

THE VILLA LA DULCE CASE: INCLUDING THE EXCLUDED IN SOCIAL HOUSING PLANS

By Sebastián Tedeschi and Julieta Rossi¹

Introduction

The *Villa La Dulce* case clearly illustrates the degree to which the poorest² are excluded from the social housing policies that are in place in Argentina. Not only are members of this group unable to obtain the necessary basic social goods and services on the open market, they are also excluded from social housing programmes.

Argentina's failure to incorporate international standards into the design and implementation of its public housing policies has resulted in injustice and distortion in the State's distribution of resources that should be utilised in solving the problems faced by the most vulnerable in society. This concern is magnified by the clear growth of this population segment in recent years.

Eviction

In October 2000, a group of families who had been living in precarious housing conditions peacefully occupied a building at the corner of Pergamino Street and Ferré Street in Buenos Aires city. The building had been un-occupied for over ten years and was derelict. As time went by, many others in similar

positions joined the original group. Eventually, the number of people occupying the building totalled 180.

The situation of these families became a matter of public concern when the judge of the First National Correctional Instance³ held it to be a case

of illegal (criminal) occupation and, on 16 July 2001, ordered the immediate eviction of the families living in the building. The families obeyed the judicial order without resistance. However, as they had nowhere else to go and most had young children of school-age, they constructed shacks on the paths and in the street outside the building from which they had been evicted.

With the support of the Buenos Aires City Public Defence Attorney, the Titular Assistant in Administrative Disputes, and the Catholic Church, negotiations were opened with the Local Government authorities and an agreement was signed on 7 November 2001. According to this written agreement, the Government undertook to »

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 2 Those who are first and second generation descendants of equally poor parents.
 3 Number 9, Secretary number 65.

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In the last ten years, there has been a marked increase in the number of cases brought before national, regional and international courts with the aim of upholding economic, social and cultural (ESC) rights. Moreover, Albie Sachs, a judge of the Constitutional Court of South Africa, has predicted that 21st-century jurisprudence will “*focus increasingly on socio-economic rights*”.⁴ If the first decade is anything to go by, he may be proved correct.

With the *Housing and ESC Rights Law Quarterly* we aim to provide advocates and other interested persons with information about national and international legal developments related to housing and ESC rights. By focusing on recent cases and housing legislation, the *Housing and ESC Rights Law Quarterly* seeks to provide potential litigants and lobbyists with the tools necessary to bring housing and ESC rights cases before judicial and other bodies. The Quarterly is prepared by COHRE’s ESC Rights Litigation Programme and overseen by an Editorial Board composed of experts and advocates from Asia-Pacific, Africa, North America and Latin America (see page 12).

This edition leads with a review of a recent housing rights case concerning social housing policy in Argentina. The complainants’ lawyers describe not only the judgment, but also its impact on their clients’ situation and the broader issues raised when employing litigation to influence, or bring about changes in, social policy. This case review is followed by a series of in-depth case notes on recent groundbreaking ESC judgments related to social security and health rights at both regional and national levels. In our legislation review, we analyse Scotland’s 2003 award-winning homelessness legislation. Finally, this edition offers a round-up of other recent judgments in ESC rights cases, plus information on forthcoming events and publications.

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We hope you find the *Housing and ESC Rights Law Quarterly* useful. We welcome any comments, submissions of case notes and articles, as well as information on new cases and relevant events and publications. Please feel free to contact us at: quarterly@cohre.org

⁴ Albie Sachs, *Social and Economic Rights: Can they be Made Justiciable?* (Southern Methodist University School Of Law, 1999).

» provide, within 60 days, 86 houses for the evicted people. These would be constructed on land located in the Villa Celina, La Matanza.

Legal action: emergency relief and construction of housing

However, when the agreed period ended in February 2002, the Government had not even started the promised building work. With the support and assistance of the Centro de Estudios Legales y Sociales (The Centre for Legal and Social Studies, CELS), the evicted people initiated a legal action in a bid to have their social rights enforced. The action sought to uphold the right to adequate housing, which is enshrined in the National Constitution, the Constitution of the City of Buenos Aires, and in various international human rights instruments.

The judge hearing the case first made a personal on-site inspection of the living conditions of the evicted families. She immediately issued a temporary order sequestering US\$ 500 000 of the City Government Budget Fund so that adequate housing could be constructed. Furthermore, in order to solve the immediate housing problem, the judge conducted negotiations in judicial chambers, which resulted in an agreement that the families would be moved to city hotels, where they would enjoy decent living conditions.

While the legal agreement was being implemented, several practical problems arose in relation to the construction work, resulting in delays. These problems included the discovery that the proposed site was environmentally contaminated.

For the duration of the court case, the Government was obliged to continue paying large monthly sums to keep the displaced people in their hotels – in addition to being unable to use the sequestered US\$ 500 000. As a result, the Government entered into a new round of negotiations in judicial chambers with the evicted families. Also taking part in these talks were CELS, the Public Defender, the Titular Assistant and the Social Pastoral Department of the Archdiocese of Buenos Aires.

