

**Editorial note: Certain information has been redacted from this document in compliance with the law.**



## **CONSTITUTIONAL COURT OF SOUTH AFRICA**

**D. A. v Minister of Home Affairs and Another**

**CCT 115/21**

**Date of Hearing: 3 August 2021**  
**Date of Judgment: 30 December 2021**

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### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Thursday, 30 December 2021 at 10h00, the Constitutional Court handed down judgment in an application for direct appeal against the judgment of the High Court of South Africa, Gauteng Division, Johannesburg (High Court). That Court dismissed the applicant's application which sought an order, amongst other things, interdicting the respondents from deporting the applicant until his status under the Refugees Act 130 of 1998, alternatively under the Refugees Amendment Act 11 of 2017, has been lawfully and finally determined. The applicant also sought an order declaring his continued detention unlawful, and that the respondents be directed to release him. The High Court declared the applicant's detention lawful.

Mr A, the applicant, is an illegal foreigner from Ethiopia who, at the time the application was launched, was detained at the Lindela Repatriation Facility awaiting deportation. The applicant entered South Africa illegally from Zimbabwe, having travelled from Ethiopia. It is unclear when he entered South Africa. On 8 June 2020, Mr A was arrested at Eshowe, KwaZulu-Natal, for unlawfully entering and residing in South Africa, in contravention of the Immigration Act 13 of 2002. On 7 July 2020, the Eshowe Magistrates' Court convicted and sentenced him to 50 days' imprisonment with an option to pay a fine of R1 500. He immediately began serving his sentence which officially ended on 25 August 2020. This notwithstanding, Mr A remained in custody and was only released on Friday, 25 June 2021. The reasons and facts leading to his remaining in

custody after 25 August 2020 are as follows. On 17 July 2020, while serving his imprisonment sentence, Mr A brought an urgent application in the High Court of South Africa, KwaZulu-Natal Local Division, Durban (High Court, Durban) seeking a *rule nisi* directing the respondents not to remove him from the Eshowe Police Station holding cells and the High Court, Durban's jurisdiction; and interdicting the respondents from deporting him to Ethiopia. On 21 July 2020 the High Court, Durban granted these interim orders pending the finalisation of Mr A's application for his release from custody to be heard on 6 August 2020.

On 6 August 2020, by agreement between the parties, the *rule nisi* was extended and subsequently extended further on numerous occasions until it was discharged on 27 January 2021 at the instance of Mr A.

On 8 February 2021, the officials of the respondents, being the Minister of Home Affairs and the Director General, Department of Home Affairs, initiated the deportation process. A warrant of detention of the applicant was issued which ordered the head of the detention facility to detain him until such time he is removed from the Republic of South Africa. This warrant of detention was later confirmed by the Eshowe Magistrates' Court. On 1 March 2021, Mr A's detention was extended by a court order of the Krugersdorp Magistrates' Court for a period 90 days.

On 12 March 2021, Mr A filed an urgent application in the High Court to challenge the lawfulness of his continued detention. In this application, he sought an order interdicting the respondents from deporting him until his status under the Refugees Act had been determined. He further sought an order declaring his detention to be unlawful and that he be released from jail in order to approach a Refugee Reception Centre to apply for asylum. The application was opposed by the respondents.

The High Court rejected Mr A's submission that his detention was unlawful. It noted that the applicant was detained in terms of the provisions of the Immigration Act and that there was a court order which extended his detention for 90 days pending his deportation. It concluded that the limitation of his freedom was justified in terms of section 36 of the Constitution. With regard to his alleged right to apply for asylum, the High Court noted that Mr A gave contradicting versions about when he arrived in South Africa. Apparently, he informed the police that he arrived on 5 January 2017 but later informed his attorneys that he arrived in December 2019. The High Court accepted the former as his arrival date. Importantly, the High Court accepted, with reference to numerous cases, that once an applicant indicates his or her intention to apply for asylum, he or she is entitled to be given an opportunity to do so by being released and issued with a temporal permit until the determination of his or her asylum application. The Court, however, held that these cases did mean that once a person indicates his or her intention to apply for asylum, he or she must be released from jail despite spending many years in South Africa without applying for asylum. It held that long queues at Refugee Reception Offices cannot be an excuse for not acquiring the necessary documents to be in the Republic. The High Court accordingly dismissed the application with costs.

In a unanimous judgment penned by Tshiqi J (Zondo ACJ, Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ and Theron J concurring), the Constitutional Court held that the interests of justice favoured the granting of direct leave to appeal. It held that section 2 of the Refugees Act, which remains unamended by the Refugees Amendment Act, gives expression to the principle of non-refoulement as espoused by this Court in *Ruta v Minister of Home Affairs* [2018] ZACC 52. The Court further stated that the legislative changes occasioned by the amendments to the Refugees Act, which came into operation on 1 January 2020, do not have the effect of barring persons in Mr A's position from applying for asylum. The Court held that the amendments introduced an additional step, in the form of an interview, before a person may be permitted to apply for asylum. The Court held further that the amendments do not affect the *ratio* in *Ruta* when dealing with the delay by an illegal foreigner in applying for asylum.

Regarding the lawfulness of Mr A's detention, the Court stated that his custodial sentence ended on 25 August 2020, which entitled him to be released. He was therefore kept in detention without just cause or in the absence of a court order from 26 August 2020 until 7 February 2021. The Court further held that Mr A's continued detention after the expiry of the court order extending his detention was also unlawful as such extension ended on 29 May 2021. He was only released on 25 June 2021.

The Constitutional Court accordingly upheld the appeal with costs and declared that Mr A is entitled to remain in the Republic pending the final determination of his asylum application. The Court further directed the respondents to take all reasonable steps within 14 days of its order to give effect to Mr A's intention to apply for asylum in terms of the provisions of the Refugees Amendment Act.