CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 17/01

KHALFAN KHAMIS MOHAMED — First Applicant

ABDURAHMAN DALVIE — Second Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
AND SIX OTHERS — Respondents

and

THE SOCIETY FOR THE ABOLITION OF THE DEATH
PENALTY IN SOUTH AFRICA

THE HUMAN RIGHTS COMMITTEE TRUST — Amici Curiae

Heard on : 10 May 2001

Decided on : 28 May 2001

JUDGMENT

THE COURT:

[1] The first applicant before this Court, Mr Khalfan Khamis Mohamed ("Mohamed"), is currently standing trial on a number of capital charges in a federal court in New York. He alleges that the relief sought in the proceedings in this Court could have a bearing on the criminal trial which started some months ago. For that reason the preliminary steps for a hearing in this Court

were foreshortened and, with the cooperation of counsel for the parties, set-down was expedited.[1] It is necessary to describe the nature of each of the two cases and to explain their interrelationship.

[2] The case before this Court is an urgent application for leave to appeal against a judgment in the Cape of Good Hope High Court.[2] In that Court[3] the applicants sought declaratory and mandatory relief against the government[4] arising out of Mohamed's arrest in Cape Town on 5 October 1999, his subsequent detention and interrogation there by South African immigration

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1 Rule 11(1) of the Constitutional Court Rules provides that in urgent matters the President of the Court may dispense with the forms provided in the rules and give directions as to time, manner and procedure of disposal of the matter.

2 Per Blignault J, Hlophe JP concurring, delivered on 20 April 2001.

3 The initial application, launched on 14 November 2000, was aimed at obtaining sight of the official South African documents relating to Mohamed's case and on 15 December 2000 Conradie J issued an interlocutory order for the production by the respondents of "all information in their possession in respect of which lawful privilege may not be claimed". A bundle of documents was produced and a subsequent order by Hoffman AJ led to extracts of another document being delivered. The notice of motion was then amended to claim the substantive relief that remains in issue before this Court.

4 The respondents cited are the President as head of the Executive, the Minister of Justice and Constitutional Development, the Minister of Home Affairs, the Minister of Safety and Security, the Minister of Foreign Affairs, the National Director of Public Prosecutions and the Chief Immigration Officer, Cape Town.

officers and his handing over to agents of the United States Federal Bureau of Investigation ("the FBI") for interrogation and removal two days later to New York, there to stand trial.

[3] The argument advanced on behalf of the respective parties will be analysed in detail later. Suffice it to say by way of introduction that the main contention on behalf of the applicants (supported by the *amici curiae*[5]) was that Mohamed's arrest, detention, and handing over by the South African authorities to the FBI agents and his removal by them to the United States were part and parcel of a disguised extradition in breach of the law. More particularly the South African authorities were said to have breached the provisions of the Aliens Control Act[6] ("the Act") and the regulations published thereunder.[7] Even more pertinently, Mohamed's

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5 The Society for the Abolition of the Death Penalty in South Africa and the Human Rights Committee Trust.

6 Act 96 of 1991.

7 The Aliens Control Regulations published under Government Notice R999 (Government Gazette 17254) of 28 June 1996.

constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment[8] had allegedly been infringed.

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8 The relevant provisions of the Bill of Rights read as follows:

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right ─

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) . . . .

[4] The factual substratum of the case for the applicants was gleaned from documents that had been made available to their legal representatives pursuant to two interlocutory orders on the government for their disclosure. The thrust of the consequential relief the applicants unsuccessfully sought in the High Court and pursued in this Court was a declaration to the effect that—

(i) the arrest, detention, interrogation and handing over of Mohamed to the FBI agents were unlawful and unconstitutional; and

(ii) the respondents breached Mohamed's constitutional rights by handing him over to the custody of the United States without obtaining an assurance from the United States government that it would not impose or carry out the death penalty on him if convicted.

[5] The mandatory relief sought pursuant to this declaration was an order "[d]irecting the Government of the Republic of South Africa to submit a written request through diplomatic channels to the Government of the United States of America, that the death penalty not be sought, imposed nor carried out upon [Mohamed]" should he be convicted in the criminal trial.

[6] The crux of the government's contentions, which carried the day in the court below, was that Mohamed was an illegal immigrant whom the immigration authorities had properly decided to deport and whose deportation was mandated by the Act. Such deviations as there might have been from the literal prescripts of the Act or the regulations were of no legal consequence. Nor did the collaboration between the South African officials and the FBI agents whereby Mohamed was eventually removed to the United States make any difference to his status or his liability to deportation. Moreover, so the court held, on the evidence of the immigration officials, which

could not be rejected in motion proceedings, Mohamed had been duly apprised of his rights and had freely elected to accompany the FBI officers without delay to the United States, there to stand trial with his comrades. Finally, so the government contended and the court found, a court had no power to issue the mandamus sought, which would in any event have no efficacy. On 20 April 2001 the High Court delivered its judgment, comprehensively dismissing the contentions advanced on behalf of the applicants and refusing the relief they had sought.

[7] That is when the applicants approached this Court as a matter of urgency, asking for condonation for non-compliance with the ordinary procedures for appeals to this Court and for leave to bring an appeal directly here.[9] On the face of it there was manifest urgency and, with the active cooperation of all concerned, the matter was ripe for hearing within three weeks of delivery of the judgment below. The Court is grateful to all who made this possible. With this description of the nature of and backdrop to the proceedings in this Court, we turn to outline the other case which is currently under way in New York.

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9 Ordinarily, under rule 18(6) of the rules of this Court, the court of first instance should be asked to furnish a certificate as to, among other things, the prospects of success on appeal and whether it is in the interests of justice for the matter to be brought directly to this Court. Rule 31 of the rules affords this Court a general discretion, "on sufficient cause shown" to condone non-compliance with any of the rules and rule 11(1), as pointed out in n 1 above, makes provision for directions to be given in urgent cases.

[8] That case, a criminal trial, arises from events that took place on 7 August 1998 in Nairobi and Dar es Salaam. That morning, in quick succession, the United States embassies in those two cities were rocked by violent explosions that all but destroyed them. In Nairobi 212 were killed and more than 4 500 injured and in Dar es Salaam 11 were killed and 85 injured. A federal grand jury had been sitting in New York since the mid-nineties investigating the activities of an organisation called Al Qaeda founded, led and financed by a Saudi multi-millionaire, Usama bin Laden. The grand jury concluded that the attacks on the two embassies were the work of Al Qaeda in its ongoing international campaign of terror against the United States and its allies.

[9] Later, the grand jury indicted 15 men on a total of 267 counts, including conspiracy to murder, kidnap, bomb and maim United States nationals; conspiracy to destroy United States buildings, property and national defence facilities; bombing of the two embassies and murder of the 223 persons there killed. Of the 15 named and indicted conspirators, four are currently on trial: Mohamed and three other men. Mohamed is a Tanzanian national by birth and lived there until recently. According to the indictment, he procured a false passport in May 1998, rented a house, bought a motor vehicle for use by the conspirators and actively participated in the preparations for the bombing of the Dar es Salaam embassy.

