

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Kaunda & Others v The President of the RSA and Others Case

CCT 23/04

Decided on 4 August 2004

Media Summary

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

The Constitutional Court today dismisses the appeal against the judgment of the High Court in Pretoria (the High Court) delivered on 9 June 2004. The applicants in the matter are 69 South African citizens presently being held in Zimbabwe on a variety of charges. The applicants initially approached the High Court seeking the following orders:

- “2. Directing and ordering the Government of the Republic of South Africa (the Government) to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.
3. Declaring that the Government is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.
4. Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea.
5. Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments, as the case may be to not impose the death penalty on the applicants.
6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.
7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants’ right to freedom and security of person including the rights not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.
8. Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

9. Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of this Honourable Court on a weekly basis as to the issues set out above where applicable.”

The High Court dismissed the application and the applicants applied for leave to appeal directly to this Court.

This Court unanimously holds that the application for leave to appeal raises complex issues of law, of great importance not only to the applicants but to our society as a whole and as such the application for leave to appeal directly to the Constitutional Court should be granted.

The decision of the Court is in a judgment delivered by Chaskalson CJ with whom Langa DCJ and Justices Moseneke, Skweyiya, van der Westhuizen, and Yacoob concur. Concurring judgments were delivered by Ngcobo and Sachs JJ. A dissenting judgment was delivered by O’Regan J, with whom Mokgoro J concurs.

All the judgments hold that the claims as formulated by the applicants, demanding that their rights under the South African Bill of Rights to dignity, freedom and security of the person, including the right not to be treated or punished in a cruel inhuman or degrading way, and the right to a fair trial and conditions of detention are misconceived. They also hold that the claim that steps be taken as a matter of urgency by the South African government to seek the extradition of the applicants from Zimbabwe must be dismissed.

All the judgments recognise that as a nation we have committed ourselves to uphold and protect fundamental rights which are the cornerstone of our democracy. We recognise a common citizenship and that all citizens are entitled in terms of section 3(2) of the Constitution to the rights, privileges and benefits of citizenship. A privilege and benefit of South African citizenship is an entitlement to request the South African government for protection against wrongful acts of a foreign state. The government has a corresponding obligation to consider the request and deal with it consistently with the Constitution. The difference between the majority and the dissenting judges concerns the nature and extent of this obligation.

The majority hold that decisions as to whether, and if so, what protection is given, is an aspect of foreign policy which is essentially the function of the executive. These are matters of great sensitivity, calling for government evaluation and expertise. This does not mean that South African courts have no jurisdiction to deal with issues concerning diplomatic protection. The exercise of all public power is subject to constitutional control. This also applies to an allegation that government has failed to respond appropriately or at all to a request for diplomatic protection. In dealing with a dispute that may arise in that regard, however, courts must give particular weight to the government’s special responsibility for and particular expertise in foreign affairs. The South African government has a wide discretion in deciding how best to deal with such matters.

The stated government policy concerning nationals in foreign countries, who are required to stand trial there on charges for which capital punishment is competent, is to make representations concerning the imposition of capital punishment only if and

when such punishment is imposed on a South African citizen. Government's stated policy concerning the conditions of detention and the conduct of trials of nationals in foreign countries is to ensure that all South African citizens are detained in accordance with international law standards, have access to their lawyers and receive a fair trial. The majority holds that these policies are not inconsistent with international law or any obligation that government has under the Constitution, and that there is no reason to believe that they will not be applied to the applicants should the occasion to do so ever arise.

The applicants also raised issues relating to the conditions in which they are being detained in Zimbabwe and sought an order directing the government to ensure that their right not to be subjected to cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the South African Constitution are at all times respected and protected in Zimbabwe. All the judgments hold that section 12 of the Constitution is not applicable to the conditions of detention in Zimbabwe. It was not disputed that all requests for assistance by the applicants to the South African High Commission in Zimbabwe have been taken up, and that the South African High Commission did make representations to the Zimbabwe authorities about these matters. All the judgments hold that the applicants have failed to establish that the government's response to these requests for assistance was inconsistent with the Constitution or international law.

In a separate judgment, Ngcobo J holds that under section 3(2)(a) read with section 7(2) of the Constitution, the government has a duty to provide diplomatic protection to South African nationals abroad. This duty arises from section 3(2)(a) of the Constitution which provides that all South African citizens are equally entitled to the rights, benefits and privileges of citizenship. He finds that diplomatic protection is one of the benefits, if not the right, that accrues to South African citizens. He rejects the argument that the government has no constitutional duty to provide diplomatic protection to its nationals abroad.

The duty of the government entails the obligation to consider rationally the requirements for diplomatic protection. Such a request cannot be arbitrarily refused, he holds. However, Ngcobo J holds that the government has a wide discretion to decide whether, when and how to grant diplomatic protection. But this does not mean that the judiciary cannot review the decision of the executive refusing to grant diplomatic protection.

In a dissenting judgment O'Regan J (with Mokgoro J concurring) holds that there is a duty, in terms of section 3(2) of the Constitution, for the state to provide diplomatic protection to its nationals in order to prevent the violation of their fundamental human rights under international law. O'Regan J holds that because the duty can only be carried out by the government in its conduct in foreign relations, it must be afforded a wide degree of latitude to determine how the duty ought to be discharged. Given that there was ample evidence that the applicants might find themselves in Equatorial Guinea and that they were at risk of receiving an unfair trial which might result in the death sentence, O'Regan J finds that it is appropriate to issue a declaratory order holding that the government is under a duty to afford diplomatic protection to the applicants to protect them from egregious violations of international law.

Sachs J concurs in the main judgment, while agreeing with the additional points of substance in the separate judgments. He states that it would be a strange interpretation of the Constitution that suggested that adherence by the government, in any of its activities, to the foundational human rights norms of international law that led to the creation of a democratic South Africa, was merely an option and not a duty.