Sneller Verbatim/rm

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 15343/06

2006-06-26

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 2/8/06 SIGNATURE

In the matter between

MUHAMED KHAN & OTHERS	Applicants
and	
MINISTER OF HOME AFFAIRS	First Respondent
SENIOR OFFICIAL IN CHARGE OF THE LINDELA DETENTION CENTRE	Second Respondent

JUDGMENT

BERTELSMANN, J: The applicants applied on 20 May 2006, by way of urgency, for their immediate release from the Lindela Detention Centre.

The applicants are foreigners, Pakistani nationals, who are allegedly present in the Republic of South Africa without the required permission or authorization by the first respondent. The first respondent is the Minister of Home Affairs, cited as such in the

official capacity of care of the State Attorney, Pretoria. The second respondent is the senior official in charge of the Lindela Detention Centre, the facility where officials of the first respondent detain illegal foreigners prior to their deportation, pending their return to their countries of origin.

The present application is the second urgent application brought within a matter of days for the release of the applicants. On 17 May 2006 the court granted the first order, directing the officials of the first respondent to release the applicants from detention. At that stage the applicants were allegedly held in terms of section 41 of the Immigration Act, Act 13 of 2002, (hereinafter referred to as "the Act"). The court held that the first respondent's officials had not complied properly and strictly with the provisions of the Act and consequently ordered the release of the applicants. In passing the court remarked during judgment that the applicants might be arrested or detained again in the future.

It is the applicants' case that when they were released from the Lindela Detention Centre in terms of the first court order on 19 May 2006, they were immediately approached by officials of the Department of Home Affairs, interrogated and detained again, clearly with the objective of deporting them to Pakistan purportedly in accordance with the Act.

Another urgent application was launched for their release. The court granted a *rule nisi*. The respondents were ordered to release the applicants immediately. Pending the return date, the respondents were further ordered to show cause why they should not be

interdicted from arresting or causing the applicants to be arrested, or deporting the applicants or causing the applicants to be deported, until there had been propor compliance with section 8 of the Act, and the applicants had exhausted their remedies in terms of that section. Pending the return date the applicants were ordered to stay at a fixed address and to report regularly to the Laudium Police Station. 5

On the extended return date the applicants moved for confirmation of the rule, while the respondents sought an order entitling them to deport the applicants.

In order to be able to determine whether or not the arrest and subsequent detention of the applicants was lawful, the relevant provisions of the Act must be considered. The sections that are relevant for purposes of this judgment are the following: 10

"Section 8

Review and appeal procedure. 15

(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and

a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or 20

b) in any other case than the one provided for in paragraph (a), that request shall be submitted to 25

the Minister within three day after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision -

a) in a case contemplated in subsection 1(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic or 5

b) in a case contemplated in subsection 1(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision. 10

(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision. 15

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within ten working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director General <u>for the review or appeal of that decision</u>. (My underlining.) 20 25

(5) The Director-General shall consider the application

contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

6. An applicant aggrieved by a decision of the Director-General contemplated in subsection 5 may, within ten working days of receipt of that decision, make an application in the prescribed manner to the Minister <u>for the review or appeal of that decision</u>. (My underlining.)

7. The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision."

"<u>Section 34</u>

Deportation and detention of illegal foreigners.

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by Director-General, provided that the foreigner concerned -

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by a warrant of a

Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner,

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court, which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four pm of the first following court day.

(3) The Director-General may order a foreigner subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses related to his or her deportation, detention, maintenance and custody and an officer may

in the prescribed manner enforce such payment of such deposit.

(4) Any person who fails to comply with an order made in terms of subsection (3) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000,00 or to imprisonment not exceeding 12 months.

(5) Any person other than a citizen or a permanent resident who having been -

(a) removed from the Republic or while being a subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or

(b) refused admission, whether before or after the commencement of this Act, has entered the Republic,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court, and, pending his or her removal, be detained in the manner and the place determined by the Director-General.

(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at

that time.

7. ...

8. A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.

9. ...

10. ...

11. ..."

"Section 41

Identification.

1. When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be

in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34. 5

(2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence." 10

"Section 49.

Offences.

(1) (a) Any one who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months. 15

2. ..." 20

The Scheme of the Immigration Act.

