



B and Others v. Minister of Correctional Services and Others

1997 (4) SA 441 (C); 1997 (6) BCLR 789 (C)

Country: South Africa

Region: Africa

Year: 1997

Court: High Court - Cape of Good Hope Provincial Division

Health Topics: Health care and health services, Health systems and financing, HIV/AIDS, Infectious diseases, Medicines, Poverty, Prisons

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

Facts

The Applicants were four prisoners living with HIV. They sought an order declaring that prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts was less than 500 per milliliter of blood were entitled to receive appropriate antiretroviral treatment at the Government's expense. They noted that Section 35(2)(e) of the Constitution establishes that "everyone who is detained, including any sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including the provision at state expense of . . . medical treatment." The Respondents, the Minister of Correctional services and others, did not contest whether the Applicants were entitled to adequate medical treatment. The dispute instead revolved around the whether the Applicants and other prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts was less than 500 per milliliter of blood were entitled to receive the antiretroviral treatment at Government's expense.

The Department of Correctional Services did not have firm guidelines establishing when antiretroviral treatment was to be initiated for prisoners living with HIV. The Department's policy was instead largely determined by the policies of provincial hospitals. At the time, provincial hospitals provided only monotherapy to prisoners at the Government's expense, rather than the recommended triple combination therapy, and only prisoners with a CD4 count of less than 200 and more than 50 per milliliter of blood and whose condition had developed into AIDS received treatment. These policies were the result of significant budgetary constraints.

The Applicants argued that the policies of provincial hospitals were inadequate because physicians waited too long to begin antiretroviral treatment, thus increasing the risk of death amongst prisoners living with HIV. They also claimed that administering appropriate antiretroviral treatment at an earlier stage of the disease was more cost-effective.

Decision and Reasoning

The Court considered two questions: whether the Appellants and other prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts were less than 500 per milliliter of blood were entitled to have antiretroviral treatment prescribed for them on medical grounds, and, if so, whether they were entitled to receive such treatment at the Government's expense.

The Court held that the first question was not within its purview to decide, as it was a purely medical assessment. Regarding the second question, the Court held that a lack of funds did not justify the Government's failure to realize a prisoner's right to adequate medical treatment. It declared that "once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment." However, the Court noted that the determination of what constitutes "adequate medical treatment" could not be made in a vacuum and that financial constraints could be considered when making this decision. It stated that if the Government cannot afford a particular medical treatment or if the provision of such treatment would place "an unwarranted burden" on the Government, "the Court may very well decide that the less effective medical treatment which is affordable may be accepted as adequate."

The Court next stated that the distinction between prisoners and people outside prisons was significant. It held that "prisoners have a fundamental right to adequate accommodation, nutrition and medical care, whereas no such guarantee is given to people outside prison." The Court stated that "unlike persons who are

free, prisoners have no access to other resources to assist them in gaining access to medical treatment.â€• It further noted that prisoners living with HIV were unique because the Government is â€œkeeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside.â€• Therefore the level of medical treatment the Government is required to provide prisoners must be treatment that is â€œbetter able to improve their immune systems than that which the State provides for HIV patients outside.â€• The Court further declared that the Respondents had failed to demonstrate that the Department of Correctional Services could not afford to provide combination antiretroviral treatment to prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts were less than 500 per milliliter of blood.

The Court thus held that combination antiretroviral treatment constituted â€œadequate medical treatmentâ€• to which prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts were less than 500 per milliliter of blood were entitled under section 35(2)(e) of the Constitution. The failure to provide such treatment to these prisoners amounted to an infringement of their constitutional rights.

Decision Excerpts

â€œWith reference to the position at common law, Mr Scholtz submitted that if the same standard of care and treatment is provided for prisoners attending State institutions, they would be retaining the residuum of rights which survive incarceration. I do not believe that this is so. Unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment. It is true that some HIV positive prisoners will, upon release, be dependent on the State for medical treatment. On the other hand, there are prisoners, like first applicant, who may well be able, upon their release, to earn an income which will enable them to afford anti-viral treatment or who will receive charitable assistance from their employers. As far as the latter category of prisoners is concerned, an inroad would be made upon their personal liberties if they were to be refused access to anti-viral treatment. Since such inroad cannot be described as a necessary consequence of incarceration, I do not believe that the refusal to provide these prisoners with anti-viral medication is consistent with the principles of our common law. In saying that I obviously do not intend to suggest that the standard of medical treatment for any particular prisoner should be determined by what he or she could afford outside prison. What I am saying, is that the standard of medical treatment for prisoners in general cannot be determined by the lowest common denominator of the poorest prisoner on the basis that he or she could afford no better treatment outside.â€• Para. 53.

â€œWith regard to possible financial constraints, there is the further consideration of a cost-saving raised by applicants' experts to which respondents have, in my view, not given a satisfactory answer. As appears from the foregoing, it is contended by applicants' experts, on the basis of international research, that the administration of anti-viral therapy at an early stage is cost-effective in that the treating of opportunistic infections is significantly reduced.â€• Para. 57.