[10] Mohamed obtained a visitor's visa from the South African High Commission in Dar es Salaam the day before the explosions and left Tanzania by road the day after. Travelling via Mozambique to South Africa he entered the country on 16 August 1998 and travelled to Cape Town where he obtained employment — and later lodgings — with the second applicant, Mr Abdurahman Dalvie ("Dalvie"). In due course he applied for asylum — under his assumed name

and on spurious grounds — and was afforded enhanced temporary residence status. He was issued with a temporary residence permit that had to be renewed periodically pending the decision on his application for asylum. As far as is known, Mohamed lived and worked quietly in Cape Town during the ensuing year while his application was being processed.

[11] In the meantime, however, Mohamed had been indicted by the grand jury and on 17 December 1998 a warrant for his arrest was issued out of the Federal District Court for the Southern District of New York on charges of "murder, murder conspiracy [and] attack on US facility". The following month Interpol, Washington DC, at the request of the FBI, put out an international "wanted" notice with photographs and a description of Mohamed, listing "murder of US nationals outside the United States; conspiracy to murder US nationals outside the United States; attack on a federal facility resulting in death" and cautioning that he should be considered armed and dangerous.

[12] From about 12 August 1999, the South African Police Service and the Department of Home Affairs were aware of the investigation by the FBI into the bombings of the two American embassies and were asked to provide it with information concerning another suspect named Ally Hassan Rehani. Then on 30 August 1999 an FBI agent identified Mohamed while searching through the asylum-seekers records in Cape Town with the permission of the seventh respondent, the Chief Immigration Officer, Department of Home Affairs, Cape Town, Mr Christo Terblanche ("Terblanche"). These records contain both fingerprints and photographs of applicants for asylum and the agent was able to make the identification despite the pseudonym Mohamed used.

[13] The next day, Terblanche sent the Directorate: Alien Control, Department of Home Affairs Head Office in Pretoria a copy of the warrant for Mohamed's arrest as well as copies of an associated letter to Interpol and the FBI "wanted" poster. In the covering letter Terblanche requested that Mohamed be declared a prohibited person as a matter of urgency[10] and stressed that it was of the utmost importance that he be stopped should he try to leave South Africa.

[10] In terms of section 39(2)(d) of the Act.

[14] In the week of 13 September 1999 the second and sixth respondents, the Minister of Justice and Constitutional Development and the National Director of Public Prosecutions ("the Minister" and "the NDPP" respectively), were in Washington DC for the signing of a new extradition treaty between South Africa and the United States to replace one dating from 1951. A political offence exception[11] that had been contained in the 1951 treaty was not re-embodied in the new treaty, which has not yet come into force. Also, the new treaty introduced a provision for the surrender of a fugitive with his or her consent without further extradition proceedings.[12] While in the United States the Minister and the NDPP were invited guests at an in-depth FBI briefing session in New York concerning the Nairobi and Dar es Salaam embassy bombings. They were informed that a suspect was residing in Cape Town and that FBI agents were "working on apprehending" him. According to a Department of Foreign Affairs report on the meeting, the Minister at one point observed:

> "that the FBI should not merely discontinue their relationship with their counterpart agencies in SA once they had achieved their objective of apprehending the suspected bomber and bringing him to the US to stand trial."

[15] At about the same time,[13] two meetings were held at the offices of the Independent

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11 Contained in article 6 of the 1951 treaty.

12 Article 19.

13 On 14 and 20 September 1999.

Directorate for Organised Crime ("IDOC"). At the first, attended by Terblanche and an FBI special supervisory agent, senior representatives of IDOC were informed:

> "of the combined investigation between Immigration and the FBI into fugitives connected to the bomb attacks on US embassies in Nairobi, and Dar Es Salaam on 8 August 1998".

The second meeting, attended by the same people and also by the NDPP and the Deputy Director-General of the National Intelligence Agency, was:

> "convened to discuss possible links between the fugitives an [sic] local terrorist attacks and a possible national threat. Also under discussion was the new treaty signed between South Africa and America on 16 September 1999 where Mr Ngcuka and Minister P Maduna [were] briefed on the two bombings and possible arrests in South Africa."

[16] Mohamed was due to call at the refugee receiving office in Cape Town by 5 October 1999 for the extension of his temporary residence permit[14] and members of the Aliens Control Unit together with members of the FBI started a surveillance programme there on 2 October 1999 in anticipation of his calling. This he did on the morning of 5 October 1999 at 09:15 and was arrested there and then. Present were Terblanche, an FBI agent and an immigration officer. According to Terblanche, he warned Mohamed:

> "as is customary after all arrests, that I [Terblanche] was an immigration officer, that he was under arrest, that he was under no duty to say anything to me but that anything he did say might be used in evidence against him, and that he was entitled to a legal representative if he so wished."

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[14] Issued in terms of s 41 of the Act to a prohibited person.

This is disputed by the applicants. Be that as it may, Mohamed was taken to a car waiting in the basement of the building and driven to a holding facility at Cape Town International Airport, where he was questioned by Terblanche and a colleague of his, a Mr Christians.

[17] According to an affidavit by Terblanche the questioning was conducted by Christians, who prefaced the session with an explanation that they:

> "wanted to ask him questions in order to verify his status in the country. [Christians] asked [Mohamed] whether he had any objection to answering questions and again told [Mohamed] that he was entitled to a legal representative if he so wished. He said, too, that if [Mohamed] did not co-operate he might be further charged under the provisions of the Aliens Act. [Mohamed] responded simply by saying 'I will tell you everything you want to know.' The first question Mr Christians asked him was 'What is your name?' The answer to this was 'Khalfan Khamis Mohamed.' In other words, the first answer [Mohamed] gave was an admission that he had entered the country under a false name and passport."

Although the applicants disputed some of these allegations by Terblanche, it is not necessary to engage in any detailed analysis of the contested material. It is common cause that an interrogation of some two hours or more ensued and that Christians typed up a statement running to close on three pages of single-spaced typing covering in extensive detail Mohamed's life from his birth in Zanzibar to his departure for South Africa, his family set-up, the circumstances of his acquiring the false passport, and chapter and verse of his journey to Cape Town and his sojourn there.