The Act provides for a variety of potential situations that may arise in dealing with persons that are alleged to be or are suspected of being illegal foreigners. An illegal foreigner is, according to the definition of the term in section 1 of the Act "a foreigner who is in the Republic in contravention of the Act." 25

In the first instance, a person regarded as an illegal foreigner may arrive at a port of entry into the Republic of South Africa ("the Republic") and may be refused entry by an immigration officer. (Section 8(1) of the Act read with section 34(8) and (9)). Persons prohibited from entering the Republic are foreigners who do not qualify for a visum, for admission into the Republic or for a temporary or permanent residence permit on the grounds set out in section 29(1) of the Act; or foreigners who have been declared undesirable in terms of section 30(1) thereof. 5

If an immigration officer finds that a person seeking entry into South Africa is an illegal foreigner, he is entitled to refuse entry to such person. The alleged illegal foreigner shall be informed by way of the 'prescribed form' that he or she may in writing request the Minister to review that decision. (Section 8(1)). 10

If such illegal foreigner has arrived on a vessel or 'other means of conveyance' that is about to depart the Republic, the request, if made, shall without delay be submitted to the Minister. If the vessel or other means of conveyance departs from the Republic before the Minister has made his decision, the person affected must depart from the Republic and await the outcome of the request for review outside the Republic. (Section 8(2)(a)). 15 20

In all other cases, i.e. those in which the alleged illegal foreigner is inside the Republic at the time the immigration officer finds that he is an illegal foreigner, the request for a review must be communicated to the Minister within three days after the immigration officer's decision. (Section 8(1)(b)). 25

In such event, the person affected may not be removed from the Republic before the Minister has confirmed the relevant decision.

The present wording of section 8 has been quoted above. This wording was introduced into the Act by Act 19 of 2004, the Immigration Amendment Act. It is important to note the wording of this section before its amendment. It read as follows:

"1. Before making a determination adversely affecting a person, the Department shall notify the contemplated decision and related motivation to such affected person and give such person at least ten calendar days to make representations, after which the Department shall notify such person either that such decision has been withdrawn or modified, or that it shall become effective, subject to subsection 2.

2. Within 20 calendar days of its notification, the person aggrieved by an effective decision of the Department may appeal against it -

a) to the Director-General, who may reverse or modify it within ten calendar days, failing which the decision shall be deemed to have been confirmed; or

b) within 20 calendar days of modification or confirmation by the Director-General, if any, to the Minister, who may reverse or modify it within 20 calendar days, failing which the decision shall be deemed to have been confirmed and be final,

provided that in exceptional circumstances or when such person stands to be deported as a consequence of such decision -

(i) the Minister may extend such deadline; and

(ii) at the request of the Department the Minister may request such person to post a bond to defray his or her deportation costs, if applicable; or

(c) within 20 calendar days of modification or confirmation by the Minister, if any, to a Court, which may suspend, reverse or modify it in accordance with its rules.

3. If not appealed in terms of subsection (2), a decision of the Department is final, subject to section 37 of this Act.

4. Any person adversely affected by a decision of the Department shall be notified in writing of his or her rights under this section and other prescribed matters and may not be deported before the relevant decision is final.

5. Notwithstanding subsection (1), as soon as notified to the person concerned in terms of subsection (4), the decision of an immigration officer refusing entry into the Republic shall be effective for the purposes of subsection (1) and final for purposes of deportation but subject to subsections (2) and (3)."

The section was amended by the Immigration Amendment Act and came into effect shortly after the Constitutional Court judgment

In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) was delivered, in which the provisions of section 34(1), (2), (8) and (9) of the Act were held to be constitutionally compatible, subject to an addition to subsection 8 being read in. It is evident that the amended section restricts the right of a person affected by a decision of an immigration officer to have the matter considered by higher authority solely to an administrative process, that ends with an application to the Minister. 5

On the other hand, however, the amended section expressly introduces the options of either a review or an appeal, that may be directed to the Director-General or, eventually, to the Minister. The original version provided only for representations and an appeal to the Director-General or the Minister. Although the express right granted to an affected person to appeal to the High Court against a negative decision by the Minister has been erased from the Statute, it is clear that access to the courts has not been restricted, although the affected person may now only be able to institute review proceedings that are purely administrative in nature. 10 15

