

JÜRGEN HARKSEN v THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS

CCT 41/99

Explanatory Note

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

The appellant, Jürgen Harksen, a German citizen and permanent resident of South Africa is the subject of an extradition request made in 1994 by the Federal Republic of Germany (FRG) to South Africa. Harksen is alleged to have committed serious fraud in the FRG. This case is the latest in a series brought by the appellant to delay or prevent his extradition. He asked the Constitutional Court to set aside a judgment of the Cape High Court which upheld the validity of section 3[2] of the Extradition Act, 67 of 1962.

There is no extradition treaty between South Africa and FRG. In the absence of a treaty, individuals are liable to be extradited if the President consents in writing under section 3(2) of the Extradition Act. On 24 May 1995, President Mandela so consented, rendering Harksen liable for surrender. The Minister of Justice thereupon invoked the provisions of the Act, and a magistrate held an inquiry after which he found that there was sufficient evidence against Harksen to justify his extradition.

Harksen brought proceedings in the Cape High Court designed to set aside the magistrate's findings. A number of challenges were raised. Although Harksen succeeded on a ground of review relating to aspects of the procedure followed, the constitutional issues argued by his counsel were dismissed. These constitutional challenges were brought before this Court on appeal.

Harksen first submitted that section 3(2) of the Extradition Act is unconstitutional as the President's consent under section 3(2) constitutes the conclusion of an international agreement which is not made subject to parliamentary approval as mandated by section 231(2) of the Constitution. Harksen argued in the alternative that the failure, in this instance, to subject the 'international agreement' to the constitutional requirements of parliamentary approval and legislative incorporation, as provided for in section 231(2) and (4) of the Constitution, made his extradition process unlawful and invalid.

Justice Goldstone, in whose judgment the entire Court concurred, held that the presidential consent under section 3(2) has domestic application only, serving merely to bring the requested individual within the ambit of the Extradition Act. As a domestic act, the President's consent was never intended to create international legal rights and obligations and did not constitute an international agreement. The constitutional requirements of section 231 relating to international agreements thus do not apply. Accordingly both constitutional arguments made by Harksen are dismissed in the judgment.