrolled for hearing in this court on 16 February 2009. The application for the appeal to be reinstated, this time with a shortened record, was granted. However, as part of the reinstatement application the first appellant applied for leave to place further documentary evidence, which had been part of the consolidated record but not of the 12 June 2006 application, before this court. (It was contained in the application brought by the Society for the Protection of Our Constitution). The evidence was required to support the contention that Rashid had been removed from the country because he was being sought for his alleged connection with international terrorism. There were two pieces of evidence that they sought to have admitted for this purpose: first, the statement of the Pakistan High Commission issued on 14 June 2006 which reads:

'Mr Khalid Mahmood, a Pakistani national was arrested by South African Authorities on 31 October 2005. Mr Khalid Mahmood was wanted in Pakistan for his suspected links with terrorism and other anti state elements. The suspect was handed over to Government of Pakistan officials on 6 November 2005. Presently he is in custody of (the) Government of Pakistan.'

The second item of evidence was a letter apparently written by an Advocate Malik of the Pakistan High Court. (The letter is addressed to Dr Mary Rayner outlining their efforts to secure Rashid's release in the Lahore High Court Rawalpindi).

[17] The difficulty for the first appellant was that his attorneys did not bring a proper application, supported by a reasonably sufficient explanation for not having included the evidence in its founding affidavit, or outline any special reason for the court to grant this relief.[5] In the circumstances the evidence could not be admitted and will be disregarded for the purposes of deciding this appeal.

[18] The full court was asked to decide whether:

[5] Section 22 of the Supreme Court Act 59 of 1959; P B J Farlam & D E Van Loggenberg *Erasmus-Superior Court Practice* 30 ed A1-55-56.

- the respondents ought first to have invoked the procedure provided for in s 8 of the Act before arresting Rashid;
- the respondents' failure to obtain a warrant for Rashid's deportation rendered the deportation unlawful;
- the respondents purportedly used a deportation procedure to achieve an ulterior and unlawful purpose – the extradition of Rashid as an 'international terrorist' under the guise that they were deporting an illegal foreigner. (In other words the court was asked to decide whether the deportation constituted a 'disguised extradition');
- Rashid's disappearance after his arrest constituted an 'enforced disappearance of persons' as contemplated in Article 7(1)(i) of the Rome Statute of the International Criminal Court – and thus a 'crime against humanity';
- by annexing a document to the first appellant's founding affidavit, apparently in violation of a court order, the appellants were in contempt of court.

[19] The court decided these issues against the appellants, but did not deal with the argument advanced by the *amicus* concerning the respondents' alleged failure to obtain a deportation warrant.

[20] Before I deal with each issue I outline what the law requires when disputes regarding deportations arise. Deportation is a unilateral act of the deporting state to remove a foreigner, who has no right or entitlement to be in its territory. Its purpose is achieved when the foreigner leaves the deporting state's territory. The authority of and constraints on the state to deport people is to be found in the Immigration Act 13 of 2002[6] and the Immigration Regulations made by the Minister under s 7 of the Act.[7] For a deportation to

[6] As amended by the Immigration Amendment Act 19 of 2004.
[7] 'Immigration Regulations, GN R616, *GG* 27725 of 27 June 2005.'

be carried out lawfully, the 'action or procedure' used to facilitate an illegal foreigner's removal from the country must be done in 'terms of the Act'.[8]

[21] A decision to deport someone often carries far-reaching consequences – it concerns that person's livelihood, security, freedom and, sometimes, his or her very survival. This is why immigration laws, often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights. Our courts have thus stressed

'. . . the duty which lies on officials entrusted with the administration of the immigration laws . . . of observing strictly and punctiliously the safeguards created by the Act.'[9]

[22] An act of deportation does not necessarily involve the loss of a deportee's liberty, but it usually does – as in this case, where it is preceded by arrest and detention. And because every deprivation of liberty is presumptively unlawful the respondents bear the onus to adduce sufficient facts to justify their actions.[10] This is so also in motion proceedings – as an exception to the general requirement that the applicant must disclose its entire case in the founding affidavit.[11] There is good reason for this approach, especially in the present case where a person on whose behalf the application was launched is alleged to have disappeared and is himself unable to depose to an affidavit. Moreover, the respondents alone know the true facts concerning the detention and deportation. The appellants have, in their founding affidavit, squarely placed the lawfulness of Rashid's arrest, detention and deportation in issue – the respondents must therefore prove that they acted lawfully.[12]

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[8] Section 1 defines 'deport or deportation' to mean 'the action or procedure aimed at causing an illegal foreigner to leave the Republic in terms of the Act'.
[9] See Blackwell J in *Kazee v Principal Immigration Officer* 1954 (3) SA 759 (W) p 763A.
[10] *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) p 589E-F; *Zealand v Minister of Justice and Constitutional Development & another* 2008 (2) SACR 1 (CC); [2008] ZACC 3 para [25].
[11] *Minister Van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) p 294B-D.
[12] See *Matshoba* above at p 296B-D.

[23] It is convenient, at this stage, to outline the scheme of the relevant provisions of the Act (and regulations) that bear on this appeal. The provisions of the Act are ss 1, 8, 32, 34 and 41 and they are interrelated. Section 1 defines an '*illegal foreigner*' as:

'A foreigner who is in the Republic in contravention of this Act.'