[18] What the statement does not minute is any warning as to the protection against self-

incrimination or the right to remain silent. There is no mention of the right to legal representation, nor that any such rights were waived. Although Terblanche and Christians alleged in their affidavits that Mohamed had been given a choice as to whether he should be removed from South Africa to Tanzania or the United States and had expressed a clear and reasoned preference for the latter, the statement is silent on the point. Indeed, as Terblanche and Christians would have it, Mohamed feared for his life at the hands of vengeful Tanzanians should he be repatriated. He wanted to join with his comrades in the glory of being tried for their heroic conduct and, God willing,[15] to die for the cause. The statement lacks any intimation that the bar placed on removal from South Africa within 72 hours of a deportee's arrest, contained in section 52 the Act, was drawn to Mohamed's attention. Terblanche and Christians alleged that Mohamed had freely and unreservedly ― even brazenly ― disclosed his part in the terrorist plot to bomb the embassies in Nairobi and Dar es Salaam; yet the statement is silent on the topic. Perhaps that is because the South African officials felt the bombing of the United States embassies was none of their business but it is curious that there is no indication that Mohamed's possible contact with terrorists in South Africa was investigated. After all, Mohamed's alleged connection with the embassy bombings had prompted Terblanche to stress to his head office that Mohamed should not be allowed to leave the country and the meeting with IDOC and the senior officials had been convened to discuss possible links between Mohamed and "local terrorist attacks and a possible national threat".

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15 Christians ascribes to him the ubiquitous Muslim expression to that effect: "inshallah".

[19] However, as will become apparent later, the statement, both as to what it says and, more specifically, as to what it does not say, is ultimately of no real significance. In any event, as to what passed between Mohamed and the immigration officers there is a conflict of evidence that cannot be resolved on the papers.

[20] After he had signed the Christians transcript, Mohamed was handed over to members of the FBI. He was interrogated by them over a period of two days, during which he made a lengthy statement, the contents of which are so potentially prejudicial to the security of the United States that its publication has been embargoed by the trial judge and did not form part of the data disclosed in the High Court. The statement has, however, been admitted in evidence before the jury in the United States and apparently comprises a comprehensive and damning confession of Mohamed's enthusiastic and unrepentant participation in the murderous bombing of the Dar es Salaam embassy.

[21] During the afternoon of Mohamed's arrest four immigration officials, three FBI members and a person described by Terblanche as "a State department official", presumably an American, searched, photographed and chemically examined Mohamed's lodgings at Dalvie's house. They told Dalvie that they:

> "had come to collect [Mohamed's] goods as he was being sent back to Tanzania because he had entered the country under false names. Mr Dalvie asked whether it would help to get a lawyer to represent [Mohamed] and [Terblanche] said [Dalvie] could do that, but in [his] view it would be a waste of money, because [Mohamed] had admitted entering the country with a false document. The Dalvies did ask whether they could see [Mohamed], and [Terblanche] said no, because [he] knew that [Mohamed] was being held in a

> restricted area of the airport, barred to the public, for which a visitor's permit would not be issued."

[22] The manifest and settled intention on the part of the United States government agents, both in New York when they briefed the Minister and the NDPP in mid-September and thereafter in Cape Town, was to take Mohamed to New York to stand trial for the vicious crimes he had committed against their country. Terblanche does not explain how, in the face of this, he could truthfully have told the Dalvies that Mohamed was due to be sent to Tanzania. Nor does he say why it would have been futile for Mohamed to have been afforded the benefit of independent legal advice. Indeed, according to Terblanche and Christians, the latter had at the outset of the interrogation expressly informed Mohamed of his right to legal representation.

[23] It is also hardly conceivable that Terblanche and his three colleagues present at the time of Dalvie's enquiry could have been unaware of the provisions of section 52 of the Act, in a sense their charter, and the breathing space it affords prohibited persons facing deportation. There was no pressing urgency if Mohamed were to be sent to Tanzania. Moreover, Terblanche's suggestion that access for Dalvie to the detainee could not have been arranged also rings singularly hollow. Terblanche was, after all, the Chief Immigration Officer who had planned and executed Mohamed's arrest, who had taken him to the holding facility at the airport and who was clearly in control of the man and in overall charge of the case. Indeed, the excuse is so lame as to be disingenuous. If, for some unexplained reason, permission for access to the holding facility was not in Terblanche's gift and could not be procured from the (unnamed) repository of this power, there was no reason why Terblanche could not have had Mohamed removed to any other safe place.

[24] The inference is well nigh irresistible that the Dalvies were fobbed off to ensure that Mohamed would continue to be denied access to a lawyer and would remain incommunicado. That might then give rise to the even more sinister inference that Mohamed was deliberately kept isolated and uninformed in order to facilitate his removal by the FBI agents. However, these issues were not adequately canvassed in the court below and there may possibly be some less sinister construction to put on the proven facts. In any event, for reasons that will become plain later, the handing over of Mohamed for removal to the United States, as well as the subsequent removal, were on the respondents' own showing in breach of the Act and infringed Mohamed's constitutional rights.

[25] On 6 October 1999, after the FBI had questioned Mohamed, Detective Captain Barkhuizen of the South African Police Service questioned him in connection with bombing incidents in the Western Cape and specifically a bombing that had been perpetrated at a restaurant called Planet Hollywood shortly after Mohamed's arrival in the country. Barkhuizen satisfied himself that Mohamed could not be linked to urban terror in the Western Cape.

[26] Later on 6 October Mohamed was delivered into the custody of the FBI for removal by them to the United States. From the outset, the case made out by the applicants was that such delivery was in breach of the Act and infringed Mohamed's constitutional rights. They challenged the propriety of the delivery and removal, saying they constituted a disguised extradition which infringed Mohamed's right to claim that the South African authorities stipulate as a condition of his removal to the United States that an undertaking be given by the United

States authorities that the death penalty would not be sought or carried out. Although Terblanche deposed to more than one affidavit dealing with the point, and although the NDPP also traversed the contention in an affidavit, it can nevertheless not be ascertained with any certainty when — and by whom — the decision was taken on behalf of the South African government to hand Mohamed over to the American government.

[27] What is known is that an aeroplane was specially sent from the United States to fetch Mohamed and that he was flown out of South Africa on 6 October 1999 in the custody of a number of FBI agents, accompanied by a United States Attorney for the Southern District of New York[16] and a medical doctor. They arrived in New York the next day and the day thereafter Mohamed appeared in the Federal Court for the Southern District of New York on the charges mentioned above. The trial judge formally notified him that he faced the death penalty on a number of the charges.

[28] That, then, is the factual matrix in which the legal issues are to be considered. We turn to address them now. They are, in the order they will be addressed:

(i) The validity of the deportation of Mohamed.

(ii) Deportation or extradition involving the possibility of capital punishment.

(iii) The legal efficacy of consent to deportation or extradition.

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16 It is interesting to note that this person, who forms part of the prosecution team in the cases against Mohamed and his co-accused, was present during lengthy discussions held with Mohamed in the course of the flight from Cape Town to New York.

(iv) The relief sought.