Final settlement: using international housing rights law

In December 2003, after five months of negotiations, an agreement was reached that incorporated international standards on the right to adequate housing. Under the agreement, the Government would construct 91 homes in three stages. In evaluating construction proposals received in response to public tenders for the execution of the works, the Government would give preference to those builders who undertook to contract 20 percent of their administrative, technical or building workers from among those affected by lack of housing. Furthermore, the families evicted from the area previously known as the *Villa La Dulce* would be entitled to acquire the newly constructed homes. The Government undertook to arrange that the Instituto de la Vivienda (the ‘Housing Institute’, a Government building society) would create a leasing contract with a purchase option, or a special credit line that would make home acquisition viable for the beneficiaries.

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The credit line would be completely interest free, while the loan repayments would be adapted to the income possibilities of each of the evicted families and would not exceed 20 percent of their real income.

This case is significant as it is an example of the resolution of a serious conflict by negotiation and mutual flexibility. Furthermore, it demonstrates that when the Government participates in a reasonable dialogue with affected persons, it is possible to arrive at solutions that fulfil the right to adequate housing set out both in the National Constitution and in international human rights instruments. The agreement has the force of a legal order and provides a valuable example of how the problems of those who cannot acquire housing in Buenos Aires may be solved. Also significant is the inclusion in the agreement of international standards on the right to

adequate housing, including those concerning habitability and accessibility of housing as laid down by the Committee on Economic, Social and Cultural Rights (CESCR).⁵ These standards define the fundamental characteristics of housing adequacy necessary to fulfil this right. For example, the ‘habitability’⁶ requirement implies that the house should be of quality construction, allowing the families to live decently. So far, all social housing plans in Argentina have been designed for the middle-class. This is partly because such plans require repayments, which poorer people simply cannot afford as their incomes are too low. However, the agreement reached in this case includes an ‘accessibility’⁷ requirement, to ensure that the purchasing plan is adjusted to take account of the economic reality of low-income buyers, so that they will be able to meet the payments as they fall due. The notion that attention to these minimum requirements can transform the constitutional right to adequate housing into a physical reality is something entirely new in Argentina.

Social rights litigation: benefits and shortcomings

The agreement discussed above was reached in judicial chambers and demonstrates that using judicial strategies and litigation to resolve private disputes can be a powerful

tool for influencing housing policy decisions that are necessary to obtain effective housing solutions. It must be stressed, however, that in many cases, including the present one, specific judicial remedies may solve the problem of an individual group, but leave all those in a similar situation unsatisfied. In other words, although legal intervention can secure the rights of a group of people, it is generally unable, at least on its own, to bring about sufficient change in public policy. In this case, the victims of the *Villa La Dulce* evictions may well see their right to adequate housing fulfilled. However, those in a similar situation cannot all count on getting the same treatment.⁸

Another concern is that reliance on legal remedies by some victims may actually result in a deterioration of the situation of others who do not have sufficient means to bring their cases before the courts — at least insofar as the satisfaction of a particular group’s demands is not reflected in changes to the general housing policy. The solution of a particular problem (which, without doubt, is extremely valuable as it represents the resolution of the housing problems of those involved) may nonetheless contribute to a lack of attention to others in a similar situation, and may even result in their being further marginalised. »

- 5 The CESCR, the UN Committee that oversees the International Covenant on Economic, Social and Cultural Rights (ICESCR), has issued a series of General Comments defining the scope of the obligations assumed by States Parties to the ICESCR and outlining the substantive contents of the rights enshrined in it. Of these General Comments, Nos. 4 and 7 define the scope of the right to adequate housing. In the former, the Committee recognises that access to adequate housing is related to other aspects of the individual’s life, stating that: “The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.” [See: General Comment No. 4, para. 1] General Comment No. 7 also refers to this interrelationship, stating (in para. 5) that forced evictions frequently violate not only the right to adequate housing, but other human rights as well. In similar vein, Gerardo Pisarello, in his publication entitled *El derecho a la vivienda adecuada: notas para su exigibilidad* (‘The right to adequate housing: notes on whether it can be demanded’), states that the right to adequate housing is a composite right, the violation of which influences the enjoyment of other rights, such as those to health, employment, education and privacy. On the concept of adequate housing, in General Comment No. 4 (para. 7), the Committee asserts that it cannot be considered as merely constituting the provision of a roof over the heads of residents, but must also be seen as the right to live in “security, peace and dignity”. The Committee further states that: “Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost.” [See: General Comment No. 4, para. 7]
- 6 With respect to this requirement, the Committee states that: “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the *Health Principles of Housing* [1990] prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates.” [See: General Comment No. 4, para. 8(d)]
- 7 With respect to this requirement, the Committee states that: “Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.” [See: General Comment No. 4, para. 8(e)]
- 8 This is partly due to procedural problems. Under Argentina’s civil law system, remedies are ordinarily limited to the parties before the court. Courts are often unable to make rulings that may have wider impact.

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» For this reason, it is imperative to consider that the intervention of the legal system in a particular case should be merely part of an overall strategy. Indeed, one benefit of taking a rights-based approach to housing is that similarly situated communities may be positively affected. This case, therefore, should be seen as having a bearing on a general problem and as being a big step towards an overall solution.