During argument the question arose whether the Legislature's intention in framing the amended section as quoted above was to enable the affected person to object to the merits of the immigration officer's decision by way of an appeal; and could raise matters extraneous to the record of the proceedings by way of a review, such as, e.g. bias on the part of the immigration officer concerned against the affected person. 20 25

Although the wording is not without difficulty, the Legislature

clearly intended to ensure that the full range of administrative reviews and appeals was available to an affected person. From the amended wording it is also clear that the affected person is entitled to be fully informed of every administrative step that might be taken to secure a re-hearing of the matter by higher authority. This would be in compliance with the Promotion of Administrative Justice Act 3 of 2000. 5

While subsections (1) and (2) of section 8 deal with persons who are refused entry into the country, and make express reference to a prescribed form through which the relevant information concerning any right to appeal or review must be conveyed to the affected person, subsection (3) decrees that all other information of an adverse nature must be conveyed to the affected person in writing. Subsection (4) states that the person concerned may make an application for review or appeal "in the prescribed manner". The prescribed manner obviously refers to the forms that are published in terms of the Regulations under the Act. These are designed to record the information which the respondent's officials must convey to the affected person. They also inform the affected person how the review or appeal procedure to higher authorities should be instituted. 10 15 20

Decisions of an adverse nature, other than those contemplated in subsections (1) and (2) of section 8, are primarily decisions that may be taken in terms of section 28, the withdrawal of a permanent residents' permit (subsection 29) and declaration as a prohibited or an undesirable person (section 30); section 32 (Illegal foreigners must depart or shall be deported); section 34 (Deportation and detention of 25

illegal foreigners) and section 41 (identification of a person's status or identity).

For present purposes the provisions of section 41, section 34 and section 8 are important. Section 41 decrees that any immigration officer or a police officer may require any person to identify himself or herself as *inter alia* a foreigner. If the officer concerned suspects on reasonable grounds that the affected person is an illegal foreigner he may interview and take such person into custody without a warrant. The interview is obviously aimed at establishing the affected person's status relative to his or her entitlement to be in the Republic. The affected person must be assisted in the task of verifying her or his status. If necessary, the person concerned can be detained by the officer in terms of section 34. The original detention or arrest, i.e. before a decision has been taken that the affected person is indeed an illegal foreigner, must terminate after 48 hours and may only endure beyond this time limit if a decision to deport the illegal foreigner has indeed been taken. (See Section 34(2)).

Section 34 contains drastic provisions for dealing with illegal foreigners who are about to be deported. They may be arrested without a warrant and, provided that the decision to deport has been taken, they may be detained for 30 days without a warrant of a court. Such warrant, if obtained, may extend the period of detention for a maximum of 90 days in total (section 34 (1)(d)). Detainees have no automatic right to be brought before a court other than to request an attending officer to have the detention confirmed by a warrant of the court, which must be obtained within 48 hours of the request, failing

which the detainee is entitled to his or her immediate release (section 34(1)(b). The affected person is entitled to be informed of his or her rights in terms of the various provisions of the Act as expressly provided by section 34(1)(c) and 8(1). The information so provided must obviously be full and complete and couched in a fashion that the detainee understands. For this purpose the first respondent has published prescribed forms in the form of annexures to regulations, the last of which regulations were published on 27 June 2005.

<u>The lawfulness of the applicants' detention.</u>

The arrest of the applicants is common cause, so is their detention. The onus to prove the lawfulness of the detention rests on the respondents. From the affidavits filed by the first respondent's officials it appears that the applicants were approached immediately after their release from the Lindela facility and were asked to identify themselves. They produced documentation, with the exception of one of their number who alleged that he had lost his documents. This documentation did not satisfy the officials that the applicants were lawfully in the Republic. They were informed of this fact and requested to return to the detention centre to enable the officials to verify their status. This was done in terms of section 41 of the Act.

After they had been offered any assistance they might require, which they allegedly declined, they are alleged to have informed the officials that they had no further information available to prove their status. Their documentation is alleged by the officials to have been fake. The officials informed them thereafter that they were not satisfied that the applicants were lawfully in the Republic, which the

applicants are said to have admitted. I should add that the court has only the version of the respondents' officials before it. None of the applicants swore to an affidavit in these proceedings. They were represented by a friend, Mr Malik.

