



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 258/24

In the matter between:

IAN GEORGE DALLAS WARES

Applicant

and

ADDITIONAL MAGISTRATE, SIMONSTOWN

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

Third Respondent

Neutral citation: *Wares v Additional Magistrate, Simonstown and Others* [2025]
ZACC 29

Coram: Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J,
Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgment: Dambuza AJ (unanimous)

Heard on: 13 February 2025

Decided on: 23 December 2025

Summary: Extradition Act 67 of 1962 — constitutionality of section 10(1) —
section is unconstitutional to the extent that it does not make
provision for magistrates to extend or grant bail after issuing a
committal order under that section.

ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Western Cape Division, Cape Town:

1. The order of the High Court of South Africa, Western Cape Division, Cape Town, declaring section 10(1) of the Extradition Act 67 of 1962 (Act) inconsistent with the Constitution and invalid to the extent that it does not provide for the power of a Magistrate to grant or extend bail after a committal order is granted under section 10(1), pending an application to review such a committal order or pending the Minister's decision in terms of section 11 of the Act, is confirmed.
2. The operation of the declaration of invalidity is suspended for a period of 24 months to allow Parliament to enact remedial legislation.
3. The declaration of invalidity shall take effect from the date of this order.
4. Until remedial legislation as contemplated in paragraph 2 of this order comes into force, the following words are read into the Act as section 10(5):

“The Magistrate issuing the committal order may, on application by such person, grant bail or extend the bail of such person, if the interests of justice permit the person's release or continued release on bail, pending the Minister's decision in terms of section 11 of this Act, or pending any legal proceedings instituted to review the decision of the Magistrate or the Minister, on condition that such person deposits with the clerk of the court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody the sum of money determined by the Magistrate.”

5. The second and third respondents, jointly and severally, must pay the applicant's costs in this Court, such costs to include the costs of two counsel.

JUDGMENT

DAMBUZA AJ (Madlanga ADCJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application in terms of section 167(5)¹ read with section 172(2)(a)² of the Constitution for confirmation of an order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town (High Court). In terms of that order, the High Court declared section 10(1) of the Extradition Act³ (Act) inconsistent with the Constitution and invalid to the extent that it does not provide for the power of a Magistrate to extend or grant bail to persons brought before their courts under that section, after granting committal orders against them, and pending either an application to review the committal order or the Minister's decision in terms of section 11 of the Act.⁴

¹ Section 167(5) of the Constitution states that:

"The Constitutional Court makes the final decision on whether an Act of Parliament, a provincial Act or conduct of the President is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa or a Court of similar status before that order has any force."

² Section 172(2)(a) provides:

"The Supreme Court of Appeal, the High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

³ 67 of 1962.

⁴ Section 11(a) provides that the "Minister may . . . order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her".

[2] The High Court suspended the declaration of invalidity for a period of 24 months to afford Parliament an opportunity to enact remedial legislation. It also ordered a temporary reading-in pending the suspension. The first issue before us is whether section 10(1) is inconsistent with the Constitution. The consequent issue is the determination of the appropriate remedy. The last issue is the question of costs in this Court. In both the High Court and this Court, these issues were narrowed down as a result of concessions made by the respondents in relation to the constitutional inconsistency of section 10.

Background

[3] The 84-year-old applicant, Mr Ian George Dallas Wares, is the subject of an extradition request made by the High Commissioner for the United Kingdom under the European Convention on Extradition, to which South Africa is a signatory. He is a self-confessed paedophile currently residing in the Cape Peninsula. The particulars of his conduct are set out in more detail in the judgment of the High Court.⁵

[4] The prosecuting authorities in Scotland seek his surrender to stand trial in Edinburgh on various counts, described in Scottish law as “lewd, indecent and libidinous practices and behaviour”, and a single charge of “indecent assault”. A warrant of arrest for his extradition was executed on him at his home by members of the South African Police Service on 22 May 2019. The following day he appeared before the first respondent, the Additional Magistrate, Simonstown, Cape Town (Magistrate). He was released on bail granted in terms of section 9(2) of the Act⁶ and on 12 July 2019 the extradition proceedings under section 10 commenced before the Magistrate.

⁵ *Wares v Additional Magistrate, Simonstown, Cape Town* [2024] ZAWCHC 200; [2024] All SA 287 (WCC); 2025 (1) SACR 130 (WCC) (High Court judgment) at paras 2-5.