Conclusion

For those organisations working for the effective implementation of economic, social and cultural rights, the challenge is, therefore, to work out how the specific jurisprudence resulting from cases brought before the courts can be used to create or influence general policies and programmes in order to

positively benefit all persons whose housing rights are similarly violated. In the present case, in particular, the standards set out in the agreement signed by the Government of the City of Buenos Aires should be used as the basis for designing a public housing policy directed at eradicating the housing deficit amongst the poorer population segments. In other words, the *Villa La Dulce* case could prove to be the 'foot in the door' needed to hold the Government of the City of Buenos Aires accountable for its obligation to implement policies that satisfy the needs of all those in dire need.

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THE RIGHT TO HEALTH FOR MENTAL HEALTH PATIENTS: AFRICAN COMMISSION

Purohit and Moore v Gambia ⁹

African Commission on Human and Peoples' Rights

health rights – maximum available resources – African Charter – people with mental disabilities

Introduction

In its second major case on economic, social and cultural rights, the African Commission on Human and Peoples' Rights has examined the operation of, and conditions in, mental health institutions. In a relatively detailed decision, the Commission examines not only the basis for detention but also the positive obligations to ensure adequate care for patients. An interesting aspect of this decision is the Commission's implication of the defence of 'maximum available resources'. However, in contrast to earlier jurisprudence on implied rights, little justification or clarification is provided.

Facts

Purohit and Moore were mental health advocates representing mental health patients detained at Campana, a psychiatric unit of the Royal Victoria Hospital in the Republic of Gambia. More broadly, they were also acting on behalf of the existing and future

mental health patients (to be) detained under the country's Mental Health Acts. The complainants claimed, *inter alia*, that the legislation governing mental health in Gambia was outdated; that there were no provisions or requirements establishing safeguards during diagnosis certifi-

cation and detention of patients; that there was overcrowding in the Campana psychiatric unit; and that there was no requirement of consent to treatment or subsequent review of continued treatment. They alleged violations of the right to freedom from discrimination in the enjoyment of the rights provided by the African Charter on Human and Peoples' Rights.¹⁰ These include: the right to equality before, and equal protection from, the law;¹¹ the right to respect of human dignity and freedom from all forms of exploitation and degradation;¹² the right to an appeal and the right to defence, including the right to be defended by counsel of one's choice;¹³ the right to participate in the government of one's country,¹⁴ and Articles 16 and 18(4) of the African Charter. Here, we focus on the Commission's findings in relation to Articles 16 and 18(4). (see box).

⁹ Communication 241/200. Decided at 33rd Ordinary Session of the African Commission (15-29 May 2003).

¹⁰ African Charter on Human and Peoples' Rights, Art. 2.

¹¹ *Ibid.*, Art. 3.

¹² *Ibid.*, Art. 5.

¹³ *Ibid.*, Arts. 7(1) and [c].

¹⁴ *Ibid.*, Art. 13(1).

Admissibility

Article 56(5) of the African Charter states that communications received by the Commission will be considered if they “are sent after exhaustion of local remedies, if any, unless it is obvious that the procedure is unduly prolonged”. Gambia claimed that although the law in question, the Lunatics Detention Act (LDA), did not provide for a remedy, the Constitution could be interpreted as providing one, either under constitutional law or under common law. The Commission stated that the real question was whether, with regard to this particular category of persons, the available remedies were realistic. Considering the absence of legal assistance and aid, as well as the profile of the complainants (who, the Commission found, were likely to be poor or “picked up from the streets”), it could not be said that the available Constitutional remedies were realistic. Consequently, the communication was held to be admissible.

Decision

The Commission assessed Gambia's LDA in relation to the African Charter and other relevant international instruments. It pointed out that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms. The right to health includes the right to health facilities, as well as access to goods and facilities, to be guaranteed to all without discrimination of any kind. Furthermore, due to their condition and by virtue of their disabilities, mental health patients should be accorded special treatment that would enable them not only to attain but also to sustain their optimum level of independence and performance. Such a practice would be in keeping with Article 18(4) of the African Charter and the standards applicable to the treatment of mentally ill persons as defined in the Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care (UN Principles). The Commission stated that the UN Principles envisage not just ‘attainable standards’, but the highest attainable standards of health care for the mentally ill in the analysis and diagnosis of a person's mental condition, in the treatment of that

condition, and during the rehabilitation of a person believed to have, or diagnosed as having, mental health problems. The Commission stated that the scheme of the Lunatics Detention Act was lacking in therapeutic objectives as well as in provision of matching resources and programmes of treatment of persons with mental disabilities – a situation that fell short of satisfying the requirements of Articles 16 and 18(4) of the African Charter.

Very significantly, the Commission recognised that millions of Africans are denied the maximal enjoyment of the right to health due to the prevailing poverty that renders African countries incapable of providing the necessary amenities, infrastructure and resources to facilitate enjoyment of the right. Taking this into account, the Commission proceeded to read into Article 16 the obligation on States Parties to the African Charter “to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.” In this way, the Commission appears to have limited the obligation of a State to take steps to realise the right to health – that is, to no more than the maximum that its available resources permit – even though there is no such qualification in the text of Article 16. Admittedly, such limitation of obligation is in line with the approach to ESC rights taken in international instruments such as the ICESCR¹⁵, and, under Articles 60 and 61 of the African Charter, the Commission is able to look to international instruments. Nevertheless, this limitation might be regarded as a weakening of the obligation imposed on states under

Article 16

1. Every individual shall have a right to enjoy the best attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 18(4)

The aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs.