The applicants were thereafter arrested in terms of section 34. A warrant was issued to the head of the Lindela facility in terms of which he was ordered to detain the applicants with specific reference to section 7(1)(g) and 34(1) of the Act read with regulation 28(1) published in terms thereof. (Section 7 deals with the matters that the Minister may determine by regulation.)

The applicants were served with notices contained in a form identified as B1-1724, purportedly issued in terms of section 34(1)(a) of the Act read with regulation 28(2). The relevant part of this form reads as follows:

> "In terms of section 34(1)(a) and (b) of the Act, you have the right to appeal the decision to the Director-General in terms of section 8(4) of the Act within ten days from the date of receipt of this notice and at any time request any officer attending to you to have your detention for purposes of deportation confirmed by a warrant of the court.
>
> **Should you choose not to exercise the rights mentioned above, you shall be detained pending your deportation. Should you however choose to exercise the rights mentioned above, you shall remain in custody and may not be deported pending the outcome of the appeal or the confirmation of the warrant of detention by the court. You will not be allowed to return to the**

> **Republic, unless you have obtained the necessary lawful authority in this regard.**
>
> Acknowledgement of receipt of notification:
>
> I hereby acknowledge receipt of the original notification of deportation in which my rights in terms of section 34(1)(a) and (b) of the Act were explained to me."

All the applicants are said to have waived their rights to an appeal or an application for a confirmatory warrant of detention. They are also said to have chosen to await their deportation in custody.

The respondents contend, on the basis of these facts, that the applicants' arrest and detention was lawful. This submission cannot be entertained. The provisions of the Act have not been correctly applied. Several material errors occurred in the interaction between the applications and the first respondent's representatives that render the detention unlawful.

In the first instance the first respondent's officials failed to apply section 8 of this Act as it has been judicially interpreted in two decisions of this division. In *Arisukwu and Others v Minister of Home Affairs and Another* 2003 (6) SA 599 (T), De Villiers J held that the current section's predecessor, section 9 of the Aliens Control Act 96 of 1991, must be complied with before an alleged illegal alien may be arrested. The same finding was made in respect of the current Act's section 8 by Southwood J, in *Mohammed v Minister of Home Affairs and Another* case number 41182/05 (not yet reported). Both decisions held that once an official had decided that a foreigner was illegally in the country and the foreigner had been informed of that

fact, the foreigner must be informed of his rights in terms of the relevant section. The foreigner is entitled, as a matter of law, not to be detained immediately after his having been informed of the decision to deport him, but to exercise his rights either to appeal to the minister or to apply to the Director General to review of appeal the decision to deport him either in terms of section 8(1) and 8(2) or section 8(4) without and before being incarcerated. 5

It follows that the information conveyed to the applicants by first respondent's officials in the form B1-1724, the material portions of which have been quoted above, is incorrect and misleading in its most important parts. The assertion that the state is entitled to detain the alleged illegal foreigner regardless of his rights in terms of section 8 is in conflict with the provisions of the Act and therefore invalid. It is also unlawful to require the person concerned to make a decision immediately once the form is placed before him or her whether to appeal or launch a review or not. The Act expressly allows the person affected to exercise the right to approach the Minister or the Director-General by way of an appeal or a review within a specified number of days, as quoted above. 10 15

The potential deportee is given a period of three or ten days respectively, to consider his or her position. During this period of deliberation the affected person is not to be held in custody. This is the reason why section 34(2) allows only a 48 hour time period of the detention of a foreigner whose sojourn in the Republic has not yet been declared to be illegal. To inform the affected person that she or he will remain in custody before the period has expired during which 20 25

such person may exercise the right to appeal or to apply for a review, amounts to a distortion of and therefore a denial of the alleged illegal foreigner's rights.