⁶ Section 9(2) is quoted at [20] of this judgment.

[5] In the section 10 extradition enquiry the applicant made certain admissions which led the Magistrate to determine that he was liable to be surrendered to the United Kingdom in terms of the Act. The Magistrate accordingly issued a committal order for his extradition, and then extended the bail that had been granted under section 9(2), pending the decision of the second respondent, the Minister of Justice and Correctional Services (Minister), on whether the applicant would indeed be surrendered to the United Kingdom in terms of section 11.

[6] Subsequent to the extradition enquiry, the applicant exercised his right under section 11 of the Act and made written representations to the Minister, arguing that his extradition would not serve the interests of justice and would constitute “severe punishment” given his poor health. Notwithstanding these submissions, on 19 February 2020 the Minister decided that the applicant should be surrendered to the United Kingdom to stand trial.

[7] The applicant approached the High Court, challenging the Magistrate’s extradition decision both by way of an appeal under section 13⁷ of the Act and by way of a review. The applicant also sought a review of the Minister’s decision made in terms of section 11(a) to surrender him to the United Kingdom. The ground of review as against the Minister was that, because the Magistrate had not committed the applicant to prison but had instead granted bail, the Minister lacked the power to order him to be surrendered to the United Kingdom.

[8] In response to the review application against the Minister’s surrender decision, the respondents, being the Minister and the Director of Public Prosecutions, Western Cape (DPP) brought a counter-review, seeking an order that the Magistrate’s decision to extend the applicant’s bail be declared unlawful and ultra vires (beyond the Magistrate’s legal powers). Confronted with the counter-review, the applicant, in reply, brought a collateral constitutional challenge against section 10(1) of the Act. He

⁷ Section 13 is quoted at [23] of this judgment.

contended that this provision was unconstitutional because it did not permit a person committed thereunder to be released on bail, after the committal order was issued, and pending finalisation of the Minister's decision under section 11 of the Act or pending a review of the Magistrate's decision. He contended that this constituted an unjustified limitation of section 12(a) of the Constitution.⁸ The constitutional challenge was in due course conceded by the respondents.

[9] The High Court invited the parties to consider and make submissions on the constitutionality of section 13(3) and subsection (4) of the Act. Only the applicant filed a post-hearing supplementary submission in response to the court's invitation. His submission was that bail in such instances should be considered on a case-by-case basis. Although the High Court made no order in relation to the provisions of section 13 of the Act, in this judgment I discuss, to the extent I deem beneficial to the parties, the issues that were raised by the High Court.

[10] In terms of section 13(3), if an extraditee has lodged an appeal under section 13(1) against the Magistrate's section 10 decision, the Magistrate may grant bail pending the finalisation of the appeal. Section 13(4) stipulates that if the Magistrate determines under section 13(3) that the extraditee shall be released on bail, certain provisions of the Criminal Procedure Act⁹ (CPA) shall apply to the bail so granted. Significantly, and similar to section 10, section 13 makes no provision for consideration of bail where an extraditee opts to await the decision of the Minister or intends to approach the High Court for a review rather than an appeal under section 13(1). Nor does section 13(3) empower the Magistrate to grant bail before the extraditee has actually lodged his or her section 13(1) appeal, which may be up to 15 days after the Magistrate's section 10 decision.

⁸ Section 12(1)(a) provides that everyone has the right to freedom of security of the person, which includes the right not to be deprived of freedom arbitrarily and without just cause.

⁹ 51 of 1977.

[11] The High Court upheld the applicant's argument on the unconstitutionality of section 10(1) of the Act and granted a declarator accordingly. It interpreted the provisions of section 10 to mean that Magistrates must commit to prison any extraditee against whom the enquiry succeeds. In assessing whether that limitation of rights protected under section 12(1)(a) of the Constitution is justified in terms of section 36, the High Court considered the background to extradition, which is grounded in the prevalence of crime worldwide, and the need to arrest and extradite persons in fulfilment of South Africa's international obligations. The court concluded that there is justification for limiting the substantive facet¹⁰ of the section 12 right to freedom, by depriving extraditees of their freedom.