Unless an illegal foreigner has the written authorization of the Director-General to be in the country pending his application for a status he must be deported. (Section 32)

[24] Section 41(1) is concerned with the verification of the identity and status of persons suspected of being illegal foreigners.[13] To this end an immigration officer or police officer who reasonably suspects a person to be an illegal foreigner may interview that person about his identity and status and hold him in custody briefly for this purpose. If necessary, the person may be detained in terms of s 34(2) for a period not exceeding 48 hours during the verification exercise.[14] In performing this function the officer must gain access to relevant documents; or contact persons who may be of assistance; and access departmental records.[15] The detention contemplated in s 34(2) must be by warrant addressed to the station commissioner or head of a detention facility.[16] Thereafter the suspected illegal foreigner may either be released or,

[13] Section 41(1) provides: 'Identification –
When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.'

[14] 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.'

[15] Regulation 32.

[16] Regulation 28(7) read with a form substantially complying with Form 33.

if he is in fact an illegal foreigner, detained further under s 34(1) for the purpose of facilitating the person's deportation. [17]

[25] However, the s 41 process may only be used in cases involving persons who are suspected of being illegal foreigners. Where an immigration officer has decided, as a fact, that the person concerned is an illegal foreigner the officer must consider what to do next. He may either arrest the illegal foreigner without a warrant and then detain him in terms of s 34(1) for deportation or, in terms of s 8(1), inform the foreigner concerned in the prescribed manner that he is entitled to make representations to the Minister within three days to review his determination as an illegal foreigner.[18] The illegal foreigner may not be deported before the Minister's decision is made.[19] It must be emphasised that s 34(1) confers on an officer a discretion whether or not to effect an arrest or detention of an illegal foreigner. There is no obligation to do so. If the officer exercises his discretion to arrest and detain a foreigner and it then transpires that the foreigner concerned is in fact not illegally in the country, the arrest and detention would have been unlawful – as it would have been if the officer had failed to exercise his discretion properly or at all.[20]

[26] Once an illegal foreigner is arrested and detained in terms of s 34(1) the Act and regulations contain safeguards to protect that person's rights. He must upon arrest or immediately thereafter be notified in writing of the

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[17] Section 34(1) provides: '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 her or she understands;

. . .'

[18] Section 8(1)(b) read with reg 5(1). The request is submitted on a form substantially corresponding to Form 1.

[19] Section 8(2)(b).

[20] *Lawyers for Human Rights v Minister of Home Affairs* 2003 (8) BCLR 891 (T) p 896.

decision to deport him; of his right to appeal the decision and also of his right to request that his detention be confirmed by warrant issued by a court within 48 hours. If the warrant is not issued he must be released immediately.[21] In addition, and although not mentioned in the Act or regulations, detained illegal foreigners are beneficiaries of rights under s 12(1) and s 35(2) of the Constitution.[22] The arrested person's detention must be by means of a warrant issued by an immigration officer authorizing the station commissioner or head of the detention facility to detain him.[23] Where the authorities intend to detain an illegal foreigner for longer than 30 days, they must obtain, from a court, a warrant which may on good and reasonable grounds be extended for a period not exceeding 90 days.[24] The person must be held in compliance with minimum standards protecting his dignity and human rights.[25] Once detained an illegal foreigner's release may be effected only by written authority of an immigration officer as contemplated in s 34(7) of the Act or if a court so orders.[26]

[27] Section 8 of the Act provides for review and appeal procedures and deals with people who are refused entry into the country and those who are found to be illegal foreigners.[27] In this appeal we are concerned only with the

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[21] Section 34(1)(a), (b) and (c). In terms of reg 28(2) the notification of the deportation of an illegal foreigner contemplated in s 34(1)(a) shall be in a form substantially corresponding to Form 29. The form does not make provision for the detainee to be informed of his constitutional rights under s 35(2) of the Constitution.

[22] *Lawyers for Human Rights & another v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 27.

[23] Regulation 28(1) read with Form 28.

[24] Section 34(1)(d).

[25] Section 34(1((e).

[26] Section 34(7) provides: 'On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.'

[27] Section 8 provides: 'Review and appeal procedures

(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and-

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a) , that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision-

latter category. I have mentioned earlier that the effect of s 8(1) is that once an immigration officer finds that a person is an illegal foreigner, he must inform the foreigner concerned of his right to make representations to the Minister. In terms of s 8(3) any decision other than one contemplated in s 8(1) (a finding by an immigration officer that a person is an illegal foreigner), which adversely and materially affects the rights of any person, must be communicated in writing to the person concerned. In my view, a decision to deport a person falls within the purview of this sub-section. A decision of this nature, and the reasons for it, must be communicated in writing to the affected person promptly. The notification must also inform the person that he may, within 10 working days, make representations to the Director-General for a review or appeal of the decision.[28] An aggrieved applicant who has made written representations to the Director-General in terms of s 8(4), may, if still unhappy with the outcome, make further representations to the Minister.[29]

[28] It is apparent that s 8 is concerned only with appeals and reviews and s 34(1) with the arrest, detention and deportation of illegal foreigners. The review procedure contemplated in s 8(1) applies only when an illegal foreigner has not been arrested for deportation purposes. A right of review or appeal of any other decision contemplated in s 8(3), including the decision to deport an

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(a) in a case contemplated in subsection (1) (a) , and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or
(b) in a case contemplated in subsection (1) (b) , shall not be removed from the Republic before the Minister has confirmed the relevant decision.
(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.
(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.
(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.
(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.
(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.'