The validity of the deportation in the present case

[29] In principle there is a clear distinction between extradition and deportation.[17] Extradition involves basically three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting state. Deportation is essentially a unilateral act of the deporting state in order to get rid of an undesired alien. The purpose of deportation is achieved when such alien leaves the deporting state's territory; the destination of the deportee is irrelevant to the purpose of deportation. One of the important distinguishing features between extradition and deportation is therefore the purpose of the state delivery act in question. Where deportation and extradition coincide in effect, difficulties can arise in practice in determining the true purpose and nature of the act of delivery. This will, to the extent relevant to the present case, be dealt with later in this judgment.

[30] In its judgment the court below relied heavily on British and Commonwealth authority on the question of extradition and deportation. In argument in this Court counsel for the government did likewise. In Britain and the rest of the Commonwealth the universally accepted view has long been that surrender may not be granted in the absence of a treaty obligation and statutory warrant; at the very least there must be statutory warrant. In this regard Lord Denning

17 See, generally, Shearer *Extradition in International Law* (The University Press, Manchester, 1971) 76—7, Botha "Extradition" in Joubert (ed) *The Law of South Africa* First Reissue vol 10 part 1 paras 279 and 283, and Botha "Aspects of extradition and deportation" (1993 — 4) *SA Yearbook of International Law* 163.

MR stated the following in *R v Brixton Prison (Governor), Ex parte Soblen*:[18]

> "It is unlawful, therefore, for the Crown to surrender a fugitive criminal to a foreign country unless it is warranted by an extradition treaty with that country."[19]

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18 (1962) 3 All ER 641(CA) 659F─660B and Shearer, id, at 24─6 and the authorities there cited.

19 Id at 659I.

[31] In Britain the Crown has had a royal prerogative to expel aliens and send them home, whenever it considered that their presence in Britain was not conducive to the public good.[20] This prerogative has, at least since 1953, been supplanted by statute. Under the Aliens Order 1953 there was a power in the Crown to deport an alien if the Secretary of State "deems it to be conducive to the public good" under article 20(2)(b)[21] and in terms whereof the Home Secretary was clearly empowered to choose the ship or aircraft and thus the alien's destination. The Aliens Order has been replaced by section 3(5)(b) and schedule 3 of the Immigration Act, 1971, which likewise supplant the prerogative.

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20 Id at 660D.

21 Id at 660G.

[32] The position in this country must be considered in the light of the Constitution and the relevant legislation. In *President of the Republic of South Africa and Another v Hugo*[22] this Court came to two important conclusions regarding prerogative powers under the interim Constitution. First, the powers of the President which are contained in section 82(1) of the interim Constitution have their origin in the prerogative powers exercised under former constitutions by South African heads of state; second, there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in section 82(1).[23] This is equally so under the present Constitution and its equivalent provisions and was expressly so held in *Hugo*.[24] The powers of the President under the present Constitution originating from the royal prerogative are those in section 84(2). This subsection does not provide for any power to deport an alien.

[33] Accordingly the state's power to deport, relevant to the present case, can be derived only from the provisions of the Act. Chapter VI, in sections 44 to 51, deals extensively with the state's power to deport prohibited persons and non-citizens. None of these provisions empowers the state to determine the destination of such deportation, but regulation 23, promulgated under the provisions of section 56, does.

[34] Regulation 23, dealing with the destination of such removal, reads as follows:

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22 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

23 Id at para 8.

24 Id at para 9.

"23. Any person to be removed from the Republic under the Act, shall —
(a) if he or she is the holder of a passport issued by any other country or territory, be removed to that country or territory; or
(b) if he or she is not the holder of such a passport —
(i) be removed to the country or territory of which he or she is a citizen or national; or
(ii) and if he or she is stateless, be removed to the country or territory where he or she has a right of domicile."

[35] Counsel devoted much time in argument to the question whether the provisions of this regulation are peremptory or not. In our view such an approach is too narrow. The additional question is whether the destinations enumerated in regulation 23 constitute a closed category. The word "shall", which introduces the provisions of paragraphs (a) and (b) dealing with what is to be done with a person who "is to be removed from the Republic under the Act", is clearly mandatory in form and there is nothing in the context to indicate the contrary. Once it has been decided to remove such person and such decision persists, whether the decision to remove is obligatory or permissive, the state has no discretion but to remove the person to the destination as prescribed in paragraphs (a) and (b). The further question, however, is whether the state has any power regarding the determination of the destination to which the person is to be removed under this regulation over and above that provided for in the regulation.

[36] In our view it clearly has not. The state has no remaining prerogative power to deport, for such power is not included in section 84(2) of the Constitution. Its power to deport and determine the destination of such deportation can only be found within the four corners of the Act and the regulations. In terms of regulation 23 such power is limited, regarding destination, to the places mentioned in paragraphs (a) and (b) thereof and determined in the manner therein

prescribed. In any event it is clear that regulation 23 comprehensively covers all possibilities; the person with a passport, the person who is a citizen or national of a country and the stateless person. It covers the field of any common law power the state might have had.

[37] It is common cause on the facts of this case that if the destination of deportation is to be determined exclusively by the provisions of regulation 23, the United States is not a destination permitted by the regulation. It follows that in the present case the South African authorities were not empowered to deport Mohamed to the United States. The argument on behalf of the government that Mohamed allegedly consented to his deportation to the United States and that such consent validated such deportation will be considered later.

Deportation or extradition and the death penalty

[38] The lawfulness of the conduct of the South African immigration officers in handing over Mohamed to the FBI for them to take him to the United States was challenged on a further, even more fundamental and entirely different basis. The argument is derived from the obligation imposed on the South African state by the Constitution to protect the fundamental rights contained in the Bill of Rights.[25] The rights in issue here are the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way.[26] According to the argument the Constitution not only enjoins the South African government to

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25 Section 7(2) of the Constitution provides as follows:
"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
In terms of s 8(1) of the Constitution the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state."

26 Above n 8.

promote and protect these rights but precludes it from imposing cruel, inhuman or degrading punishment. The Constitution also forbids it knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of such punishment. In particular, so the argument runs, this strikes at the imposition of a sentence of death. Therefore, even if it were permissible to deport Mohamed to a destination to which he had consented and even if he had given his informed consent to such removal, the government would have been under a duty to secure an undertaking from the United States authorities that a sentence of death would not be imposed on him, before permitting his removal to that country.