[12] The High Court found, however, that the same cannot be said of the limitation to the procedural facet of the section 12 right. This is because under section 10 Magistrates are unable to play the role of judicial officers and consider whether the extraditee should be released on bail pending finalisation of the extradition process. Consequently, section 10(1) of the Act arbitrarily limits the procedural facet of the right to freedom and security protected under section 12 of the Constitution and falls to be struck down. The High Court suspended the order of invalidity for a period of 24-months and ordered an interim remedy to be read into the Act after the existing section 10(4).¹¹

[13] The applicant's appeal succeeded partially, and he was found liable to be surrendered in respect of only three of the eight offences for which his extradition was originally sought. With regard to section 13(3) of the Act, the court considered that it does not provide for the consideration of bail where an extraditee opts for a review, whether under section 22 of the Superior Courts Act¹² or by way of a legality challenge

¹⁰ In *Smit v Minister of Justice and Correctional Services* [2020] ZACC 29; 2021 (1) SACR 482 (CC); 2021 (3) BCLR 219 (CC) (*Smit*) at para 101, this Court held that both the substantive and the procedural facets of the right to freedom and security must be met for a deprivation not to offend the provisions of section 12(1)(a) of the Constitution. The distinction between the substantive and procedural facets of the right to freedom and security is discussed in [25] of this judgment.

¹¹ High Court judgment above n 5 at para 138.

¹² 10 of 2013. Section 22 provides:

of the decision to extradite, or where he or she elects to petition the Minister not to confirm the extradition, rather than approaching the High Court on appeal. The court, however, did not make any order in this regard.

In this Court

[14] As was the case in the High Court, the respondents accept the applicant's contention that section 10(1) is unconstitutional to the extent that it does not provide for the power of a Magistrate to extend or grant bail after a committal order to an extraditee who elects to await the decision of the Minister in terms of section 11 of the Act, or to seek a review of the committal decision. The applicant refers to case law from Canada, New Zealand, Australia, Germany and the United States of America, emphasising that the approach in such jurisdictions is to permit bail to an extraditee on being found liable for extradition.

[15] If the parties are correct regarding the constitutionality of section 10, the next issue for determination by this Court is the appropriate remedy. In this regard the applicant highlights that he is not charged with an offence in South Africa and contends that his extradition is concerned with contraventions of law that are not applicable in South Africa. He contends that the responsibility to admit him to or to extend his bail should be on the Magistrate who issued the committal order.

[16] The contention on behalf of the respondents is that the power to grant bail in extradition proceedings is limited. They submit that, in this case, once the Magistrate

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- “(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in the Magistrates' Courts.”

found that the applicant was liable for extradition, the responsibility for initiation of bail proceedings shifted to the applicant. As a general principle, once an extraditee is found to be liable for surrender, they must bear the responsibility to apply for bail and satisfy the court that the interests of justice permit their release on bail, either on the exceptional circumstances threshold provided under section 60(11) of the CPA,¹³ or in terms of section 60(1) to subsection (4), depending on the offence to which the extradition relates, the respondents argue.

Discussion

Constitutionality of section 10 of the Act

[17] Notwithstanding the respondents' concession regarding the constitutionality of section 10, it is still necessary that this Court traverses the relevant legal framework to determine whether the order of constitutional invalidity made by the High Court should be confirmed. Such an enquiry is a constitutional issue that engages the jurisdiction of this Court. If confirmation is appropriate, the next issue for this Court to determine is a just and equitable remedy under section 172(1)(b) of the Constitution.

[18] The starting points are the relevant sections of the Act. Section 3(1) regulates who may be extradited:

¹³ Section 60(11) of the CPA provides:

“Notwithstanding any provision of this Act, where an accused is charged with an offence—

- (a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release; or
- (c) contemplated in section 59(1)(a)(ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

“Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.”

[19] Section 5 regulates the issuing of a warrant of arrest or further detention for a person in respect of which a request for surrender to a foreign state is received by the Minister, or for a person in respect of whom a warrant of arrest would, in the opinion of the Magistrate, have been justified if it had been alleged that he or she has committed an offence in the Republic.