Article 16(2) of the African Charter. Even more disappointing was the Commission's failure to clearly specify the details of this exception to a State's general obligations, as was done by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 3.

On the facts of the case, the Commission commended the State of Gambia for its long-term administrative efforts to complement and/or reform archaic aspects of the LDA and to improve the nature of care given to mental health patients. Nevertheless, the Commission took the view that these efforts were insufficient, as persons with mental illnesses should never be denied their right to proper health care, which is crucial for their survival and their assimilation into, and acceptance by, the wider society.

The Commission urged Gambia to:

1. Repeal the Lunatics Detention Act and replace it as soon as possible with a new legislative regime for mental health, compatible with the African Charter and international standards and norms for the protection of mentally ill or disabled persons;
2. Create an expert body to review the cases of all persons detained under the LDA; and
3. Provide adequate medical and material care for persons suffering from mental problems in the territory of Gambia.

The Commission requested that Gambia report back to the Commission when it submits its next periodic report (in terms of Article 62 of the African Charter) on measures that it is to take in order to comply with the Commission's decision.

This case note was prepared by Mawuse Anyidoho.

15 International Covenant on Economic, Social and Cultural Rights, Art. 2.

THE RIGHT TO HEALTH - AN ECUADORIAN PERSPECTIVE

*Edgar Carpio Castro Jofre Mendoza & Ors v Ministry of Public Health and the Director of the HIV-AIDS National Programme (amparo writ)*¹⁶

Tribunal Constitucional, 3ra. Sala, Ecuador

health rights – justiciability – people living with HIV-AIDS – Constitution of Ecuador

Facts

The applicants were four persons living with HIV-AIDS. In May 2003, the public hospital where they were receiving treatment stopped providing them with one of the three drugs of the required triple therapy (tri-therapy). In September 2003, the hospital further reduced the therapy to only one of the three drugs. Because this was potentially more damaging to their health than not taking any of the drugs at all (as patients may develop drug-resistance, while deriving no therapeutic benefit, if the drugs are not used in the correct combination), the plaintiffs were forced to abandon the treatment, thereby putting their health at serious risk. The plaintiffs filed a 'constitutional *amparo*' (writ of protective injunction) against the Ministry of Public Health and the Director of the HIV-AIDS National Programme. They complained that the defendants had suspended the provision of the tri-therapy medication, and demanded the immediate restitution of such provision. They also demanded that the Government conduct various medical tests required to update their medical prescriptions.

Their writ alleged violations of, *inter alia*, the Constitution of Ecuador, specifically Article 42 (guaranteeing the right to health) and Article 43 (guaran-

teeing that public health programmes, services and actions be provided free of charge to all), as well as of Article 6 of the 'Law for the Prevention of, and Integral Assistance for, HIV-AIDS'.¹⁷

Decision

Confirming the decision of a lower civil court, the Court ordered that the State of Ecuador must ensure the right to health of its people – a right contemplated in Article XI of the American Declaration of the Rights and Duties of Man, and in Article X of the Protocol of San Salvador.

The Court held that although the right to health is an autonomous right, it also forms part of the right to life. The right to health entitles citizens not only to take legal action for¹⁸ the adoption of policies, plans and programmes related to the general protection of health (for example, in cases of disease or epidemic), but also to demand that appropriate laws be enacted, that the Government undertake the necessary research, that it develop public policies in the area of health care, and that it provide the necessary entities to ensure that the general public benefits from such policies, plans and programmes. The Court found that the Ministry of Public Health had committed an omission in failing to meet its obligation to provide

an immediate, diligent and effective solution to the problem outlined in the writ. This greatly harmed the conditions of life of those living with HIV-AIDS and amounted to a violation of their rights. Such an omission was a violation of rights guaranteed by the Constitution and by international instruments that Ecuador has ratified and, under Article 163 of the Constitution, has incorporated into its National Legislation. These rights include 'positive' social rights — immediately enforceable legal rights that are binding upon the 'public powers', who thereby have corresponding obligations. The Court stated, *obiter dictum*, that such 'social' rights are also to be implemented by courts such as this one, for which the protection of human beings is one of the basic tenets of contemporary constitutional development.

The Court concluded that, in this case, the right to health is an economic right, directly enforceable by the plaintiffs since they had previously had this right fulfilled by receiving a medically necessary treatment. Hence, the Court held, the omission by the Ministry of Public Health violated the plaintiffs' fundamental rights to life and to health.

*This case note was prepared by
Carolina Fairstein.*

¹⁶ Resolución No. 0749-2003-RA, 28 Jan. 2004

¹⁷ Ley para la Prevención y Asistencia Integral del VIH/SIDA

¹⁸ Editor's note: The judge uses the Spanish verb 'demandar', which, in a legal context, means: to file a suit or start proceedings against; to take legal action, petition or litigate for, etc.