[39] The cornerstone of this argument is the finding of this Court in *S v Makwanyane and Another*[27] that capital punishment is inconsistent with the values and provisions of the interim Constitution. When, subsequent to this decision, the Constitutional Assembly came to deal with a Bill of Rights for the "final" Constitution, capital punishment was raised as an issue and the question whether there should be an exception to the right to life permitting such punishment was debated.[28] No such exception was, however, made; nor is there anything in the 1996 Constitution to suggest that the decision in *Makwanyane* has ceased to be applicable. On the contrary, the values and provisions of the interim Constitution relied upon by this Court in holding that the death sentence was unconstitutional are repeated in the 1996 Constitution. The

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27 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

28 The question whether, in the light of the decision in *Makwanyane*, an exception should be made to the right to life to allow for the death sentence to be passed in serious cases, was thoroughly debated in the course of the deliberations of the Constitutional Assembly, e.g. during the second reading debate on 7 May 1996. Among other matters, the question of a qualification to the right to life to allow for the death sentence was expressly raised and debated. Ultimately a decision was taken that this should not be done. Although unanimity could not be reached on this particular question, the Constitution was adopted by an overwhelming majority of the members of the Constitutional Assembly.

importance of human dignity to which great weight was given in *Makwanyane* is emphasised in the 1996 Constitution by including it not only as a right, but also as one of the values on which the state is founded.[29]

[29] Section 1(a) of the Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

[40] In the various judgments given in *Makwanyane* the history of capital punishment, its application in South Africa under apartheid, the attitude of other countries to such punishment, and the international trend against capital punishment in recent times were dealt with at length. This Court, after a full and detailed consideration of the relevant provisions of the interim Constitution and the arguments for and against capital punishment, concluded unanimously that the death sentence was inconsistent with the values and provisions of the interim Constitution. There is no need to cover that ground again. It should be added, however, that the international community shares this Court's view of the death sentence, even in the context of international tribunals with jurisdiction over the most egregious offences, including genocide.[30] Counsel for

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30 In 1993 the Security Council unanimously adopted the statute for the International Criminal tribunal for the former Yugoslavia (Resolution 827 (1993)). In paragraph 1 of the resolution it approved the report of the Secretary-General of 3 May 1993 in which he recommended in paragraph 112 that "[t]he International Tribunal should not be empowered to impose the death penalty". That is reflected in Article 24 which provides that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment". See Morris and Scharf *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* Vol 1 (Transnational Publishers Inc, New York, 1995) at 274 and especially fn 713. Even in the face of the terrible genocide in Rwanda where over 500 000 people were murdered, the Security Council was not prepared to compromise on the inclusion of the death penalty. The statute was adopted by the Security Council with one dissent (Rwanda) and one abstention (China). In terms of Article 23 the penalty which may be imposed by a trial chamber is limited to imprisonment. In its explanation of vote on Resolution 955, New Zealand stated:

the government correctly accepted that capital punishment is also inconsistent with the values and provisions of the 1996 Constitution and that the issues in this appeal must be dealt with on the basis of the decision in *Makwanyane*.

> "For over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable ― and a dreadful step backwards ― to introduce it here."

Morris and Scharf *The International Criminal Tribunal for Rwanda* Vol 1 (Transnational Publishers Inc, New York, 1998) at 71―2. During the Rome Diplomatic Conference which drafted and adopted the Statute for the International Criminal Court there was much long debate on capital punishment. In the end it was agreed to exclude it as a competent sentence. In all 139 states signed the ICC Statute and 31, including South Africa, have ratified or acceded to the treaty.

[41] As had been the case in the High Court, much of the argument in this appeal was directed to the question whether the removal of Mohamed to the United States was a deportation or a disguised extradition. The distinction was said to be this. If he was deported that would have been a lawful act on the part of the South African government. The fact that Mohamed was to be "deported" to the United States where he would immediately be put on trial for an offence that carried the death penalty was not relevant. There is nothing in our Constitution that precluded the government from deporting an undesirable alien, or that required it to secure an assurance from the United States government that the death sentence would not be imposed on Mohamed if he were to be convicted. If, however, what happened was in substance an extradition, it would have been unlawful because the correct procedures were not followed. Moreover, if the removal had been effected by way of extradition, it might have been necessary to secure an assurance from the United States government as a condition of the extradition that the death sentence would not be imposed.[31]

[42] Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one state to another state of a person convicted or accused there of a crime, with the purpose of enabling the receiving state to deal with such person in accordance with the provisions of its law. The purposes may, however, coincide where an illegal alien is "deported" to another country which wants to put him on trial for having committed a criminal offence the

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[31] Cf *Mackeson v Minister of Information, Immigration and Tourism and Another* 1980 (1) SA 747 (ZR) at 753─7.

prosecution of which falls within the jurisdiction of its courts.

[43] Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the "deportation" or "extradition" is carried out.

[44] Mohamed entered South Africa under an assumed name using a false passport. He applied for asylum giving false information in support of his application and was issued with a temporary visa to enable him to remain in South Africa while his application was being considered. Those facts justified the South African government in deporting him. That, however, is only part of the story, for the crucial events are those that happened after Mohamed had secured his temporary visa. Having been identified by the FBI as a suspect for whom an international arrest warrant had been issued in connection with the bombing of the United States embassy in Tanzania, he was apprehended by the South African immigration authorities in a joint operation undertaken in cooperation with the FBI. Within two days of his arrest and

contrary to the provisions of the Act he was handed over to the FBI by the South African authorities for the purpose of being taken to the United States to be put on trial there for the bombing of the embassy. On his arrival in the United States he was immediately charged with various offences relating to that bombing and was informed by the court that the death sentence could be imposed on him if he were convicted. That this was likely to happen must have been apparent to the South African authorities as well as to the FBI when the arrangements were made for Mohamed to be removed from South Africa to the United States.

[45] Another suspect, Mr Mahmoud Mahmud Salim, alleged to be a party to the conspiracy to bomb the embassies, was extradited from Germany to the United States. Germany has abolished capital punishment and is also party to the European Convention on Human Rights. The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted, Salim will not be sentenced to death. This is consistent with the practice followed by countries that have abolished the death penalty.

[46] Recently, in *Minister of Justice v Burns,*[32] the Supreme Court of Canada had occasion to reconsider its attitude to the extradition of fugitives to a country where they would face the death penalty. It had previously been held by a majority of that Court in *Kindler v Canada (Minister of Justice)*[33] and *Reference re Ng Extradition (Canada)*[34] that there was no obligation on Canada before extraditing a suspect to a country that has the death penalty to seek an assurance from the

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32 *United States v Burns*, 2001 SCC 7, as yet unreported.

33 (1991) 6 CRR (2d) 193.

34 (1991) 6 CRR (2d) 252.

receiving state that the death penalty will not be imposed. In a unanimous judgment the Court held in *Burns*[35] that in the light of developments since the decisions in *Kindler* and *Ng*, there is now an obligation on the Canadian government, in the absence of exceptional circumstances, to seek such an assurance. The Court deliberately refrained from anticipating what those circumstances might be.[36]

[47] The decision in *Burns* turned on section 7 of the Canadian Charter which provides that:

> "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the provisions of fundamental justice."

The two suspects whose extradition was sought faced charges of murdering the father, mother and sister of one of them, in what are described in the judgment as "brutal and shocking coldblooded murders". After weighing the factors for and against extradition without assurances, the Court concluded that in the circumstances of that case, extradition without assurances that the death penalty would not be imposed violated the principles of fundamental justice, and was not justifiable under section 1 of the Charter.[37]

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35 At paras 131–2.