[20] In terms of section 9(1) any person detained under a warrant of arrest or under a warrant for further detention shall, as soon as possible, be brought before a Magistrate in whose area of jurisdiction he or she was arrested, for an enquiry to be held into whether he or she is liable to be surrendered to the foreign state in which the offence was committed or where he or she was convicted. In the enquiry, the Magistrate has the same powers as in a preparatory examination in criminal proceedings, including the power to commit the person for further examination and admitting him or her to bail.¹⁴ More specifically section 9(2) provides:

“Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes

¹⁴ Sections 123-43 of the CPA regulate preparatory examinations in criminal proceedings. Under section 123 of the CPA, where the Director of Public Prosecutions (referred to in the CPA as the “attorney general”) is of the opinion that it is necessary for the more effective administration of justice that a trial in a Superior Court or Magistrates’ Court be preceded by a preparatory examination into the allegations against an accused, they may instruct that such an examination be instituted in the Magistrates’ Court. The procedure is available where the provisions of section 119 (plea in the Magistrates’ Court on a charge justiciable in the Superior Court) are not followed, or where section 119 is followed but the proceedings are adjourned under section 121(3) or 122(1) pending the decision of the Director of Public Prosecutions. The aim of a preparatory examination is to establish whether an offence has been committed, to identify the perpetrator, to determine the circumstances of the offence, and to collate evidence to the extent necessary to determine whether charges should be preferred.

of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.”

[21] Section 10 regulates the extradition enquiry as follows:

- “(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned, and in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister’s decision with regard to his or her surrender, at the same time informing such person that he or she may within fifteen days appeal such order to the Supreme Court.
- (2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.
- (3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.
- (4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.”

[22] In terms of section 11 the Minister may order “any person committed to prison under section 10 to be surrendered to any person authorised by the foreign state to receive him or her”, or order that such person may not be surrendered until the conclusion of criminal proceedings that may be pending against him or her, or until any sentence of a term of imprisonment against him or her has been served.

[23] The right of appeal to the relevant Division of the High Court against the committal order is regulated in section 13 of the Act:

- “(1) Any person against whom an order has been issued under section ten or twelve may within fifteen days after the issue thereof, appeal against such order to the provincial or local division of the Supreme Court having jurisdiction.
- (2) On appeal such division may make such order in the matter as it may deem fit.
- (3) Any person who has lodged an appeal in terms of subsection (1) may at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of section 10 or 12 to be released on bail on condition that such person deposits with the clerk of the court, or with a member of the Department of Correctional Services, or any police official at the place where such person is in custody, the sum of money determined by the magistrate.
- (4) If the magistrate orders that the applicant be released on bail in terms of subsection (3), the provisions of sections 66, 67, 68 and 307(3), (4) and (5) of the Criminal Procedure Act 1977 (Act No. 51 of 1977), shall *mutatis mutandis* apply to bail so granted, and any reference in those sections to—
 - (a) the prosecutor who may act under those sections, shall be deemed to be a reference to such person who may appear at an enquiry held under this Act;
 - (b) the accused, shall be deemed to be a reference to the person released on bail under subsection (3);
 - (c) the court, shall be deemed to be a reference to the magistrate who released such person on bail; and
 - (d) the trial or sentence, shall be deemed to be a reference to the magistrate’s order under section 10 or 12.”

[24] In terms of these sections of the Act, bail may only be granted or extended by a Magistrate during the first (preparatory) stage of the extradition proceedings under section 9(2), and after an appeal has been lodged under section 13(1). There is no provision in section 10 for the extraditee to be admitted to bail at the end of the extradition enquiry (proper), once a committal order is granted. This means bail is not available while the extraditee awaits the decision of the Minister under section 11, or if he or she intends to bring an application to have the committal order set aside or reviewed in the High Court, or in the period (of up to 15 days) before the extraditee

lodges his or her appeal in terms of section 13(1). The effect of section 10 is that once a Magistrate determines that a person is liable for surrender, that person may only be admitted to bail after lodging an appeal under section 13.

[25] The unavailability of bail for extraditees after the grant of a committal order under section 10, up to the lodging of an appeal under section 13, must be considered against the provisions of section 12(1)(a) of the Constitution which guarantees the right to freedom of security of persons.¹⁵ This Court has repeatedly affirmed the substantive and procedural dimensions of this right. The substantive dimension ensures that deprivation of freedom cannot take place arbitrarily or without just cause. The procedural dimension ensures that deprivation of freedom will only happen in terms of a fair procedure.¹⁶ In *Bernstein*,¹⁷ O'Regan J distilled the two components of the right to freedom as follows:

“[The right to] freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.”¹⁸

[26] The limitation on the substantive dimension of the right is not in issue in this case. The applicant has not directed his challenge to that aspect. In fact, as stated, he takes no issue with the limitation placed on that aspect of the right. The need for South Africa to arrest and detain in order to fulfil its international commitments under

¹⁵ See n 8 above.