THE RIGHT TO SOCIAL SECURITY OF NON-NATIONALS: HOPEFUL SIGNS FROM THE UNITED KINGDOM AND SOUTH AFRICA

The entitlement of non-nationals to social security is a contentious issue in many countries where there is a (real or perceived) shortage of public resources and an increase in the number of non-nationals seeking access to various social welfare benefits. The following two cases are useful examples of judicial approaches to the right to social security of two different categories of non-nationals: asylum-seekers and permanent residents.

*R ('T') v Secretary of State for the Home Department*¹⁹

Court of Appeal (Civil Division)

right to social security – asylum-seekers – ECHR – UK Human Rights Act

Facts

The plaintiffs brought applications for judicial review, challenging decisions by the Secretary of State refusing them asylum support on the grounds that they had failed to file a claim for asylum as soon as reasonably practicable after arrival in the UK. The plaintiffs alleged that the continuing refusal of the Secretary of State to relieve them of the consequences of destitution amounted to a breach of their right to freedom from inhuman or degrading treatment (Article 3 of the European Convention on Human Rights, ECHR).

Decision

The High Court held that the UK State was guilty of breaching the applicants' right to freedom from inhuman or degrading treatment. On appeal by the Home Secretary against the findings in one of the applicants' cases, the Court of Appeal found in favour of the State.

Both Courts relied on a common law conception of 'destitution'. The High Court employed the definition set out in a previous House of Lords case, as "*a life so destitute that to my mind no civilised nation can tolerate it*".²⁰ The judge stated further that such

destitution is characterised by sleeping rough, begging for food or money with which to buy it, and the resultant fear, humiliation and physical and mental suffering. The Court of Appeal noted that the level of destitution must be very severe and quoted a previous case which indicated that the State is not obliged to act until it is clear that charitable support has not been provided and the individual is "*incapable of fending for himself*".

The higher and lower courts appeared to accept the Government's submission that mere homelessness in and of itself is insufficient to amount to inhuman and degrading treatment and that, in order to succeed in relation to Article 3 of the ECHR, an applicant must produce cogent medical evidence of ill-health or some similarly severe adverse consequence, for example being on the verge of resorting to crime or prostitution. However, the Court of Appeal rejected the suggestion that homelessness cannot be a relevant factor for the purposes of Article 3.

Both courts held that the standard to be applied in considering an allegation of 'inhuman and

degrading treatment' was that set out in the European Court of Human Rights' decision in *Pretty v UK*.²¹ Thus, the applicant's condition must be such that the State's refusal or failure to provide support would debase her or him and diminish her or his human dignity.

Commentary

This case is significant because the courts recognised that the Government's failure to provide social assistance may amount to a violation of the civil and political right to freedom from inhuman and degrading treatment. Although the standard of destitution required to constitute a violation of Article 3 is very severe, this is an unusually helpful case from the UK — a jurisdiction that has traditionally been hostile to ESC rights. The High Court's reference to a dictum in an earlier House of Lords case — that it is arguable that human rights include a right to a minimum standard of living, "*without which many of the other rights would be a mockery*"²² — may also be of use to advocates attempting to make ESC rights-related arguments before UK courts. »

19 23 Sept. 2003. For full text of decision, see: http://www.courtservice.gov.uk/judgmentsfiles/j1962/r_v_home_dept.htm.

20 Simon Brown LJ in *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*: [1997] 1 WLR 275, 292.

21 [2002] 2 FCR 97, p. 131.

22 *Matthews v Ministry of Defence* [2003] UKHL 4, para. 26.

Facts

The applicants were Mozambican citizens who had acquired permanent residence status in South Africa but were denied social security benefits. They brought the class action not only on behalf of themselves and their children, but also on behalf of people from other countries and a class consisting of all foreigners with right of abode. They sought to challenge certain provisions of the Social Assistance Act 59 of 1992 (some of which were not yet in force). These provisions limited entitlement to social grants for the aged to South African citizens, and would prevent children of non-South African citizens in the same position as the applicants from claiming any of the childcare grants available to South African children (regardless of the citizenship-status of the children themselves). The applicants alleged that the exclusions: 1) were inconsistent with the State's obligation pursuant to the Constitution to provide access to social security (Section 27(1)(c)); 2) infringed their rights to life (Section 11) and dignity (Section 10); 3) limited their right to equality and amounted to unfair discrimination (Section 9); and 4) infringed the rights of their children under Section 28.

Decision

Confirming the High Court decision, the majority of the Constitutional Court held that the Constitution gave "everyone" the right to social security – not merely citizens – and that "everyone" would include those residing in the country legally. The Court held that, due to their

position as people who have become part of South African society and made their homes in South Africa, the exclusion of permanent residents from the impugned legislative scheme amounted to unfair discrimination. However, this would not be the case in relation to temporary or illegal residents who have only a tenuous link with the country.

Indicating that it was the "reasonableness" test (Section 27(2)) that was to be applied, the Court stated that the importance of providing access to social assistance to all who live permanently in South Africa, as well as the impact upon life and dignity that a denial of such access would have, far outweighed the financial and immigration considerations on which the State relied. Therefore, the legislative scheme's exclusion of permanent residents was unreasonable. By way of remedy, the Court ordered that the words "*or permanent residents*" be read into the relevant legislative provisions.