36 At para 65.

37 Section 1 provides that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a

free and democratic society".

[48] Our Constitution provides that "everyone has the right to life".[38] There are no exceptions to this right. However, like all other rights in the Bill of Rights, it is subject to limitation in terms of section 36 of the Constitution. The requirements prescribed by section 36 are that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those mentioned in the section.[39] These considerations were taken into account by this Court in *Makwanyane* in holding that capital punishment was not justifiable under the interim Constitution. In the light of

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38 Section 11.

39 Factors that have to be taken into account in terms of the section are:
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

these provisions of our Constitution we can revert to the argument mentioned above[40] that a "deportation" or "extradition" of Mohamed without first securing an assurance that he would not be sentenced to death or, if so sentenced, would not be executed would be unconstitutional.

40 Above para 38.

[49] In *Makwanyane* Chaskalson P said that by committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that "this must be demonstrated by the State in everything that it does".[41] In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.

[50] Counsel for the government contended that although this requirement might be applicable to extraditions, it is not applicable to deportations. In support of this contention he relied on a series of Canadian cases the last of which is *Halm v Canada (Minister of Employment and Immigration)(T.D.)*[42] and on the judgment of the Court of Appeal of England and Wales in *Soblen*.[43] These cases dealt with the validity of deportation proceedings in circumstances where the deported person was likely to face a criminal charge in the country to which he or she was to

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41 Above n 27 at para 144.

42 [1996] 1 F.C 547.

43 Above n 18.

be deported. In all the cases a challenge to the procedure adopted based on a contention that there should have been a resort to extradition and not deportation was rejected.

[51] The decisions in these cases are referred to in the judgment of the High Court. They are, however, not directly relevant to the question that has to be decided in the present case, which depends upon the values and provisions of our Constitution. *Soblen*'s case was decided before the implementation in Britain of the European Convention on Human Rights. At that time there were no constitutional or treaty constraints which curtailed the powers of the executive. The only question was whether the removal of the applicant complied with the requirements for deportations under English law. The Court held that it did. That decision is of little assistance in deciding what our Constitution required our government to do in the present case.

[52] The Canadian cases were all decided before the decision of the Supreme Court of Canada in *Burns*. Canadian law did not then consider the removal of a person to another country where he or she would face a death sentence to be contrary to the principles of fundamental justice. In *Kindler,* La Forest J suggested that there is no reason why the same considerations should not apply to deportations and extraditions in determining what is required to meet the standards of the fundamental principles of justice.[44] The deportation cases may therefore have to be reconsidered by the Canadian courts in the light of the decision in *Burns* if in the future deportation rather than extradition is used as the means of removing a fugitive to a country where he or she faces the death penalty.

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44 Above n 34 at 203.

[53] But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated.[45] There can be no doubt that the removal of Mohamed to the United States of America posed such a threat. This is perhaps best demonstrated by reference to the case of Salim who was extradited from Germany to the United States subject to an assurance that the death penalty would not be imposed on him. This assurance has been implemented by the United States and Salim is to be tried in proceedings in which the death sentence will not be sought.

[54] If the South African authorities had sought an assurance from the United States against the death sentence being imposed on Mohamed before handing him over to the FBI, there is no reason to believe that such an assurance would not have been given. Had that been the case, Mohamed would have been dealt with in the same way as his alleged co-conspirator Salim. The fact that Mohamed is now facing the possibility of a death sentence is the direct result of the

45 Albeit subject to possible limitation under s 36.

failure by the South African authorities to secure such an undertaking. The causal connection is clear between the handing over of Mohamed to the FBI for removal to the United States for trial without securing an assurance against the imposition of the death sentence and the threat of such a sentence now being imposed on Mohamed.

[55] It is not only sections 10 and 11 of the Constitution that are implicated in the present case. According to section 12 (1)(d) and (e) of our Constitution, everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. For the reasons given in *Makwanyane*, South African law considers a sentence of death to be cruel, inhuman and degrading punishment.

[56] Article 3 of the European Convention on Human Rights provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". In *Soering v United Kingdom*[46] the European Court of Human Rights held that:

> "[i]t would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's

46 (1989) 11 EHRR 439.

view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."[47]

47 Id at para 88.

[57] *Soering*'s case was concerned with extradition, but similar sentiments were expressed by the same Court in *Hilal v United Kingdom*,[48] a case dealing with the deportation of a Tanzanian citizen from the United Kingdom to Tanzania, which was held to breach Article 3 of the Convention because the deportee would face a serious risk of being subjected to torture or inhuman and degrading treatment in Tanzania. The Court there said:

> "The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (e.g. the *Ahmed v Austria* . . . and *Chahal v the United Kingdom* judgment[s])."[49] (Citations omitted.)

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48 Application no. 45276/99, 6 March 2001.

49 Id at para 59.

[58] An equally instructive case is *Chahal v United Kingdom*[50] where the Grand Chamber of the European Court of Human Rights held that deportation of an individual to his state of origin where he would face inhuman or degrading treatment or punishment would be contrary to the provisions of Article 3 of the Convention. The Court said it was:

> "well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct . . . The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[51] (Footnote omitted.)

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50 (1996) 23 EHRR 413.

51 Id at para 79–80.

[59] These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights[52] and the positive obligation that it imposes on the state to "protect, promote and fulfil the rights in the Bill of Rights".[53] For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment.

[60] The fact that the government claims to have deported and not to have extradited Mohamed is of no relevance. European courts draw no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. Nor does the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of which South Africa is a signatory and which it ratified on 10 December 1998. Article 3(1) of this Convention provides:

> "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[54]

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52 Section 39(2).

53 Section 7(2).

54 "Torture" is defined in Article 1(1) as including "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed . . . ", while providing that "torture" does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions".

It makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case.

[61] The removal of Mohamed to the United States could not have been effected without the cooperation of the South African immigration authorities. They cooperated well knowing that he would be put on trial in the United States to face capital charges. That he should be arrested and put on trial was clearly a significant and possibly the predominant motive that determined the course that was followed. Otherwise, why instruct the officials at the border to prevent him from leaving South Africa? And why cooperate in the process of sending him to the United States, a country with which he had no connection? They must also have known that there was a real risk that he would be convicted, and that unless an assurance to the contrary were obtained, he would be sentenced to death. In doing so they infringed Mohamed's rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights.