¹⁶ See, for example *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC) at para 159; *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC); and *Makana Peoples Centre v Minister of Health* [2023] ZACC 15; 2023 (5) SA 1 (CC); 2023 (8) BCLR 963 (CC). In *Smit* above n 10 at para 102, this Court held that both facets must be met for a deprivation not to offend the provisions of section 12(1)(a) of the Constitution.

¹⁷ *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

¹⁸ *Id* at para 145.

extradition agreements is self-evident. In *Geuking*¹⁹ this Court said the following about the objectives of extradition:

“The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign state. Apart from reciprocity, governments accede to requests for extradition from other friendly states on the basis of comity. Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world.”²⁰ (Footnote omitted.)

[27] Criminal conduct therefore constitutes an acceptable justification for the curtailment of a substantive right to freedom provided under section 12(1)(a) of the Constitution. The evidence which forms the basis of the committal order provides just cause for the deprivation of freedom. What remains is whether the procedural component of section 12(1)(a) is satisfied.

[28] There can be no doubt that the mandatory committal under sections 10 and 13, pending the Minister’s decision or other further developments, without individualised assessment of necessity, undermines the procedural facet of the right protected under section 12(1)(a) of the Constitution, and renders the committal arbitrary. The procedural violation lies in the absence of a mechanism for a judicial determination as to whether continued detention serves the interests of justice in the particular case after the committal order is made. As the High Court found, once a Magistrate finds an extraditee liable for surrender and issues a committal order under section 10, he or she is barred from acting as an independent arbiter in determining whether that individual’s

¹⁹ *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (1) SACR 404 (CC); 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).

²⁰ *Id* at para 2.

circumstances warrant continued detention or whether release on bail would serve the interests of justice.

[29] Section 36 of the Constitution provides for curtailment of rights in the Bill of Rights in terms of a law of general application, where the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.²¹ In *Dlamini*,²² this Court considered the constitutionality of the limitation on the procedural aspect of the right to freedom and security in the context of lawful arrests and detention. The judgment reveals the close interrelationship between the rights under section 12(1)(a) and those provided under section 35(1)(f).²³

[30] In *Tucker*²⁴ this Court explained the correct approach to the interpretation of these rights as follows:

“It is trite that courts must read legislation, where possible, in ways which give effect to the Constitution’s fundamental values. Courts are required to interpret legislation not only so that legislation does not limit rights, but in a manner that promotes rights. In addition, courts have always interpreted legislation in *favorem libertatis* (in favour of freedom or liberty). There is a presumption that a reasonable interpretation of a

²¹ Section 36(1) of the Constitution provides:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (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.”

²² *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC).

²³ Section 35(1)(f) of the Constitution provides that “[e]veryone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions”.

²⁴ *Director of Public Prosecutions, Western Cape v Tucker* [2021] ZACC 25; 2021 (12) BCLR 1345 (CC); 2022 (1) SACR 339 (CC) at para 104.

statute that is less restrictive on the liberty of an individual is to be preferred over one that is more restrictive.” (Footnote omitted.)

[31] While section 12(1)(a) establishes the general right to freedom, section 35(1)(f) provides an additional specific right to protect that freedom. It provides the foundational basis for bail where the interests of justice permit. As this Court held in *Dlamini*, section 35(1)(f) presupposes a deprivation of the right to freedom for the limited purpose of ensuring that an arrestee is duly and fairly tried.²⁵ In extradition proceedings, the purpose of the deprivation is related and similarly limited. It is to facilitate repatriation of persons accused or convicted of crimes in other countries so that they may stand trial or serve the sentences imposed on them. The proceedings under section 10 are aimed at determining whether there is reason to surrender a person to a foreign state for trial. Once that determination is made, section 35(1)(f) requires that there be a mechanism for considering whether the interests of justice permit release pending the Minister’s decision or any review proceedings.

Is the limitation justifiable?

[32] The respondents did not advance any justification for the limitation of these rights. In any event, it is difficult to conceive of a justification that would satisfy section 36 of the Constitution. There can be no doubt that the mandatory committal under section 10 of the Act, pending the Minister’s decision, without an individualised assessment of whether the deprivation of liberty is justified, undermines both the procedural facet of the right to freedom under section 12(1)(a) and the right protected under section 35(1)(f). Under section 10 of the Act absolute deprivation of freedom occurs regardless of individual circumstances.