Two judges dissented, stating that the scheme could be justified under the limitations of rights set out in Section 36(1), which allows for such limitations when deemed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Government had insufficient means to help everyone who entered the country's borders in search of assistance and was justifiably concerned that the availability of social security benefits should not constitute an incentive for immigration to

South Africa. However, the dissenting judges did hold that it was not reasonable and justifiable in terms of Section 36 to exclude children born in South Africa to foreign parents from eligibility for childcare grants.

These case notes were prepared by Aoife Nolan.

23 Constitutional Court of South Africa, 4 Mar. 2004. For full text of decision, see: <http://www.concourt.gov.za/files/khosa/khosa.pdf>

LEGISLATION: THE HOMELESSNESS (SCOTLAND) ACT 2003 — AN ANALYSIS

In 2003, the Scottish Executive adopted the Homelessness (Scotland) Act 2003.²⁴ In doing so, they enacted what may well be the most progressive anti-homelessness law in Europe. If effectively implemented, this legislation has the potential to guarantee protection of the right to adequate housing for all homeless people in Scotland by 2012.²⁵

Building on the Housing (Scotland) Act of 2001,²⁶ the Act primarily affects local authorities in the execution of their duties in relation to homelessness. It aims to give effect to many of the law reforms proposed by the Homelessness Task Force through: 1) establishing a co-ordinated national approach to the prevention of homelessness; and 2) removing the barriers faced by many people due to aspects of previous legislation including 'priority need', 'intentionality' and the test of 'local connection'.

The new legislation expands the category of people who have 'priority need' for accommodation. It also provides for the phasing out, by 2012, of the distinction between priority and non-priority applications for local authority housing assistance.²⁷

The Act has strengthened the position of refugees by making homeless people who are at risk of violence or harassment because of their race, colour or ethnic origin a priority group for housing allocation, until the distinction is phased out. The

Act further provides that where an applicant was resident in accommodation provided pursuant to the Immigration and Asylum Act 1999, this would not constitute a 'local connection' for the purposes of the 1987 Housing (Scotland) Act.

The new legislation also empowers the Ministers to restrict the power of local authorities to refer a homeless household to another local authority if they are of the opinion that the household has a local connection with that authority.

The Act emphasises that interim accommodation provided for homeless people must fulfil certain "standards of suitability". Furthermore, Section 9(1) empowers Ministers to specify what accommodation would not satisfy these standards. The Government appears to be taking this issue seriously, judging from the announcement in January 2004 by the Scottish Executive Minister for Communities, Margaret Curran, that she would be launching a consultation process on using the legislative powers under the Act to make the placement of homeless families in bed-and-breakfast accommodation unlawful, in all but exceptional circumstances.²⁸

The Act is also progressive in its departure from the previously adopted approach towards those labelled 'intentionally' homeless, in that it makes provision for probationary tenancies for people with priority need who

have 'intentionally' made themselves homeless.²⁹

In order to help prevent homelessness, the new legislation makes limited changes to the repossession (and hence eviction) process. Section 11 of the Act provides that, before starting repossession proceedings, landlords (except when they are the local authority) must give notice of their intention to do so. This gives the relevant local authority an opportunity to intervene and prevent homelessness. Furthermore, where such proceedings are being initiated as a result of non-payment of rent, if the sheriff is satisfied that the rent is in arrears as a result of a delay or failure in the payment of housing benefit, he will not order repossession unless he considers it reasonable to do so.³⁰ Obviously the protective force of this provision will depend very much on the approach taken by sheriffs.

The Homelessness (Scotland) Act 2003 recognises that the provision of a house alone will not always suffice to solve the problems of every homeless applicant, and that a human rights approach to eradicating homelessness demands a multi-faceted strategy. If properly implemented, the Act may well result in the drastic reduction, if not elimination, of homelessness in Scotland.

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24 For text of the Act, see: http://www.bailii.org/scot/legis/num_act/2003/20030010.html. For a useful synopsis of the Act, see: Scottish Executives Notes, http://www.bailii.org/scot/legis/num_act/2003/en/2003en10.html

25 The Act is to be phased in progressively over a decade, starting on 30 Jan. 2004.

26 The 2001 Housing Act placed additional duties on local authorities to provide a minimum of temporary accommodation, advice and assistance to all applicants assessed as homeless.

27 British library, 'Homelessness (Scotland) Act 2003', <http://www.bl.uk/services/information/welfare/issue45/homeless.html>. Sect. 2 of the Act provides for the final abolition of the 'priority need' test as soon as the Ministers are satisfied that local authorities will be able to carry out their duties in relation to homeless people without distinguishing on the basis of priority need. Sect. 3(2) provides that this must be accomplished before 31 Dec. 2012.

28 'Executive to Consult on Outlawing B&Bs', *Property People – the Independent Voice of Housing*, 22 Jan. 2004, <http://www.ppmagazine.co.uk/418.html>

29 *Ibid.*, see: Homelessness (Scotland) Act 2003, Sects. 5 & 6.

