

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Mohamed and another v President of Republic of South Africa and others

CCT 17/00

Decided on 28 May 2001

MEDIA SUMMARY

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

Mr Mohamed, a Tanzanian, is on trial in New York on numerous capital charges arising out of the bombing of the United States embassy in Dar es Salaam in 1998. The FBI traced him to Cape Town where he was living under an assumed name and with a false passport. He was arrested and interrogated by South African immigration authorities as an illegal immigrant and handed over to the FBI for removal to the United States where the court told him he was facing the death penalty.

The Cape High Court later ordered the government to give Mohamed and the second applicant, his former employer/landlord in Athlone, the official information relating to the arrest and handing over. They then applied to that Court for an order invalidating as unconstitutional the removal to the United States without a condition that Mohamed would not be executed and that the government direct a corresponding request to the Secretary of State and the Attorney-General of the United States. The application failed and leave to appeal directly to this Court was urgently sought.

In this Court the applicants (supported by the Society for the Abolition of the Death Penalty and the Human Rights Committee Trust) argued that the handing over and subsequent removal were a disguised extradition without a safeguard against the death sentence. The South African officials were said also to have breached the law relating to deportation (under the Aliens Control Act 96 of 1991 and its regulations). This infringed Mohamed's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment. The government argued that Mohamed had been liable to deportation for illegally entering the country, had lawfully been arrested and at his request had properly been deported to the United States and not Tanzania.

The Court found that whether the removal was a deportation or an extradition, the ruling in *S v Makwanyane and Another* that capital punishment was inconsistent with the values and provisions of the interim Constitution applied with even greater force to the final Constitution. South Africa cannot expose a person to the risk of execution, whether by deportation or extradition and regardless of consent. Also, the Act did not permit deportation of Mohamed to the US. In any event, assuming Mohamed to have consented, he could not validly do so: he was unaware of his right under the Act to appeal against deportation and the right to insist that the South African authorities make his

deportation/extradition subject to an undertaking that he would not be executed, while he was without legal advice.

The Court upheld the appeal, declaring the handing over unlawful in that (a) the absence of an undertaking that Mohamed would not be executed infringed his constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment; (b) it breached the Aliens Control Act. The Director of the Court was authorised and directed to draw the judgment to the attention of the trial court in New York as a matter of urgency.