[33] While there is a rational connection between a finding that a person is liable for surrender and the consequential committal by a Magistrate in a section 10 inquiry, and the purpose of the Act, it is difficult to find such connection between the deprivation of

²⁵ *Dlamini* above n 22 at para 53.

the procedural right and objectives of the Act, particularly when section 35(1)(f) provides less restrictive means for achieving such objectives. The right to freedom and security of persons is a fundamental right. The limitation obliterates it in certain circumstances under sections 10 and 13. The only justification for its curtailment is to prevent extraditees from fleeing, or in some other manner interfering with the administration of justice. There can be no justification for the limitation where a less restrictive option to achieve the purpose of extradition is available. For these reasons the deprivation is arbitrary and is constitutionally unsustainable.

[34] Comparative law from various foreign jurisdictions indicates that while bail in extradition cases is often given under stringent conditions, outright prohibitions and extremely high thresholds for bail are generally avoided in favour of individualised assessments that balance freedom interests against flight risk and international obligations. In *Alexander*,²⁶ the Supreme Court of Namibia cited with approval Lord Russell of Killowen CJ in the English case of *Spilsbury*,²⁷ which held that the absence of an express statutory provision authorising courts to grant bail after committal of a person found liable for extradition did not oust the court's jurisdiction to grant bail. In arriving at his decision that the court has, independently of statute, by the common law, jurisdiction to admit to bail, Lord Russell, as summarised by the Supreme Court of Namibia intimated that:

“If it does (i.e. impliedly oust the courts' jurisdiction), a curious result would follow, for it is clear that the magistrate may remand the defendant pending the inquiry, and the inquiry may extend over a long period of time, and it is also clear that the magistrate may admit the defendant to bail as often as he remands him; it is also conceded, that when the defendant is returned to the place to which his return is demanded, the tribunal having jurisdiction in that place can admit him to bail pending the result of the trial; and, this being so, it would be a strange result if there were no jurisdiction to admit him to bail during the period between the making of the order for his return and his return.”

²⁶ *Alexander v Minister of Justice* [2010] NASC 2; 2010 (1) NR 328 (SC).

²⁷ *R v Spilsbury* [1898] 2 QB 615 at 620.

[35] The absence of bail powers under section 10(1) has not been shown to be necessary, nor reasonable. It is an unjustified infringement of sections 12(1)(a) and 35(1)(f) of the Constitution and renders arbitrary, and thus unconstitutional, the deprivation of the liberty of extraditees under section 10(1). Consistent with the obligation of this Court under section 172 of the Constitution, section 10(1) must therefore be declared invalid to the extent that it is inconsistent with the Constitution.

Remedy

[36] Having found section 10(1) of the Act to be constitutionally invalid, this Court must determine the appropriate remedy. Section 172(1)(b) of the Constitution empowers the Court to make any order that is just and equitable. The parties are in agreement with the High Court’s suspension period of 24 months to afford Parliament an opportunity to enact remedial legislation. The dispute regarding remedy centres only on the content of the reading-in order that should operate during the period of suspension.

[37] The applicant proposed the following reading-in, which was effected by the High Court as section 10(5) of the Act:

“The magistrate issuing the order of committal may grant bail or extend the bail of the person brought before him, if the interests of justice permit that person’s release or continued release on bail, pending the Minister’s decision to be made in terms of Section 11 of this Act, or pending any review of the Magistrate’s decision made in terms of Section 10 of this Act.”

[38] The respondents proposed that the reading-in be located at the end of section 10(1) rather than be a standalone provision as section 10(5). As to the substance of the reading-in clause, they proposed that the onus be placed on extraditees to initiate bail proceedings by applying for bail, either on the “exceptional circumstances” test stipulated in section 60(11) of the CPA²⁸ for offences equivalent to those listed in

²⁸ See n 13 above.

Schedule 6 of that Act, or by satisfying the “interests of justice requirement” stipulated in section 60(1) to (4), depending on the offence to which the extradition is sought.

[39] In addition, the respondents proposed the following separate reading-in to section 13(3), to address the lacuna in respect of bail pending a review of the Magistrate’s decision: (1) addition of the words “or has instituted a review” after the words “subsection 1”, and (2) addition of the words “or review” after the words “before such appeal”, as well as adding the words “if the interests of justice permit” to that section. As stated, the High Court made no order in relation to section 13 of the Act. It also seems that if provision is made under section 10 for extraditees to be admitted to bail after a committal order is made, a similar provision in section 13 may not be necessary.