30 Homelessness (Scotland) Act 2003, Sect. 12(3).

REPORT ON THE FIRST MEETING OF THE WORKING GROUP ON AN OPTIONAL PROTOCOL TO THE ICESCR

In 2003, the United Nations Human Rights Commission established an open-ended working group with a view to “*considering options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*” (the ICESCR).

This working group, chaired by Portugal, met in Geneva from 23 February to 5 March 2004. States, NGOs, international organisations and ESC rights experts participated in the working group discussions.

The discussions focused on issues such as the nature and scope of States Parties’ obligations under the ICESCR, the justiciability of ESC rights, as well as the benefits of an Optional Protocol to the ICESCR and its complementarity with other existing mechanisms. Reference was also made to the international dimension of ESC rights, as well as to the principle of international cooperation and technical assistance.

Although some delegations were strongly in favour of establishing an Optional Protocol to the ICESCR,³¹ others expressed concern, notably with regard to the justiciability of ESC rights (both at the national and international levels), the question of resources, the meaning of “*maximum available resources*”, and issues related to the cost of implementing ESC rights. Another issue raised was that a complaints procedure related to ESC rights might unduly interfere in the democratic process and national policy-making with regard to political, economic and budgetary priorities. Some delegations also questioned whether the Committee on Economic, Social and Cultural Rights (CESCR) would be competent to receive complaints under an Optional Protocol without amending the ICESCR.

Those delegations in favour of an Optional Protocol stressed that a complaints mechanism would ensure more effective local remedies, promote the development of international jurisprudence, strengthen international accountability, and empower vulnerable and marginal groups. Discussion also focused on the question of which rights should be covered by an Optional Protocol and whether a comprehensive or an *à la carte* approach should be adopted.

The various concerns raised by delegations were addressed by the Special Rapporteur on the Right to Health and the Special Rapporteur on the Right to Adequate Housing, who also participated in the working-group. They, along with NGOs and ESC rights experts, stressed that the justiciability of ESC rights has been confirmed and clarified through decisions by national courts and by regional human rights systems in Europe, the Americas and Africa, as well as by the work of the CESCR. The Special Rapporteurs also argued that the ICESCR does not impose an onerous burden on States Parties, as it simply requires them to show that they have taken reasonable action towards realising ESC rights.

Members of various UN treaty-monitoring bodies, in their discussions with the working group’s participants, rejected the view that ESC rights are mere aspirations and policy guidelines, as well as the claim that ESC rights are essentially different from civil and political rights. A member of the UN Human Rights Committee also stressed that the complaints procedure under the International Covenant on Civil and Political Rights (ICCPR) has not led to a flood of complaints, due to strict admissibility requirements.

NGO members of the International Coalition for an Optional Protocol to the ICESCR stressed the need to move towards the adoption of an Optional Protocol, which is considered to be a valuable tool to redress injustice and provide compensation to potential victims of ESC rights violations. They also emphasised that courts; 1) in adjudicating ESC rights claims, need not take over policy-making from governments; 2) already regularly order remedies for unjustified interference with ESC rights; and 3) have increasingly demonstrated their capacity to monitor the progressive realisation of such rights through the implementation of appropriate programmes and policies.

After two weeks of deliberations, the working group adopted a report based largely on the discussions³² that had taken place at the meeting. Unfortunately, the United States blocked consensus on the Chair’s recommendation and conclusions, which included a request for a two-year renewal of the working group’s mandate to consider options regarding the elaboration of an Optional Protocol. At its 60th session, the UN Human Rights Commission decided to renew the working group’s mandate for a further two years.

For information on the campaign for an Optional Protocol to the ICESCR, please contact:

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For more information, www.iwraw-ap.org/icescr_campaign.htm.

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31 Those in favour included Finland, Croatia, the Russian Federation, and Latin American countries including Brazil, Argentina, Mexico, Venezuela, Peru and Chile.

32 UN Doc. E/CN.4/2004/WG.23/CRP.8/Rev1

SUMMARIES OF RECENT ESC RIGHTS CASES

Orissa Starvation Deaths Proceedings ³³

National Human Rights Commission of India (HRC)

right to food – Constitution of India – directive principles – obligations on States

Facts

This decision was part of a continuing series of HRC hearings on the State of Orissa's response to starvation deaths. In these proceedings, the HRC considered the petitioner's argument that the Relief Manuals and Codes of India, which govern relief administration, violated the right to food, which is an integral part of the right to life as enshrined in the Constitution of India (Article 21). This interpretation was based on the assertion that 'beneficiaries' of relief are treated as recipients of state charity rather than as claim-holders.

Decision

The HRC agreed with the petitioner's interpretation, holding that when the right to life is read with the requirements set out in Article 39(a) of the Constitution (a directive principle that requires the State to direct its policy towards upholding its citizens' right to an adequate means to livelihood) and in Article 47 (which sets out the State's duty to raise the level of nutrition and standard of living of its people as a primary responsibility), the right to food is clearly a guaranteed enforceable constitutional right. The

HRC stated that the requirements of the Constitution are consistent with those set out in Article 11 of the ICESCR (which expressly recognises the right of everyone to an adequate standard of living, including adequate food). Furthermore, the right to food implies the right to food at appropriate nutritional levels. It also implies that the quantum of relief to those in distress must meet those levels in order to ensure that the right is actually secured.