[28] Read with reg 5(2) and Form 2. Form 2 makes reference only to a review and has erroneously omitted the reference to an appeal.

[29] Section 8(6).

illegal foreigner, which adversely affects the rights of any person are clearly applicable to all people, whether or not they are in custody.

[29] I revert to the first issue. The appellants and *amicus curiae* submitted that the provisions of s 8 of the Act ought to have been invoked before Rashid was arrested.

[30] The source of the contention that s 8 procedures providing for appeal and review must be applied before an arrest is effected under s 34(1) is a trilogy of decisions of the Pretoria High Court. The first was *Arisukwu & others v Minister of Home Affairs*[30] where De Villiers J held that the s 9 of the Aliens Control Act 96 of 1991, must be complied with before an illegal alien may be detained in terms of s 44(1)(a) of that Act. (These provisions are the predecessors of s 8 and s 34 in the current Act.) This was followed by judgments of Southwood J in *Muhammed v Minister of Home Affairs & others*[31] and Bertelsman J in *Khan v Minister of Home Affairs.*[32] In the latter case the learned judge held that:

'(O)nce an official ha(s) decided that a foreigner was illegally in the country and the foreigner ha(s) been informed of that fact, the foreigner must be informed of his rights in terms of the relevant section. The foreigner is entitled, as a matter of law, not to be detained immediately after his having been informed of the decision to deport him, but to exercise his rights either to appeal to the Minister or to apply to the Director-General to review or appeal the decision to deport him either in terms of s 8(1) and s 8(2) or s 8(4) without and before being incarcerated.'

[31] A contrary view was adopted by Mabuse AJ in *Abid Ali & others v Minister of Home Affairs & others*[33] who held that an illegal foreigner has no right not to be detained in terms of s 34(1) while he is being dealt with under s 8. The full court approved of Mabuse AJ's approach and disagreed with the

[30] 2003 (6) SA 599 (T).
[31] [2007] JOL 18935 (T).
[32] [2007] JOL 18958 (T) at p 18.
[33] TPD case No. 36405/06 (Unreported). It appears that the cases mentioned earlier dealing with this point were not brought to the learned judge's attention, as he made no mention of them in his judgment. This is troubling because he would have been bound to follow those judgments unless satisfied that they were clearly wrong.

judgments that preceded it. In *Ulde v Minister of Home Affairs*[34] Sutherland AJ, considered himself bound by the full court. His view captures the essence of the difference between the approach in these cases and that of the earlier trilogy:

'Section 8 does not address an arrest. Section 34 does. It is a decision that a person is an illegal immigrant and in turn the decision to deport that triggers s 8. The notion that a s 8 notice must be given for an arrest to be valid is not warranted.'[35]

[32] The first appellant's contention that a person may not be arrested or detained in terms of s 34(1) until he has been permitted to exhaust his right of appeal and review is, in my view, not only contrary to the scheme of the Act but would, if upheld, effectively render s 34(1) nugatory. This may be illustrated by a simple example, which regrettably, is common place in this country. A person enters the country illegally and fraudulently obtains documents which appear to authorize his presence here. An immigration officer examines the documents, realises that they are forgeries, and having failed to obtain a satisfactory explanation for them decides that the person is an illegal foreigner who is liable for deportation. The officer proceeds to arrest and detain him. The submission that s 8 must be invoked before such a person may be arrested and detained for the purposes of deportation, effectively means that the fraudster is entitled not to be arrested and detained until he has exhausted his right of appeal and review in terms of s 8. If on the other hand a person has been found to be an illegal foreigner and an officer decides not to arrest him, it would rarely be necessary to arrest him after the appeal or review process is finalised. In the event that his appeal or review fails, the foreigner concerned is likely to depart voluntarily, without the need for an arrest and detention.

[33] But there is a more telling reason why this submission is unsustainable. Section 41(1), as I have mentioned, read with s 34(2), permits the detention of a suspected illegal foreigner for a period not exceeding 48 hours while his

[34] 2008 (6) SA 483 (W) paras 33-34.
[35] See *Ulde* quoted above at para 29.

status is being verified. And s 34(1) permits the arrest and detention of an illegal foreigner for deportation purposes. The consequence of the submission is that a suspected illegal foreigner can be taken into custody – but not a person who is found in fact to be an illegal foreigner because, as it is submitted, he may not to be arrested until he has exhausted his right of appeal or review under s 8. This is an absurdity that the legislature could not have contemplated.

[34] To recapitulate, a decision that a person is an illegal foreigner triggers his right to appeal or review that decision. It may also cause an arrest and detention for the purposes of deportation, but need not.[36] The decision to arrest and detain an illegal foreigner for the purposes of deportation is a discretionary one. It does not detract from any of the alleged foreigner's rights under s 8 and is not contingent upon his decision whether or not to exercise them. I conclude that the judgment of the full court on this aspect is, with respect, correct and the trilogy of cases which are relied upon in support of the contrary view not.