[40] I share the High Court’s reluctance to accede to the respondents’ proposed reading-in to section 10 which incorporates requirements stipulated in section 60(11) of the CPA. Under that framework, detention is the starting norm, and the onus is placed on the accused to adduce evidence of exceptional circumstances to demonstrate that his or her release would be in the interests of justice. In this case, the respondents’ suggestion that the bail regime prescribed in section 60 of the CPA should be imported into extradition proceedings seems to be based on a misconception regarding the nature of extradition proceedings.

[41] By their nature, extradition proceedings are unique. They are neither criminal nor civil proceedings. In *Geuking*,²⁹ this Court made plain that extradition proceedings are not equivalent to domestic criminal trials. While extradition ultimately concerns criminal matters, the extraditee is not an accused person within the South African criminal justice system. Because of the peculiar nature of extradition proceedings, a court must caution itself against mechanical importation of domestic criminal processes. However, the caution exercised against incorporating the exceptional

²⁹ *Geuking* above n 19 at para 2.

circumstances test is not, by any means, a bar to the Legislature incorporating such test should it determine it appropriate to do so.

[42] In sum, the purpose of extradition proceedings is to ensure the surrendering of an extraditee to a foreign state to stand trial for crimes allegedly committed. There is no classification of offences in the Act. And the proposed basis for imposition of an onus on an extraditee, based on alignment of the offence to which the extradition relates with the Schedule 6 offences, finds no support in the language used in sections 9 and 13 in which provision is made for bail currently.

[43] There is a basis, however, for distinct specifications for admission to bail at different stages of the extradition process. Under section 9, Magistrates are empowered to admit an extraditee to bail on the same basis as in a preparatory examination. In the CPA, preparatory examinations are regulated under Chapter 20. There is no provision in that Chapter regulating the granting of bail. However, section 60(1)(a) provides for grant of bail at an accused's first or subsequent appearance. That section provides:

“An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6) be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.”

[44] The interests of justice approach to bail proceedings was explained by this Court in *Dlamini*.³⁰ It held:

“[A bail enquiry] remains a unique interlocutory proceeding where the rules of formal proof can be relaxed and where *the court is obliged to take the initiative if the parties are silent; and the court still has to be pro-active in establishing the relevant factors*. More pertinently, the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in

³⁰ *Dlamini* above n 22.

paragraphs (a) to (e) of subsection (4) [of section 60], as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by subsections (9) and (10).”³¹ (Emphasis added.)

[45] Should extraditees be required to initiate bail proceedings once they are found to be liable for surrender or after an order of committal is made? The concept “interests of justice” is not static. In bail proceedings it entails a judicial consideration of different factors that are relevant to the granting or refusal of bail. In relation to the Act, the increased risk to the fulfilment of the country’s international obligations (which arises from possible absconding) after the grant of a committal order is a relevant consideration. So is the seriousness of the offence to which the committal order relates. In this context, requiring extraditees to “apply” for bail is consistent with the interests of justice. The purpose is to set a procedural rule as to who initiates bail proceedings and presents evidence, rather than imposition of onus, as suggested by the applicant. As in section 60(2)(b) of the CPA, this will not constitute the imposition of a burden of proof as required under section 60(11). The court will determine, on a balance of probabilities, where the interests of justice lie. Importantly, a requirement to apply for bail under section 10 will be consistent with the same requirement in section 13(3) of the Act.

[46] Section 13(3) provides that an extraditee who has lodged an appeal against a section 10 or a section 12 order may “apply . . . to be released on bail on condition that [they] deposit with the clerk of the court . . . the sum of money determined by the magistrate”. This means that at this stage of the extradition the extraditee bears the responsibility of initiating bail proceedings and providing evidence to the court on which he or she relies in pleading that the interests of justice permit his or her release on bail. The requirement to initiate bail proceedings is made within the context of an effective order of extradition. As in section 13, the increased risk of flight poses a threat to the purpose of the proceedings.

³¹ Id at para 49.