Consent to deportation or extradition

[62] A submission strenuously advanced on behalf of the government was that Mohamed had consented to his removal to the United States, whether the removal is properly to be characterised as a deportation or a disguised extradition. It is open to doubt whether a person in

Mohamed's position can validly consent to being removed to a country in order to face a criminal charge where his life is in jeopardy.[55] The authorities ought not to be encouraged to obtain

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55 As to waiver generally, see *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA) at 242G─H and 244D─E; *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734─ 5; *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review and Another* [1966] NZLR 1032 (CA) at 1042─3. In *S v Shaba and Another* 1998 (2) BCLR 220 (T) at 221H─I, the court held that the private law doctrine of waiver is not applicable to inalienable fundamental rights. An individual may choose not to exercise a constitutionally protected right, but is always free to change his or her mind without penalty. De Waal et al *The Bill of Rights Handbook* 4 ed (Juta, Cape Town, 2001) at 42─3, while suggesting t hat many "freedom rights" may be waived, are of the view that rights to human dignity, life, and the right not to be discriminated against cannot be waived. In a similar vein, the German Federal Administrative Tribunal's *Peep Show* decision BVerwGe 64, 274 (1981) [English translation by Michalowski and Woods *German Constitutional Law – The Protection of Civil Liberties* (Ashgate/Dartmouth, Aldershot, 1999) at 105] states that "[h]uman dignity is an objective, indisposable value, the respect of which the individual cannot waive validly." In *Basheshar Nath v The Commissioner of Income-Tax, Delhi & Rajasthan & Another* [1959] Supp 1 SCR 528, Das CJ of the Indian Supreme Court held that equality rights (Article 14) involve important public policy considerations and can therefore not be waived (at 550─3). In concurring opinions, Bhagwati (at 556─65) and Subba Roa JJ (at 606─22) stated that *all* fundamental constitutional rights were instituted for public

consents of such a nature.

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policy reasons. In *Olga Tellis and Others v Bombay Municipal Corporation* [1986] 73 AIR 180 (SC) at paras 27—30, the court held that litigants can never be estopped from claiming any fundamental right. See also *Behram Khurshed Pesikaka v The State of Bombay* [1955] 1 SCR 613 at 653—4. Seervai *Constitutional Law of India – A Critical Commentary* Vol 1, 4 ed (Universal Book Traders, Delhi, 1999), paras 8.41—61, takes a narrower view. In his opinion, most fundamental rights, including equality, "are conferred primarily for the benefit of individuals, and can, therefore, be waived". There are some, like the prohibition of "untouchability" (Article 17), that have important public policy ramifications and cannot be waived. In *R v Tran* [1995] 92 CCC (3d) 218 at 254, the Canadian Supreme Court held that "there will be situations where [a s. 14 Charter] right simply *cannot*, in the greater public interest, be waived". In *R v Richard* [1997] 110 CCC 3d 385 at 396, the court held that while certain constitutional rights may in some circumstances be waived, "the manner in which such a waiver may be made, the extent to which such rights can be waived and the effect of a waiver may vary with the nature and scope of the right in question". The United States approach, by contrast, is to allow almost any right, whether or not constitutionally based, to be irretrievably waived by an individual; see *Peretz v US* 501 US 923, 936 (1991): "The most basic rights of criminal defendants are . . . subject to waiver"and *US v Mezzanatto* 513 US 196, 203 (1995).

[63] We did not have the benefit of full argument on this issue and it would accordingly be unwise to express a view on it. We will, without deciding, assume in favour of the respondents, that a proper consent of such a nature would be enforceable against Mohamed. To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.[56]

[64] An indispensable component of such consent would be awareness on the part of Mohamed that he could not lawfully be delivered by the South African authorities to the United States without obtaining an undertaking as a condition to such delivery that if convicted the death sentence would not be imposed on him or, if imposed, would not be carried out. Clearly this duty on the part of the South African government was important to Mohamed; and, inevitably, any consent given by him in ignorance of that duty and of the literally vital protection it afforded him, was inchoate. And it must remain such unless and until it is shown that the

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[56] *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) at 778E─F; *Laws v Rutherford* 1924 AD 261 at 263. See also *S v Gasa & Others* 1998 (1) SACR 446 (D) at 448B and *S v Pienaar* 2000 (7) BCLR 800 (NC) at 805C. The Canadian Supreme Court, in the context of the right to trial by jury, stated in *Korponey v Attorney-General of Canada* [1982] 65 CCC (2d) 65 at 74 (affirmed by *R v Lee* [1990] 52 CCC (3d) 289 at 306─9), that any waiver "is dependent upon it being *clear and unequivocal*" and must be made "*with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process*" (emphasis in the original). See also *Clarkson v The Queen* [1986] 25 CCC (3d) 207 at 217─9, *R v Evans* [1991] 63 CCC (3d) 289 at 307, *Mills v The Queen* [1986] 26 CCC (3d) 481 at 544─6, and *R v Morin* [1992] 71 CCC (3d) 1 at 15.

unqualified consent by Mohamed to be taken to New York, there to be put on trial for his life, was given at a time when he knew and understood his right to demand of the South African authorities that they perform their duty to uphold the Constitution.

[65] The onus to prove such waiver is on the government. Terblanche and Christians allege Mohamed freely, if not eagerly, chose to go to New York in the custody of the FBI agents. Mohamed flatly denied this. So direct and one-dimensional a dispute of fact cannot really be resolved on the affidavits. Nor is it possible to ascertain a clear preponderance of probabilities in favour of the government version. Although a show of bravado fired by religious fervour could explain why Mohamed would have opted for New York, it does remain curious that he would willingly put his life in jeopardy. Nevertheless and notwithstanding Mohamed's denial on oath, we will assume in favour of the government that its factual version of the consent has been sufficiently established on the papers before us. This would still not assist it, for two reasons.

[66] First, none of the government deponents even suggests that Mohamed was aware of his crucial right to demand this protection against exposure to the death penalty. Indeed, there is no suggestion that any of the South African government officials concerned (Terblanche, Christians or the NDPP) ever considered this feature, let alone contemplated informing Mohamed about it. On the contrary, the impression created by their affidavits is that they were content to let Mohamed go to New York once he had made the election to do so. And if regard is had to the surrounding circumstances there can be little doubt that they were actually keen for him to choose that option: the United States officials, having run one of the embassy bombers to ground in Cape Town, were eager to bring him to book. That their South African counterparts actively

cooperated in this endeavour is evident from Terblanche's initial message to his head office that Mohamed should be detained if he tried to leave the country and the sentiments expressed by the Minister at the FBI briefing in New York, followed by the close liaison and teamwork in Cape Town from the time Mohamed had been identified from the South African immigration records to his removal to the United States.