[35] I turn to the next issue. The first appellant and *amicus curiae* contended that Rashid's arrest, detention and deportation were unlawful because of the failure of the respondents to comply with the peremptory requirements of the Act. Concerning the arrest, detention and deportation the respondents were, at the very minimum, required to prove that:

(i) the arresting officer arrested a person who is an illegal foreigner as defined in s 1;
(ii) the detention was, as reg 28(1) prescribes, by means of a warrant corresponding to Form 28;
(iii) the detainee was informed promptly, in writing at the time or soon thereafter in terms of s 34(1) read with reg 28(2), and on a form corresponding to Form 29, what the reason(s) for his intended deportation were; that he may in terms of s 34(1)(a) appeal against the

[36] *Lawyers for Human Rights & another v Minister of Home Affairs* 2003 (8) BCLR 891 (T) p 896.

decision to deport him and also, in terms of s 34(1)(b) to request his detention to be confirmed by a warrant of a court. (If the warrant is not issued within 48 hours of such request, he must be released); and

(iv) the detained illegal foreigner's removal from custody for deportation was effected in terms of s 34(7) read with reg 28(9) through the issue of a warrant, corresponding to Form 35, by an immigration officer addressed to the person in charge of the detention facility. (As proof that the person removed from detention and deported through a port of entry is in fact the person whose name appears in the warrant, the Form makes provision for a left and right thumb print of the deportee to be taken and also the identification of the port of entry from which the deportation will be carried out. This is to ensure that there is a proper record of the identity of the illegal foreigner and the place from where he was deported. Its purpose is also to protect the Department from unwarranted allegations.)[37]

[36] De Freitas arrested Rashid on 31 October 2005 to, in his words, 'facilitate his deportation under s 34 (and) it was decided to detain him at the Cullinan Police cells, pending further investigation and compliance with the formalities prescribed in the Act'.

[37] At the time of his arrest Rashid was an illegal foreigner and on that basis, absent any attack on the exercise of the arresting officer's discretion, his arrest was authorised by the section. In respect of the other formalities prescribed by the Act the facts show a lamentable disregard for them. On the respondents' own showing:

- Rashid was detained without a warrant;
- Form 29 was given to him almost two days after his arrest – not promptly as s 34(1)l requires; and the respondents provide no

[37] Section 34(7) provides: 'On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.'

explanation for the delay. (It was suggested in argument by counsel for the respondents that there was in fact no delay as Rashid was being dealt with under s 41(1). De Freitas's affidavit, however, makes clear that Rashid was arrested immediately in terms of s 34(1). He makes no reference to s41(1)).

- No warrant was obtained for his removal from the Cullinan Police Station for the purposes of his deportation; and
- He was not deported from a port of entry that the Minister had designated for this purpose in terms of s 1 of the Act. I should point out that the full court accepted the respondents' denial that Waterkloof Air Base was not a designated port of entry. But it erred in this regard. The respondents were required to prove that the Airbase was a designated port of entry as contemplated in s 1 of the Act. They failed to do so.[38]

[38] In the view I take it is not necessary to deal with what legal consequences, if any, flow from the failure of the respondents to warn Rashid of his rights under s 34(1)(a) and s 34(1)(b) promptly after his arrest or their failure to prove that he was deported through a designated port of entry. For present purposes, the fact that Rashid was detained at the Cullinan Police Station without a warrant and then removed from this facility, also without a warrant, means that both his detention there and his deportation were unlawful.

[39] It is true, as counsel for the respondents contended, that the failure of the respondents to comply with the regulations, at least in respect of Rashid's deportation, was not raised pertinently on the papers. But, it does not follow, as counsel for the respondents sought to contend, that this failure precludes the point being raised before this court as a point of law. As I have mentioned, the respondents bore the onus to prove that the detention and deportation were lawful. And once the first appellant had placed the lawfulness of the detention and deportation in issue, the respondents were required, at the very minimum, to adduce sufficient facts to prove that every procedural

[38] The Government's website, http://www.home-affairs.gov.za/airports.asp lists 11 airports as ports of entry. Waterkloof Air Base is not one of them.

requirement, including the issue of the necessary warrants, was complied with.

[40] The first appellant and *amicus* raised another important challenge to Rashid's deportation. They contended that his deportation to Pakistan was the result of a request to the South African Government from the Government of Pakistan or some other state, because of his alleged links with international terrorism. His deportation, so it is contended, therefore constituted an unlawful disguised extradition.[39] A variation of this argument is that the deportation was constitutionally offensive because the South African Government failed to secure an assurance from Pakistan that Rashid would not be tortured or sentenced to death if put on trial. The challenge failed before the full court on the ground that the respondents were not shown, on the admissible evidence, to have been aware that Rashid was being sought because of his alleged connection with international terrorism at the time of his deportation.[40]

[41] Although the circumstances of Rashid's deportation from the country are troubling, the first appellant did not make out a case for a disguised extradition in his founding papers. His case is that Rashid is not an illegal foreigner (I have already found that he was) and that:

'The real reason for the unlawful arrest, detention and deportation of Mr Rashid, which was never frankly disclosed . . . was the request by the British Authority /Intelligence following upon their suspicion that Mr Rashid was suspected of having links to International Terrorist Networks.'