Jorge Odir Miranda Cortez et al. v El Salvador ³⁴

Inter-American Commission on Human Rights (IACHR)

American Convention – right to health – Protocol of San Salvador – interpretation

Facts

The petitioners were people living with HIV/AIDS. They alleged that the Government of El Salvador's failure to provide them with triple therapy medication violated, *inter alia*, the following rights under the American Convention on Human Rights: the rights to life (Article 4), to inhumane treatment (Article 5), to equal protection (Article 24) and to judicial protection (Article 25); and economic, social and cultural rights (for example, the highest attainable standard of health) (Article 26). They also alleged that this omission by the State constituted

a violation of Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) that guarantees the right to health.

Decision

The IACHR ruled that the case was admissible with respect to Article 26 of the American Convention, which obliges States to take steps to progressively realise the rights implicit in the economic, social and cultural standards enshrined in the OAS Charter. In its decision,

the IACHR stated that while it was not competent to determine violations of Article 10 (the right to health) of the Protocol of San Salvador,³⁵ it would "take into account the provisions related to the right to health in its analysis of the merits of the case, pursuant to the provisions of Articles 26 and 29 of the American Convention". It thereby held that the economic, social and cultural rights provisions of the Protocol of San Salvador were to be utilised for interpretive purposes in order to more precisely define the guarantees under Article 26 of the American Convention.

³³ Case No. 37/3/97-LD, 17 Jan. 2003. For full text of decision, see: <http://nhrc.nic.in/impdirections.htm#37/3/97-LD>

³⁴ Case 12.249, Report No. 29/01, OEA/Ser.LV/II.111 Doc. 20 rev. at 284 (2000). For full text of decision, see: <http://www1.umn.edu/humanrts/cases/29-01.html>

³⁵ According to Art. 19(5) of the Protocol of San Salvador, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights only have jurisdiction to consider claims with respect to Art. 8 (Trade Union Rights) and Art. 13 (Right to Education) of the Protocol.

ROUND-UP OF RECENT JUDGMENTS IN ESC RIGHTS CASES

Admissibility decisions:

Homelessness — In *E.R. Kumar & Anr. v Union of India & Ors*,³⁶ the Indian Supreme Court admitted a public interest petition seeking an order requiring the Central Government and several State Governments to take immediate steps to provide the basic amenities necessary (including shelter) to uphold the right to lead a dignified life for hundreds of thousands of poor and homeless people.³⁷

Judgments:

Inheritance Rights - In *Daniels v Campbell*,³⁸ the Constitutional Court of South Africa held that the constitutional values of equality and non-discrimination require that a woman married in accordance with Muslim rites be considered a 'spouse' for the purpose of various succession statutes.

Evictions - In *The City of Cape Town v Rudolph*,³⁹ the Cape High Court (of South Africa) refused an eviction order against homeless people on vacant land on procedural grounds, declaring that the City of Cape Town was in breach of its statutory and constitutional obligations as set out in *Grootboom*, and ordering it to remedy the breach and report back to the court.

Restitution - In *Alexkor Limited v Richtersveld Community*,⁴⁰ the Constitutional Court of South Africa held that a community dispossessed of land as a result of racially discriminatory laws or practices was entitled to have ownership of the land restored pursuant to the Restitution of Land Rights Act 22 of 1994.

36 Supreme Court of India, 27 Jan. 2004.

37 'SC [Supreme Court] to come out with law on right to shelter', *Times of India*, 27 Jan. 2004.

38 Constitutional Court of South Africa, 11 Mar. 2004.

39 High Court of South Africa [Cape of Good Hope Provincial Division], 7 July 2003.

40 Constitutional Court of South Africa, 14 Oct. 2003

Cases to watch

In *SAHAJ v Vadora Municipal Corporation*,⁴¹ the Supreme Court of India accepted that public interest petitioners had made a prima facie case that a judgment of the High Court of Ahmedabad, permitting the demolition of 'hutments' without requiring the provision of any alternative accommodation, violated the rights to shelter and housing enshrined in the Constitution of India. Despite its finding of a constitutional right to housing in *Shantistar Builders v N.K. Totame*,⁴² over the last 20 years, the Indian Supreme Court has been extremely reluctant to find in favour of complainants seeking to assert their right to housing. It is hoped that this case marks the beginning of a new judicial receptivity to such claims.

41 Supreme Court of India, 19 Dec. 2003.

42 [1990] 1 SCC 520

Recent/forthcoming publications

- Gerardo Pisarello, *Vivienda para todos: un derecho en (de) Construcción* ('Housing for everybody: a right in (de) construction') (Barcelona: Observatori DESC, 2003)
- COHRE (in collaboration with Rights Action), *Continuing the Struggle for Justice and Accountability in Guatemala – Making Reparations a Reality in the Chixoy Dam Case* (Geneva: COHRE, 2004)
- COHRE, *Bringing Equality Home: Defending Women's Rights to Inheritance and Property Ownership in Sub-Saharan Africa* (Geneva: COHRE, 2004)
- COHRE, *Litigating Economic, Social and Cultural Rights – Legal Practitioners' Dossier* (Geneva: COHRE, 2003)

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