[67] In the second place, there is the profoundly disturbing circumstance that, on the government's own showing, Mohamed was at no time afforded the benefit of consulting a lawyer. That Mohamed was in a very serious predicament is self-evident. Indeed, for him it was a matter of life and death. He was a relatively uneducated young man, untrained in the law, a fugitive in a foreign land facing numerous grave charges in yet another foreign country and being interrogated in isolation by two separate sets of law-enforcement agents. Terblanche and Christians were aware of the fundamental right of every detainee to independent legal advice and knew it was their duty promptly to inform Mohamed of this right.[57] They say that upon Mohamed's arrest by Terblanche and again when Christians commenced the interrogation at the holding facility, he was informed of this right and waived it. They do not say that the seriousness of the case or the statutory and constitutional options were mentioned to him. In any event, Mohamed denies having been informed of this right and the statement minuted by Christians is silent on the point. When Dalvie raised with Terblanche the possibility of arranging legal representation for Mohamed, he was brushed off with the laconic statement that it would be

[57] In terms of s 35(2)(b) of the Constitution "[e]veryone who is detained . . . has the right . . . to choose, and to consult with, a legal practitioner, and to be informed of this right promptly". The principle underlying this constitutional provision is, of course, recognised in open and democratic societies. In the present case it would suffice to refer to *Miranda v Arizona* 384 US 436 (1966) and *Escobedo v Illinois* 378 US 478 (1964).

a waste of money and that Dalvie himself could not visit Mohamed. Mohamed was at that stage still being detained at Cape Town International Airport and competent legal advice could have made a crucial difference to the subsequent course of events. It follows that the election Mohamed allegedly made there and then to accompany the FBI agent to the United States must have been to some extent influenced by his being cut off from legal advice. Although we do not pertinently find that there was an infringement of the constitutional right to consult a lawyer, the circumstances support the finding that there was a material impairment of Mohamed's ability validly to waive any of his rights.

[68] We accordingly conclude that it has not been established that any agreement which Mohamed might have expressed to his being delivered to the United States constitutes a valid consent on which the government can place any reliance. Its contention in this regard is accordingly rejected. The handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful.

[69] That is a serious finding. South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the state lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto

himself; it invites anarchy."[58]

The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the state bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the state acts unlawfully. Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice. They also acted inconsistently with statute in unduly accelerating deportation and then despatching Mohamed to a country to which they were not authorised to send him.

The relief to be ordered

[70] One of the grounds of opposition advanced on behalf of the government — and one that found favour with the High Court — was that it would be wrong for a South African court to

58 277 US 438, 485 (1928).

issue any declaratory order expressing disapproval of the arrest, detention, interrogation and transfer of Mohamed to the FBI agents. He was an alien who had entered South Africa fraudulently and had left its jurisdiction. With regard to the prayer for mandatory relief in the form of an order on the government to seek to intercede with the United States authorities regarding the wrong done to Mohamed, the government's opposition to any form of order was even more forceful. More specifically it was submitted that any such an order would infringe the separation of powers between the judiciary and the executive. In substance the stance was that Mohamed had been irreversibly surrendered to the power of the United States and, in any event, it was not for this Court, or any other, to give instructions to the executive.

[71] We disagree. It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case. In the first instance, quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that we say plainly what our conclusions as to those issues are. And as far as the particular interests of Mohamed are concerned, we are satisfied that it is desirable that our views to be appropriately conveyed to the trial court. Not only is the learned judge presiding aware of these proceedings,[59] but the very reason why they were instituted by the applicants was said to be that our findings may have a bearing on the case over which he is presiding. On the papers there is a conflict of opinion as between one of the defence lawyers on the one hand and a member of the prosecution team on the other, both of whom have filed affidavits expressing their respective views as to the admissibility and/or cogency in the criminal

[59] Indeed, Judge Sand specially authorised the expenditure of funds to enable Mohamed's court-appointed defence team to pursue his interests in the South African courts, urging that such proceedings be concluded with all due expedition.

proceedings of any finding we might make. It is for the presiding judge to determine such issues. For that purpose he may or may not wish to have regard to disputed material such as our findings. It is therefore incumbent on this Court to ensure as best it can that the trial judge is enabled to exercise his judicial powers in relation to the proceedings in this Court; and an appropriate order to that end will be made.

[72] Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of state in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of state power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa,[60] namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty[61] to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights. On the facts of the present case, however, and bearing in mind the advanced state of the proceedings in New York, we believe that the most appropriate and effective order is the one that follows below.

Costs

[73] The applicants would ordinarily have been entitled to an order for costs in their favour, not only following their success in the suit but because they had raised against the government

60 Section (1)(c) of the Constitution.

61 Under s 7(2) read with ss 38and 172(1)(a) of the Constitution.

constitutional issues of general importance. However, in this particular case it would not be appropriate to make such an order. We were told by counsel for the applicants that pursuant to an order issued by the judge presiding in the criminal case, the litigation on behalf of Mohamed in South Africa was funded by the United States government. We were also told that any additional costs that may have been incurred by Dalvie as a result of his participation were negligible. An order for costs in favour of the applicants would therefore effectively oblige the South African government to reimburse the United States government, for whose benefit and at whose instance Mohamed had been handed over. Accordingly no order as to the costs in this court will be made. The order in the court below directing the applicants to pay the government's costs in that court must obviously be set aside.

The order

[74] The following order issues:

1. Non-compliance by the applicants with the requirements of the Constitutional Court Rules, 1998 is condoned and leave is granted to appeal directly to this Court.

2. The appeal is upheld.

3. The order in the court below is set aside and in its place the following order is made:

3.1 It is declared that the handing over of Mohamed at Cape Town on or about 6 October 1999 by agents of the South African government to agents of the United States for removal by the latter to the United States for him to stand trial in the Federal Court for the Southern District of New York on criminal charges in respect of which he could, if convicted, be sentenced to

death, was unlawful in that:

3.1.1 It infringed Mohamed's rights under sections 10, 11 and 12(1)(d) of the Constitution to human dignity, to life and not to be treated or punished in a cruel, inhuman or degrading way, inasmuch as a prior undertaking was not obtained from the United States government that the death sentence would not be imposed on Mohamed or, if imposed, would not be executed.

3.1.2 In terms of the provisions of Chapter VI of the Aliens Control Act 96 of 1991 read with regulation 23 of the Aliens Control Regulations published under section 56 of the said Act, there existed at the time of Mohamed's removal from the Republic of South Africa no authority in law to deport or purportedly to deport or otherwise to remove or cause the removal of Mohamed from the Republic to the United States.

3.1.3 In terms of section 52 of the Aliens Control Act 96 of 1991 the removal of Mohamed from the Republic could not validly be effected before the expiry of a period of three days after he had been declared a prohibited person.

4. There is no order as to costs.

5. The Director of this Court is authorised and directed to cause the full text of this judgment to be drawn to the attention of and to be delivered to the Director or equivalent administrative head of the Federal Court for the Southern District of New York as a matter of urgency.

Chaskalson P Madala J Sachs J

THE COURT

Ackermann J	Mokgoro J	Yacoob J
Goldstone J	Ngcobo J	Madlanga AJ
Kriegler J		Somyalo AJ

For the applicants / appellants: MA Albertus SC and A Schippers (instructed by J Ramages Attorneys, Athlone).

For the respondents: HP Viljoen SC and N Bawa (instructed by the State Attorney, Cape Town).

For the amici curiae: A Katz and R Paschke (instructed by the Legal Resources Centre, Cape Town).