[42] Be that as it may, the only evidence to support this allegation directly is the first page of a document emanating from a file of the respondents. The document became a hotly contested issue after the appellants had annexed it to the founding papers before the full court, apparently in violation of a court order of Poswa J issued on 14 May 2006. The circumstances under which the file containing the document was placed before Poswa J are not explained in

[39] See generally J Dugard. *International Law – A South African Perspective* 3 ed (2005) p 229-231.
[40] See judgment of the full court above at n1 para 37.

the papers before us. The document linked Rashid to international terrorism and appears to be part of a report on Rashid's arrest which, according to the respondents, formed 'a part of the notes by an employee of the first respondent for the purposes of briefing counsel'.

[43] In summary the document reveals that a member of the South African Police Service Crime Intelligence Unit, Captain Moses, contacted De Freitas to assist in arresting a suspected illegal foreigner. De Freitas referred him to his supervisor, Mr Chembayan. Moses then contacted Chembayan and told him that he required De Freitas's help to track down the Pakistani national 'who was suspected of having links with International Terrorist Networks abroad'. He also told Chembayan that due to the 'sensitive nature of the case' it was being 'handled at Ministerial level'. Chembayan authorized De Freitas's participation in the operation. The following day, on 31 October, Moses collected De Freitas at the Durban Central Police Station from where they proceeded to Estcourt in search of the suspected illegal foreigner. On route Moses indicated that the suspect was 'wanted by the British Authorities for having links with international terrorist Networks', but made no mention of the suspect's nationality.

[44] The full court struck out the contents of the founding affidavit upon which this report was based on the grounds that the appellants had published it in violation of Poswa J's court order of 14 May 2006.

[45] The document is incomplete, unsigned and its author unknown. *Ex facie* the statement the information it contains constitutes inadmissible hearsay evidence. Moreover, it does not suggest that Rashid was wanted for questioning in Pakistan. In those circumstances there was no basis for the suggestion, in argument, that the deportation was actually a disguised extradition. In my view, the contents of the document are not only unreliable but do not advance the first appellant's case that he now seeks to make.

[46] I turn to deal with the next issue – whether the appellants were properly convicted of contempt of court arising from their use of the controversial

document in support of their application. On 15 May 2006, Poswa J prohibited publication of the file's contents (mentioned earlier in connection with the disguised extradition argument) and ordered its return to the Department. The order read:

'1. That there shall be no publication of the contents of the affidavit for the intended application for intervention as *amicus curiae* and annexures whatsoever.

2. That there shall be no publication of the contents of the file of the Department of Home Affairs.

3. That the file shall be restored to the representative of the respondent.'

[47] The order, which was issued by the registrar, is clear in its terms. Nevertheless, in the present proceedings the appellants annexed the document to the founding affidavit to support the allegation that Rashid was deported because of his alleged involvement with international terrorism. The respondents, in addition to filing an answering affidavit on the merits in the 12 June 2006 application, lodged a counter-application for the appellants to be committed for contempt of court because of their use of the document in apparent disregard of the court order. However, in their answering affidavit filed in response to the respondents' counter-application, Mr Omar avers that Poswa J stated in court that the prohibition on publication did not prevent him from using the contents of the file in any other proceedings. The respondents do not deny this averment and for present purposes it must be accepted.

[48] Mr Omar, however, took a further precaution by instituting proceedings before Poswa J, before the full court heard the matter, for his order to be corrected so as to confirm the appellants' understanding of it. Having heard the party's submissions the judge upheld the appellants' contentions and amended the order on 8 August 2006. The relevant amendment was contained in paragraph 4 of the amended order. It reads as follows:

'4. Orders 1 and 2 above shall not prohibit use of the file of the Department of Home Affairs in the advancement of any other court proceedings. The orders in 1 and 2 above shall endure until judgment by this court in these proceedings.'

[49] The full court took the view that the amended order had no bearing on the original prohibition against the usage of the contents of the file before any other court.[41] But it seems that this is precisely what Poswa J intended. The appellants' use of the document before the full court, therefore, did not violate his order. It follows that the appellants were incorrectly convicted of contempt of court.

[50] The last issue to be decided is whether the manner of Rashid's removal from South Africa constituted a 'crime against humanity' under Article 7(1)(i) of Part 2 of the Rome Statute of the International Criminal Court because it was an 'enforced disappearance'. The Rome Statute sets a threshold for a crime to be elevated to the level of a 'crime against humanity'. The criminal act must be committed with specific intent and be 'part of a widespread or systematic attack directed at a civilian population'.[42] Article (2)(i) defines 'enforced disappearance of persons' as 'the arrest, detention, abduction, of persons by, or with the authorization, support, or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'. For present purposes, even if I were to accept that the circumstances of Rashid's removal from South Africa does fall within this definition (which I do not because the definition refers to 'persons', not a person), there can be no suggestion that removing a single person from a country meets the threshold level for a 'crime against humanity'. This contention must fail.

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[41] See the judgment of the full court above at n1 para 45.
[42] Dugard *International Law - A South African Perspective* 3 ed (2005) p 182-185.

[51] I turn to the question of costs. In the reinstatement application, Mr Omar contended that the order of this court on 27 November 2008 that he pay the wasted costs *de bonis propiis* relating to the record on appeal which had been struck from the roll, be reconsidered because it was interlocutory in nature. The submission is without merit. An order striking a matter from the roll with costs is final in effect and cannot be reconsidered.

