



Samuel Kaunda and Others v. President of the Republic of South Africa, et al.

[2004] ZACC 5

Country: South Africa

Region: Africa

Year: 2004

Court: Constitutional Court

Health Topics: Prisons

Human Rights: Freedom from torture and cruel, inhuman or degrading treatment, Right to due process/fair trial, Right to liberty and security of person

Facts

The applicants in this case were 69 South African citizens held in Zimbabwe on a variety of charges, including the possession of and attempt to smuggle dangerous weapons. The applicants initially brought a claim before the High Court seeking to require that the South African Government: (1) take steps to have them extradited to South Africa so that any trial they would face would be conducted in South Africa; (2) seek assurances from the Zimbabwean Government that they would not be extradited to Equatorial Guinea; (3) seek assurances from the Zimbabwean and Equatorial Guinean governments that capital punishment would not be imposed on them; and (4) ensure their rights to dignity, to freedom and security of person including the rights not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, to fair detention and fair trial, as respectively guaranteed in sections 9, 12 and 35 of the Constitution of South Africa. The High Court dismissed the application, and the applicants applied for leave to appeal directly to the Constitutional Court.

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

The Court granted the application for leave to appeal but dismissed the appeal, holding that the right to diplomatic protection was not recognized by international law as a human right. Diplomatic protection could not be compelled as such and remained the prerogative of the State to be exercised at its discretion. The Court reasoned that the right to diplomatic protection was not expressly spelt out in the Bill of Rights and the Constitution of South Africa and could not be regarded as a right guaranteed by these instruments. Diplomatic protection could therefore not be required on the basis of customary international law or South African law.

The Court further emphasized that the Bill of Rights and the Constitution of South Africa did not provide for their application outside the frontiers of South Africa, and international law provided that laws of a State were applicable to nationals beyond the State's border only if the application of the law did not interfere with the sovereignty of other States. There could therefore be no positive obligation on the South African Government to ensure that South African law was applied in another State (*R v. Cook* [1998] 2 SCR 597 (Canadian Supreme Court)).

Moreover, Section 3 of the Constitution of South Africa was read as entitling South African citizens to a right to request the South African Government for protection under international law against human right abuses from foreign States. The decision as to whether or what protection was given was a function of the executive, and the Government had a duty to respond to such requests in good faith and rationally. Such decisions were subject to constitutional control, but the courts recognized that the Government had a wide discretion in dealing with matters of foreign affairs.

The Court stated that capital punishment was inconsistent with the provisions of the Bill of Rights and was thus unconstitutional. However, the South African Government's policy was to make representations concerning the imposition of capital punishment only if and when such punishment was imposed on a South African citizen. South African citizens were therefore entitled to the benefit of that policy but only once capital punishment was effectively imposed on them. As long as it had not been, there was no indication that

representations would not be made by the Government if capital punishment were to be imposed.

The South African Government could not be asked to seek assurances from a foreign country's government which detained South African citizens that they not be extradited to another State when no claim for extradition had actually been lodged, and cannot be reasonably expected to make demands on a foreign country's government on the assumption that they would act illegally and contrary to South Africa's rights under international law.

The South African Government's policy concerning the conditions of detention and the conduct of trials in foreign countries was to ensure that all South African citizens were detained in accordance with international standards, had access to their lawyers and received a fair trial; that policy was not inconsistent with international law or constitutional provisions. South African citizens were entitled to the benefit of this policy. The South African High Commission in Zimbabwe had made representations to the Zimbabwean authorities following the requests for assistance made by the applicants. The Court was not in a position to require or propose any approach to be adopted by the Government with regard to timing or modalities. In the applicants' case it could not be said that the South African Government had not taken steps in responding to the requests to ensure the rights to freedom and security of person and the right to fair detention and fair trial.

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Decision Excerpts

"Currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve. Diplomatic protection remains the prerogative of the state to be exercised at its discretion. It must be accepted, therefore, that the applicants cannot base their claims on customary international law. No contention to the contrary was addressed to us in argument." Para. 29.

"A right to diplomatic protection is not referred to in the Universal Declaration of Human Rights, nor is it a right contained in any international agreement of which I am aware, including the international human rights treaties to which South Africa is a party, such as the African Charter on Human and Peoples' Rights or the International Covenant on Civil and Political Rights. Our Constitution shows respect for international law, and although it includes rights which go beyond those recognised by international law and major human rights instruments, when it does so, it spells out the rights expressly." Para. 34.

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