



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

(MAHGB-000057-14), BWHC 1 (2014)

Country: Botswana

Region: Africa

Year: 2014

Court: High Court

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

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

Facts

The applicants, two prisoners with HIV and an interested non-governmental organization, complain that the policy of denying Highly Active Antiretroviral Therapy (â€œHAARTâ€•) to non-citizen inmates is a violation of the rights of such non-citizen prisoners under the Constitution of Botswana.

HAART is a drug treatment that helps control HIV mutation and reduces the likelihood of opportunistic infections in HIV-infected persons. Two of the applicants are Zimbabwean nationals being held in the Central Prison at Gaborone after convictions in 2007. Both applicants are HIV positive and were diagnosed with HIV while in prison. Enrollment in HAART treatment involves an assessment of viral load and CD4 count. The applicants were denied this assessment on the grounds that they were not Botswanan citizens. At this stage, the applicants reached out to the third applicant, the Botswana Network on Ethics, Law on HIV/AIDS for assistance. In 2010, this non-governmental organization financed an assessment of both prisonersâ€™ viral loads and determined that the applicants met the criteria for HAART enrollment. The applicants were denied enrollment in the program due to the fact that they were not citizens of Botswana. Prisoners who were citizens of Botswana were supplied with the treatment.

The applicants base their claim on Presidential Directive Cab (5) of 2004 which directly addresses that the government must provide for the â€œ[p]rovision of free treatment to non citizen prisoners suffering from ailments other than AIDS.â€• The applicants challenge the directive as a violation of various provisions of the Constitution of Botswana: (1) Section 4 on the right to life; (2) Section 7 on the right not to be subjected to torture or inhuman and degrading punishment; and (3) Section 15 which guarantees non-discrimination on various grounds, including place of origin. The applicants seek a review of the decision to exclude them from treatment and also a declaration that the actions violate their constitutional rights.

The government respondents raised several procedural challenges, but the Court dismissed the challenges and ruled on the merits of the case. In dismissing the challenges, the Court noted that the procedural rules are not intended to be hurdles that prevent the bringing of claims, especially in cases involving constitutional challenges.

Decision and Reasoning

The Court held that the policy of denying HAART treatment to qualified non-citizen prisoners was a violation of the Constitution of Botswana under sections 4, 7, and 15. The Court ruled that the applicants, and other non-citizen inmates who meet the criteria for HAART, must be enrolled in the treatment program.

The Court held that the denial of HAART treatment can violate a personâ€™s right to life. HAART can help control viral load and prevent opportunistic infections, including tuberculosis. As progression of the disease from HIV to AIDS can result in death, failure to supply the treatment can be a violation of the right to life. The Court also found that the directive did not prevent the treatment of prisoners with HIV as it specifically referenced prisoners with AIDS, not HIV.

With regards to non-discrimination under Section 15 of the Constitution, the Court held that the policy of denying HAART to prisoners based on their non-citizen status violates the Constitution. In order to for a policy to make such a distinction between citizens and non-citizens, it must be â€œreasonably justifiable in a democratic society and or in the public interest.â€• The Court found that denying the HAART treatment not only

posed a threat to the person denied the treatment, but also increased the likely prevalence of opportunistic infections, like tuberculosis, which pose a threat to all prisoners in detention at the facility. As such, the policy cannot be in the public interest. In determining whether the policy is justifiable in a democratic society, the Court cites to the African Charter on Human and Peoples' Rights, which includes provisions that state parties must protect the health of their people and that discrimination on the basis of place of origin should not occur. The Court notes that although this has no force of law in Botswana, this is a goal to which national laws should measure up.

Decision Excerpts

“The withholding of HAART from the applicants will enable their HIV to replicate and there by relegate them to the terminal stage known as AIDS. To this end, HAART is not only a medical necessity but a life saving therapy the withholding of which will take away a constitutionally guaranteed right to life.” (para. 28)

“The applicants, it must be noted have had their liberty curtailed pursuant to a sentence of a court of law. The residuum of their rights under the Constitution of Botswana, however, remains intact and so are their rights under the Prisons Act.” (para. 28)

“It is impermissible for the respondents to indirectly extend the limits of punishment by withholding certain services to which inmates are lawfully entitled on account of their status as “convicted non citizen inmates.” (para. 33)

“Botswana is a member of the community of civilized states which has undertaken to abide by certain standards

of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken” (p. 34)

“The denial of HAART to HIV positive inmates not only exposes them to premature death but increases the likelihood of HIV transmission as well as other life threatening contagious infections like tuberculosis to other inmates regardless of their HIV status and one may add, nationality.” (para. 40)

“It can never be in the public interest nor can it ever be reasonably justifiable in a democratic society like ours, that the provision of life saving medication like HAART is withheld with the ultimate result that the group of people so deprived become more infections [sic] to others or die in our hands.” (para. 41)