[52] The *amicus* contended that the respondents ought to pay their costs for having unreasonably opposed their application to be admitted as *amicus curiae* in this court. In this matter the submissions of the *amicus* were of considerable assistance to the court. There were no proper grounds for opposing its application and I agree that it is appropriate that the respondents pay such costs.

[53] To conclude, Rashid's arrest was lawful but his detention and deportation were not because they were carried out without compliance with the peremptory procedures prescribed by the Act. We were informed from the bar that Rashid was released from the custody of the Pakistani authorities in December 2007. The appellants have accordingly abandoned the relief sought for an order declaring that the government conduct an investigation while Rashid's fate was not clarified. The appellants have, in the main, been successful in this appeal and it follows that they are entitled to their costs.

[54] I must express our gratitude to the *amicus curiae* for its assistance to us.

[55] The following order is made:

1. The appeal is upheld with costs;
2. The convictions and sentences of the appellants for contempt of court are set aside;
3. The respondents are to pay the costs occasioned by their opposition to the application for the admission of the *amicus curiae*;

4. The order of the court below is set aside and in its place the following is substituted:

   ‘a. the detention of Khalid Mahmood Rashid at Cullinan Police Station and his subsequent removal and deportation are declared to have been unlawful;

   b. The respondents are to pay the costs of the application;

   c. The counter-application is dismissed with costs.’

A CACHALIA
JUDGE OF APPEAL

PONNAN JA (Streicher JA et Hurt AJA concurring)

[56] I have read the judgment of my colleague Cachalia. I take a far narrower approach to the matter. Although there had been a proliferation of applications and counter-applications involving essentially the same issues, the matter ultimately came to be decided, at the direction of the learned Judge President, by a specially constituted court consisting of three judges (Ngoepe JP, Pretorius J and Snijmann AJ), on the basis of just one of the many applications that served before them. It is noteworthy that the founding and answering affidavits in the matter comprise a single volume of less than 120 pages. That matter serves before us on appeal on the basis of leave having been granted by this court. We are thus constrained by that record, which I may add, does not contain a replying affidavit.

[57] A useful starting point is the allegations made in the affidavits filed of record in the matter. To my mind, the crux of the first appellant’s case is to be found in paragraph 24 of the founding affidavit, which reads:

'NOTEWORTHY is that Mr. De Freitas, who at all material times worked in the course and scope of his employment with the First Respondent immediately arrested,

detained and later deported Mr. Rashid following upon the said Mr. De Freitas having declared Mr. Rashid an "illegal foreigner". Mr. Rashid was not afforded the rights contemplated in Section 8(1) and (2) of Act 13 of 2002, more specifically to appeal/ make representations challenging the decision to declare him (Mr. Rashid) an 'illegal foreigner". The adverse consequence of being declared "an illegal foreigner" is that an "illegal foreigner" may be arrested, detained and deported. I respectfully say that the "legislature" intended that the procedure in Section 8(1) and (2) of Act 13 of 2002 must be followed before arrest and detention in terms of Section 34 of Act 13 of 2002. The arrest and detention of Mr. Rashid on the 31st October 2005 is / was therefore unlawful.

. . . .

The response it elicited was:

'In the light of the facts before court, the affidavits of De Freitas and Swartland I do not understand on what basis the deponent makes the allegations in this paragraph. He has no personal knowledge of what happened to Khalid after his arrest. The rest of the contents of this paragraph are argumentative, speculative and incapable of traverse. Questions of interpretation of the Act will be dealt with at the hearing of this matter.'

[58] Earlier in the answering affidavit filed on behalf of the respondents, the following appears:

'Khalid's arrest and detention were effected pursuant to information that the Department had received that he was an illegal foreigner, residing in Estcourt. On 31 October 2005, Anthony de Freitas, who is employed by the Department as a Senior Immigration Officer at its offices in Durban, arrested Khalid in the following circumstances. He went to Khalid's place of residence, namely, 12 Canna Avenue, Fordville, Estcourt. As is often the practice when Department officials effect arrests under their statutory powers, De Freitas was accompanied by a number [of] policemen. On this occasion, the policemen were under the command of Inspector Arumugan Munsamy. They were armed and clad in bullet proof vests, which is the practice employed in such operations. After they had pronounced the premises safe to enter, De Freitas went in. There he found Khalid and Mohamed Ali Ebrahim Moosa Jeebhai ("Jeebhai"), the deponent to the founding affidavit.

. . .

When De Freitas entered the premises in which Jeebhai and Khalid were to be found, he asked for their identification and travel documents. Khalid said he did not

have any identification papers. He said his passport was in Johannesburg. But he produced a copy of the passport. However, no permit of any nature appeared on the page where his personal particulars were reflected. It was clear to De Freitas that Khalid was an illegal foreigner, as contemplated in the Act. As such, he was subject to arrest and deportation.

De Freitas informed Khalid that he was being placed under arrest. The purpose of his arrest was to facilitate his deportation under s34 of the Act. In order to facilitate his deportation, it was decided to detain him at the Cullinan Police cells, pending further investigations and compliance with the formalities prescribed in the Act. Khalid was then transported to the Cullinan Police cells. De Freitas accompanied the police who were responsible for such transportation. After Khalid was placed in the police cells at Cullinan, De Freitas returned to Durban. While at the Cullinan police cells, Khalid was in the custody of the police members there. I annex hereto as "JS1" a confirmatory affidavit of De Freitas.

