



Attorney General, et al. v. Dickson Tapela, et al.

Country: Botswana

Region: Africa

Year: 2015

Court: Court of Appeal of the Republic of Botswana at Gaborone

Health Topics: Health care and health services, HIV/AIDS, Infectious diseases, Prisons

Human Rights: Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Right to health, Right to life

Facts

Case 1: Tapela and Piye, two Zimbabwean nationals imprisoned in Botswana, both contracted HIV in prison. They were refused antiretroviral treatment for their condition based on an internal directive issued by the national government to all public medical institutions and personnel on March 26, 2004, indicating that testing, assessment, and treatment with antiretroviral and highly active anti-retroviral therapy (HAART) be freely provided to all prisoners, except HIV-positive, non-citizen prisoners.

Tapela and Piye, along with the Botswana Network on Ethics, Law and HIV/AIDS, filed a civil claim against the government, asserting that the internal directive denying foreign prisoners free access to treatment, while affording free treatment to citizen prisoners, was invalid and violated both the Prison Act and Regulations, and their constitutional rights to life, non-discrimination, and freedom from inhuman and degrading treatment.

The dominant relief sought was (1) a declaration that the internal directive was unlawful and invalid to the extent that it denies access to treatment to HIV-positive foreign inmates, and (2) an order that the treatment be provided to the plaintiffs, as well as all future non-citizen inmates with HIV. The lower court held that refusal of treatment to HIV-positive foreign inmates was invalid, the plaintiffs' constitutional rights were violated, and the government's duty to provide basic health services to prison inmates was breached. The court ordered that Tapela and Piye be enrolled in antiretroviral treatment. The government appealed this decision.

Case 2: Mwale, a Zimbabwean national imprisoned in Botswana, contracted HIV in prison, which progressed into AIDS. Upon hearing of the outcome of Tapela and Piye's case, Mwale applied for free antiretroviral treatment, but was refused. Mwale filed a civil claim against the government alleging contempt for failure to enroll him in treatment, breach of obligation, and violation of his constitutional rights. The lower court held that all the holding of Tapela and Piye's case was to be applied to all foreign prisoners, and ordered that Mwale be enrolled in antiretroviral treatment. The government appealed this decision.

Case 1 and Case 2 are joined in the present appeal.

Decision and Reasoning

The Court of Appeals dismissed the appeal, upholding the lower court's decision that denial of testing, assessment, and antiretroviral treatment to foreign prisoners, while affording it freely to citizens, discriminated unlawfully against non-citizens.

The Court held that the lower court erred in invoking the constitutional rights of the prisoners. Accordingly, the Court adjusted the lower court's orders to exclude references to the constitution, instead ordering:

the decision to withhold free medical treatment from HIV-positive non-citizen prisoners be set aside; this decision be applied to all other HIV-positive foreign prisoners, in compliance with the Prisons Act and Regulations.

The Court asserted that this decision applies narrowly to foreign prisoners seeking medical treatment to which they are entitled under the Prisons Act and Regulations.

The Court held that the directive could not be justified by public interest concerns due to resource constraints, because a bald statement from the government, absent evidence showing statistics and cost analyses, did not

adequately demonstrate that providing antiretroviral treatment to non-citizens was unaffordable. The Court stated that a lack of funds could not, in the normal course, justify disobedience to laws protecting human rights and freedoms.

The Court held that there exists no constitutional right to health care in Botswana, and that this right, along with other "socio-economic" rights, cannot be inferred from overbroad constructions of the rights to life and freedom from inhuman or degrading treatment.

The Court held that section 15(4)(b) of the constitution did not give permission for discrimination against non-citizens in the performance of public functions, because this provision is only applicable to discriminatory laws. The Prisons Act is neither discriminatory nor unconstitutional, and the administrative directive order from the government did not amount to law in this context.

Decision Excerpts

"In terms of the common law the State has the duty to keep good health the prisoners in its custody because, having forfeited their freedom, they are unable to properly fend for themselves" Page 25, para. 40.

"The refusal of free enrolment on HAART to non-citizen prisoners when this is afforded to citizen prisoners clearly discriminates against the non-citizen on account of their place of origin . . ." Page 37, para. 55.

"There will be many decisions of the Court that by their very nature carry financial implications for the Government . . . If the law requires a service to be provided, then funds must be found to provide that service, or Parliament must be engaged to amend that law. Lack of funds will not in the normal course justify disobedience of the law." Page , para. 70.

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