[47] In other comparable criminal proceedings, section 321 of the CPA provides that an appeal against conviction does not automatically suspend the execution of the sentence imposed following the conviction. However, the convicted person may “apply” to be released on bail and must present the facts necessary to enable the court to exercise its interests of justice discretion.³² Although an extraditee is not a convicted person, the pending appeal does not suspend the extradition order. The use of the word “apply” in both proceedings is deliberate, and takes into account the significant findings made against the bail applicant. The responsibility on the extraditee to initiate bail proceedings can only be effected by way of tendering evidence on which the court can make an evaluation as to whether the interests of justice permit his or her release on bail. The distinction in the approach to bail under section 9 on one hand, and under sections 10 and 13 on the other, must be viewed against this background. However, there is no basis for importation, in extradition proceedings, of the special circumstances threshold prescribed in the section 60(11) framework, and the Schedule 6 offences under the CPA.

[48] Insofar as the respondents suggest that the reference in section 13(3) to provisions of the CPA implies an overlap between the two types of proceedings, justifying the importation of the Schedule 6 classification of offences and its exceptional circumstances standard into bail in extradition proceedings, I do not agree. The provisions of the CPA referred to in sections 13(3) and 13(4) regulate measures to be taken in the event of breach of bail conditions by an accused,³³ including cancellation of bail,³⁴ and provisional cancellation of bail in instances where an offender, who had been granted bail pending a review, cannot be found at the address given by him or her at the time of granting bail.³⁵ These provisions of the CPA are applicable in extradition proceedings in instances of breach of bail conditions generally and not particularly to section 60(11) bail proceedings.

³² *S v Beetge* [2013] ZASCA 1.

³³ Sections 66 and 67 of the CPA.

³⁴ Section 68 of the CPA.

³⁵ Sections 307(3), (4) and (5) of the CPA.

[49] With regard to reading-in, this Court cautioned in *National Coalition*³⁶ about the need to ensure that the provision which results from severance or reading words into a statute is (a) consistent with the Constitution and its fundamental values; and (b) interferes with the laws adopted by the Legislature as little as possible.³⁷

[50] It is of importance that the reading-in remedy in this case should reflect proper deference to the separation of powers while providing immediate relief to those affected by the constitutional deficiency. It must bridge the gap between the need to ensure that South Africa fulfils its international extradition obligations and the imperative to protect individual liberties. It must not unduly burden the courts or impose particular hardship on the state or on extraditees seeking temporary release.

[51] As to the suspension of the declaration of invalidity it seems to me that a period of 24-months would be adequate to allow Parliament to address the constitutional defect. During this period, the reading-in remedy shall apply to ensure that the rights of persons subject to extradition proceedings are protected. If remedial legislation does not come into force during the 24-month period, the reading-in will continue to operate until such legislation does come into force.

[52] It bears repeating that the “interests of justice” standard does not impose an onus on the extraditee. It is an obligatory constitutional rule that is sufficiently flexible to accommodate both the freedom interests of extraditees and the important state interest in fulfilling international obligations.

Costs

[53] Although the respondents did not oppose the merits of this application, their concessions were only made at the hearing of the application before us, after they had

³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).

³⁷ *Id* at para 74.

offered strong opposition to the remedy and persisted in their contention that the principles applicable under section 60(11) be imported into bail in extradition proceedings. It is appropriate that they bear the applicant's costs, including the costs consequent upon employment of two counsel.

Order

[54] The following order is made:

1. The order of the High Court of South Africa, Western Cape Division, Cape Town, declaring section 10(1) of the Extradition Act 67 of 1962 (Act) inconsistent with the Constitution and invalid to the extent that it does not provide for the power of a Magistrate to grant or extend bail after a committal order is granted under section 10(1), pending an application to review such a committal order or pending the Minister's decision in terms of section 11 of the Act, is confirmed.
2. The operation of the declaration of invalidity is suspended for a period of 24 months to allow Parliament to enact remedial legislation.
3. The declaration of invalidity shall take effect from the date of this order.
4. Until remedial legislation as contemplated in paragraph 2 of this order comes into force, the following words are read into the Act as section 10(5): "The Magistrate issuing the committal order may, on application by such person, grant bail or extend the bail of such person, if the interests of justice permit the person's release or continued release on bail, pending the Minister's decision in terms of section 11 of this Act, or pending any legal proceedings instituted to review the decision of the Magistrate or the Minister, on condition that such person deposits with the clerk of the court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody, the sum of money determined by the Magistrate."
5. The second and third respondents, jointly and severally, must pay the applicant's costs in this Court, such costs to include the costs of two counsel.

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