Swartland, an employee of first respondent, conducted an investigation into the residence status in South Africa of Khalid. In his capacity as the Department's Tshwane Chief Immigration Officer, he has access to all [the] Department's records on foreign nationals in South Africa.

He interviewed Khalid at the Cullinan Police Station on 2 November 2005. Khalid admitted to Swartland that he had entered the country illegally. He then advised him that, because he was in the country illegally, he was liable to be deported. As he is required to do under the Act, he gave Khalid written notification of his decision to deport him to his country of origin, namely Pakistan. He further informed Khalid of his right to appeal against that decision and to have his detention confirmed by a warrant of the Court. These averments are confirmed by the written notification that he then handed to Khalid, on 2 November 2005. A copy of that notification is annexed hereto marked "JS2".

. . .

I may mention that Khalid's decision in respect of the three matters[43] are entirely consistent with the following. In response to Swartland's enquiries as to how he had entered the Republic and secured a "work permit", Khalid told Swartland the following: That he had entered the country without a visa, and had paid an agent

[43] In terms of JS2, Khalid chose: (i) To await his deportation at the first reasonable opportunity, whilst remaining in custody; (ii) Not to appeal the decision to deport him; and (iii) Not to have his detention confirmed by a warrant of court.

$600 "to get me through the immigration". He had thereafter paid R7 000.00 to the agent for "a fake work permit". Khalid later confirmed the aforegoing in an affidavit. A copy of the affidavit is annexed hereto, marked "JS3".'

[59] Significantly, those allegations are not disputed by or on behalf of the appellants. Nor, given the nature of the allegations, could they be. Absent a referral to oral evidence and there was none here, it follows that the matter falls to be determined on the version of the respondent. On that version they were dealing with a self-confessed illegal foreigner in Mr Khalid Rashid, who had by virtue of that fact rendered himself liable to arrest in terms of s 34(1) of the Act for the purposes of deportation. I pause to record that, in my view as well, the cases, in which it was held that the procedure outlined in s 8(1) and (2) must be followed before a person may be arrested in terms of s 34, were wrongly decided. If a person is an illegal foreigner he may be arrested in terms of s 34. An illegal foreigner is, in terms of s 1, by definition a foreigner who is in the Republic in contravention of the Act and not a person who is confirmed to be an illegal foreigner by the Minister upon review in terms of s 8(2). Mr Khalid Rashid, by his own admission, fell within this definition of 'illegal foreigner'. Moreover, also on his own version, he had perpetrated a fraud in order to facilitate his entry into and sojourn in the Republic. In those circumstances, like Cachalia JA, I too am of the view that his arrest was authorised by the Act.

[60] The same does not hold true for Mr Rashid's detention at the Cullinan Police Station and his subsequent deportation. The receipt and subsequent retention of an individual in custody is an exercise of public power. Any such exercise is constrained by the principle of legality.[44] It may thus only occur in terms of lawful authority.

[61] Regulation 28 (1) of the Immigration Regulations[45] provides:

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[44] *Minister of Justice and Constitutional Development and Another v Zealand* 2007 (2) SA 401 (SCA); [2007] ZASCA 92; *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC); [2008] ZACC 3.
[45] See footnote 7.

'The detention and deportation of an illegal foreigner contemplated in section 34(1) of the Act shall be by means of a warrant issued by an immigration officer, which warrant shall substantially correspond to Form 28 contained in Annexure A.'

Form 28 is headed 'WARRANT OF DETENTION OF ILLEGAL FOREIGNER', and must be addressed to the relevant 'Station Commissioner/Head of Prison or Detention facility'. It reads:

'As …….. (first name(s) and surname of illegal foreigner) has made *himself/herself liable to *deportation/removal from the Republic and for detention pending such *deportation/removal in terms of section *34(1)/34(5)/34(8) of the Act, you are hereby ordered to detain him or her until such time as *he/she is *deported/removed from the Republic.'

There then follows designated spaces on the Form for the 'Signature of [the relevant] immigration officer, 'Date' and 'Official stamp'.

[62] Regulation 28(9)(a) provides that the warrants contemplated in s 34(7) of the Act shall 'in respect of the removal of an illegal foreigner, be in a form substantially corresponding to Form 35'. Form 35 reads:

DEPARTMENT OF HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

WARRANT FOR REMOVAL OF DETAINED ILLEGAL FOREIGNER
[Section 7(1)*(g)* read with section 34(7); Regulation 28(9)*(a)*]

TO: **Person in charge of prison or detention facility**

As .....(first name(s) and surname), whose fingerprints appear on the reverse side of this Form, has made *himself/herself liable to removal from the Republic, you are hereby requested to deliver *him/her into my custody.

Removal from the Republic shall be affected via ..... (port of entry) and the responsible immigration officer or police officer at that port of entry shall, before the removal of the detainee, impress the left and right thumb prints of

the detainee in the space provided hereunder and certify that the prints were taken by him or her.

....

Signature of immigration officer **Date**

Appointment no.: .....

Place: .....

Reference no.: .....

CERTIFICATE BY IMMIGRATION OFFICER

I hereby confirm that the abovementioned person was removed from the republic on .....(date) to ..... (country)

via .....(port of entry).

I also confirm that *his/her left and right thumb prints were taken by me.

