



## *Response*

*July 3rd, 2017*

### **LHR v Minister of Home Affairs and Others.**

On 29<sup>th</sup> June 2017 the Constitutional Court handed down a unanimous landmark judgment in the case of *Lawyers for Human Rights v the Minister of Home Affairs and Others*, in which the Court found that section 34(1)(b) and (d) of the Immigration Act 13 of 2002 were inconsistent with the Constitution and therefore invalid. The Court ruled that the rights guaranteed in section 12 and 35 of the Constitution—the right to legally challenge a detention in court within 48 hours of arrest; and the right to be protected against arbitrary detention without trial—apply equally to foreign nationals as to South African citizens. The declaration of invalidity was suspended for 24 months to allow Parliament to remedy the defect. The Court also ordered that all ‘illegal’ foreign nationals in detention under s 34(1) of the Immigration Act at the time of the judgment, be brought before a court within 48 hours.

Prior to this, the courts were only required to review the detention of foreign nationals who were in detention for longer than 30 days. The relevant section of the Act, which now needs to be amended by Parliament, reads: ‘the foreigner may not be held in detention for longer than 30 calendar days without warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days.’ LHR argued that current immigration procedures denied individuals the constitutionally guaranteed right to be protected against arbitrary arrest and to be permitted to bring their cases to court in terms of sec 35 of the Constitution, which guarantees access to a court within 48 hours.<sup>1</sup> In addition, while the Act envisages a warrant of detention being obtained from a Magistrates Court, the Department of Home Affairs has interpreted this as being done without the detainee appearing in Court.<sup>2</sup> This approach is unconstitutional, as it does not allow the detainee to explain her or her circumstances in person to the Court.

As a spokesperson for LHR stated, ‘This ruling will most importantly protect vulnerable individuals whose detention has in the past fallen beyond the reach of judicial oversight resulting in widespread rights violations.’<sup>3</sup>

It is worth noting that Catholic Social Teaching supports the notion of illegal foreigners, migrants, and refugees being the bearers of basic human rights.<sup>4</sup> Under the rubric of ‘protection’ it holds that

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<sup>1</sup> <http://mailchi.mp/eefd7120bc20/constitutional-court-unanimously-upholds-the-rights-of-all-detainees-to-access-to-courts?e=7f23f7a357>

<sup>2</sup> <http://www.sowetanlive.co.za/news/2016/10/11/passop-intervenes-in-case-on-detention-of-suspected-illegal-foreigners>

<sup>3</sup> Cape Times 30/6/2017 p1

<sup>4</sup> <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/strangers-no-longer-together-on-the-journey-of-hope.cfm>

protection requires, at a minimum, that migrants have a right to claim refugee status without incarceration, and to have their claims fully considered by a competent authority in a transparent process and within a reasonable time frame. While this is not exactly the same issue as that which served before the Constitutional Court, it nonetheless underpins the right of migrants to have their dignity respected and to enjoy those basic human rights which, irrespective of their legal status, they are entitled to on the basis of their dignity as persons. The judgment strongly affirms that the human dignity and human rights of undocumented migrants should be respected. As the United States bishops note, “regardless of their legal status, migrants, like all persons, possess inherent human dignity that should be respected. Often they are subject to punitive laws and harsh treatment from enforcement officers from both receiving and transit countries. Government policies that respect the basic human rights of the undocumented are necessary.”<sup>5</sup>

This judgment constitutes a protection of both the values of the Constitution and the dignity of a vulnerable group in society whom our laws are meant to protect and not render more vulnerable. We look forward to Parliament amending the defects in the Immigration Act.

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**Peter-John Pearson**  
**Director**

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<sup>5</sup> USCCB 2003 pp 34-35. <https://www.mncatholic.org/strangers-no-longer-together-on-the-journey-of-hope/>