In addition the first respondent's officials clearly followed the practise of demanding the detainee's decision whether or not to appeal or to launch a review immediately while the form was being completed, so that the decision could be recorded there and then. This too is unlawful. 5

Lastly, the form fails to draw the alleged illegal foreigner's attention to the right to have the officer's decision taken on review. Again this is a failure to put the potential deportee fully into the picture of all rights he or she may exercise. This is unlawful. 10

There are important reasons why the affected person should be given the right to consider his or her decision how to react to an official's decision to declare her or him an illegal foreigner while she or he is free. The officer's decision to declare the person concerned an illegal foreigner, and the spectre of a consequent deportation, constitute severe inroads into the affected person's rights to privacy, bodily integrity and freedom of movement, and often also inroads into the right to earn a living, the right not to be discriminated against and the right to choose one's abode. 15 20

The powers entrusted to immigration officers are much wider and more invasive than those granted to a police officer in terms of the Criminal Procedure Act 51 of 1977. In fact the immigration officers' powers are draconian. Neither the decision to deport a foreigner nor the decision to declare a person an illegal foreigner is 25

subject to automatic control by an independent tribunal. An arrest by a police officer in terms of the Criminal Procedure Act is overseen by a court before whom an arrested person must be brought within 48 hours after such arrest. South Africa's correctional institutions are subject to inspection by the staff of the Office of the Inspecting Judge, the Inspecting Judge himself and independent prison visitors appointed on a voluntary basis by the office of the inspecting judge. (See Chapters IX and X of the Correctional Services Act, 111/1998.) The inspecting judge, his staff and independent prison visitors also report on the conditions of the institutions where prisoners are kept. There is no such provision in the Act. Nor is there any control over any arrest effected by an officer for the detention of the illegal foreigner pending her or his deportation in terms of the Act.

The Criminal Procedure Act 51 of 1977 requires an arrested person and an accused to be informed fully of his or her rights to remain silent, to legal representation and to bail. No such provisions exist in the Act.

The respondents argue that they are entitled to detain the applicants until they are deported. It must be underlined that not one of the applicants has been charged criminally under section 49 of the Act. They did not receive any legal advice when they were questioned by the respondents' officials, nor were they given any assistance when they were required to decide whether or not to challenge the decision to deport them. Given the drastic nature of the decisions taken by the respondents' officials, this is disquieting.

The Act does not oblige the respondents' officials to detain a

deportee. In suitable circumstances, a deportee can make his or her own arrangements to leave the country.

No reason has been advanced why the first respondent's officials chose the most drastic remedy available to them by detaining the applicants. It is common cause that all the applicants were engaged in commercial activities when they were first arrested and detained. The Immigration Act does not provide for legal presentation of a detainee, nor does it demand of the police officer or immigration officer who arrests or detains an alleged illegal foreigner to inform them of a right to legal representation.

It is for these reasons that the provisions of the Act must be interpreted as narrowly and as restrictively as the wording allows.

None of the interactions between the officer and the potential deportee are subject to independent control. These procedures are consequently also in conflict with the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. The convention entered into force on the 26th of June 1987. South Africa is a signatory thereto, but not yet to the Optional Protocol, although signature may well be pending. The Optional Protocol requires *inter alia* outsiders, independent persons, to visit places of detention such as Lindela.

Given the drastic nature of the powers granted to immigration officers, the affected person must have the opportunity to deliberate in private and in freedom with access to friends, family and advisors whether or not to appeal or to apply for a review of the decision to declare him or her an illegal foreigner or to deport the person. The

steps that must be taken to exercise the right to appeal should not be taken in the gloom of incarceration. The detainee's right to communicate with the authorities should not be limited to an approach to an attending officer before the time limit set for the exercise of his rights, unless this is absolutely essential. 5

In the light of the incorrect information given to the applicants by the officials, their purported decision not to appeal and to remain in custody pending deportation cannot be accepted as valid in law. It is unrealistic in the extreme to suggest that they would have chosen to remain in custody had they been correctly informed of their right to contemplate their next step in freedom and in privacy. The detention of the applicants was unlawful and must be set aside. 10

I make the following order:

<u>ORDER</u> 15

- Paragraphs 2(a), 2(b) and 2(c) of the order granted on 20 May 2005 are confirmed. The applicants are set free and first respondent must pay the costs.
- Costs are to be calculated on the party and party scale.
- The counter application is dismissed with costs. 20
- The other provisions of the interim order fall away.

<u>DATE OF JUDGMENT</u>: 2006-06-26