LEFT THUMB PRINT **RIGHT THUMB PRINT**

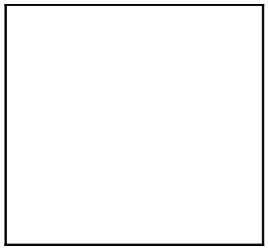
Immigration officer: .....

Appointment number: .....

Date: .....

Port of entry: .....

Departure Stamp



[63] Given that the deprivation of Mr Rashid's liberty was prima facie unlawful, it was for the respondents to justify such deprivation.[46] In this instance, one would have thought that, as a bare minimum, the respondents would have sought to show compliance with Regulation 28. It would to my mind have been a relatively simple matter to have adduced duly completed Forms 28 and 35 as proof of compliance with Regulation 28. That the respondents failed to do. After all, it seems to me that the Regulation 28 safeguards exist, not just for the benefit of the illegal foreigner, but also to protect the respondents against unjustified and unwarranted claims flowing from detention or deportation or both. Accordingly, on the view that I take of the matter, from the time that Mr Rashid was handed over by De Freitas to the officials at the Cullinan Police cells until he came to leave the Republic, the conduct of the state officials in whose charge he found himself, was unlawful. It follows that Mr Rashid's detention and subsequent deportation was unlawful.

[64] That, ordinarily at any rate, ought to be the end of the matter certainly insofar as the main issue is concerned. There remains the contention ─ which was not pressed with any vigour before us ─ that Mr Rashid's deportation constituted a disguised extradition. Although I am by no means persuaded that this is still a live issue in the current appeal, it may nonetheless be prudent for me to deal with it, albeit briefly. Once again the starting point has to be the founding affidavit. In this regard, the closest that the founding affidavit comes to advancing that rather speculative hypothesis is as follows:

'The real reason for the unlawful arrest, detention and deportation of Mr. Rashid, which was never frankly disclosed to this Honourable Court was the request by the British Authority / Intelligence following upon their suspicion that Mr. Rashid was

[46] *Zealand* (CC) para 24.

suspected of having links to International Terrorist Networks. Ironically, the former British Prime Minister Margaret Thatcher labelled our former president Madiba (Nelson Mandela) a terrorist. Madiba, was conferred the status of "Icon" approximately three years ago. British Authority and particularly the British Prime Minister were clearly wrong in labelling Madiba a terrorist, particularly because not too long ago the same Madiba was awarded an International Nobel Peace Prize. Mr. Rashid was not linked to any International Terrorist Network nor was Mr. Rashid suspected of having committed a crime anywhere in the world including South Africa.'

The response, unsurprisingly was:

I deny that the real reason for the arrest of Khalid was not disclosed. Khalid was an illegal foreigner who had entered the country through illegal means including fraud and corruption in that he paid money to buy both a visa and a permit. The Act referred to above empowers first respondent to arrest, detain and deport an illegal foreigner. That is the basis on which Khalid was deported from South Africa. The rest of the contents of this paragraph are polemic, vague, irrelevant and incapable of traverse.'

[65] Without more and given the nature of the factual dispute, had those juxtaposed paragraphs stood in isolation, the issue of the alleged disguised extradition would have been resolved against the first appellant. But, in the paragraph of the founding affidavit immediately preceding that under consideration, the following appears:

‘"MV9"[47] hereto is the first page of a report supplied to the First respondent about the "arrest" of Mr. Rashid by the SAPS Crime Intelligence Unit Durban. Noteworthy is the concluding paragraph on "MV9" more specifically:-

" ... That the suspected illegal foreigner to be arrested in Estcourt (referring to Mr. Rashid) was wanted by the British Authority for having links to International Terrorist Networks abroad ..." '.

The response it elicited was:

‘The report referred to in this paragraph is also part of the notes by an employee of first respondent drawn for the purposes of briefing counsel. The notes are privileged and inadmissible and should have never have been used or annexed to this

[47] Summarised in para 43 of Cachalia JA’s judgment.

application. The use of all these documents in contempt of a court order shows how desperate deponent is to buy publicity.'

It is thus necessary to subject MV9 to greater scrutiny to ascertain whether it materially advances the first appellant's case in this regard.

[66] For the reasons that follow, I am of the view that no evidential weight can be attached to MV9. First, on the first appellant's own showing, it is only the first page of a report. Second, the statement is unsworn and unsigned and there is, moreover, no evidence as to the identity of its author. Third, ex facie the statement, the information it contains constitutes inadmissible hearsay evidence. Fourth, even if it be shown to have been made by an official in another arm of state, MV9 could hardly be binding on the first respondent, absent an admission by her of the truth of its contents. Fifth, if agents of the South African state were acting at the behest of British Authorities in securing Mr Rashid's arrest ─ as the document asserts – it is incomprehensible and indeed would appear to be inconceivable, that they would have simply handed him over to the Pakistani authorities. I thus remain unpersuaded that such evidence as there is (namely the reliance on MV9) – which to my mind is neither reliable nor credible and stands to be disregarded in its entirety - supports the inference sought to be advanced by the first appellant.

[67] I agree with Cachalia JA that the contempt of court conviction cannot stand and that the respondents' counter-application in that regard should accordingly have been dismissed with costs by the court below. I likewise agree with his approach to costs. In the result, I agree with the order proposed by my learned Colleague.

V M PONNAN
JUDGE OF APPEAL

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