

With the *Housing and ESC Rights Law Quarterly*, the COHRE ESC Rights Litigation Programme aims to present advocates and other interested persons with information on national and international legal developments related to housing and ESC rights.

ENSURING WOMEN'S AND CHILDREN'S EQUALITY RIGHTS AND SOCIO-ECONOMIC RIGHTS - RECENT SOUTH AFRICAN DEVELOPMENTS

By Michelle O'Sullivan

Introduction

Based in Cape Town, South Africa, the Women's Legal Centre (WLC) conducts public interest litigation and advocacy to advance women's rights in areas such as violence against women, equality, customary and religious laws, and women's access to resources including healthcare, land and housing. This article focuses on recent decisions of the South African Constitutional Court (CC) in cases brought by the WLC concerning inheritance and maintenance rights of women in Islamic marriages, under customary law, and in domestic partnerships, when these relationships are dissolved by death.

Ten years into democratic rule, the formal legal system still did not recognise the rights of women and girl children to inherit under African customary law,¹ Muslim marriages were not recognised for inheritance purposes, and domestic partnerships had no legal status.

Securing inheritance rights serves to protect women at a time when they are most vulnerable: upon the death of a husband or partner. This is crucial in light of the increasing mortality in South African society, largely as a result of the HIV/AIDS pandemic. Secure inheritance rights assist in enhancing women's security of

tenure and socio-economic status. The cases described below have indirect implications for the socio-economic rights to property and housing contained in the South African Constitution.

For the Government of South Africa, arguably, it is simpler to implement court orders conferring the right to inherit upon women than it is to legislate in the contested terrain of customary or religious laws. Thus, judgments such as those described in this article may help to inform the legislative process. The Government has played a complementary role in the cases discussed, either by adhering to the Court's judgments or by supporting the relief sought. »

¹ In *Mthembu v. Letsela & Anor*. 2000 (3) SA 867 (SCA), the Supreme Court of Appeal upheld the rule of primogeniture insofar as it applied to girls whose parents were unmarried.

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EDITORIAL

The equality rights and socio-economic rights of women and children are the subject of the first article in this edition of the *Quarterly*. Michelle O'Sullivan of the Women's Legal Centre discusses cases brought by the Centre to give effect to the inheritance and maintenance rights of women in various forms of union, upon the death of their partners. Then Malcolm Langford reviews recent cases decided by the European Committee on Social Rights, dealing with access to education, housing and health-care. The next article provides a detailed summary of a decision by the South African Supreme Court of Appeal on the right to restitution of a dispossessed community. Then there is a round-up of other judgments and admissibility decisions in ESC rights cases. This is followed by a note on a communication being brought by COHRE before the African Commission on Human and People's Rights in relation to forced evictions and accompanying human rights violations in Darfur, and, finally, information on forthcoming events.

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» Cases that proceed to finality involve women of immense courage. Litigation of this nature often poses a threat to vulnerable family relationships of interdependence. There are community and cultural perceptions about women challenging religious and cultural norms in these cases, which may result in discriminatory or threatening conduct. It is almost never in the interests of parties to pursue such litigation, because the costs of defending the litigation are borne by the 'deceased estate' (i.e. the possessions of the deceased that are subject to probate and distribution to heirs and beneficiaries). These cases invariably concern an estate where the family home is the only asset. Any charge against the estate may result in the sale of the family home to pay estate charges, an outcome that the WLC seeks to avoid at all costs. In cases that do proceed, *pro amico* (free of charge) legal representatives and executors are appointed for parties defending the litigation in order to avoid losing the home. The practical outcome that the WLC seeks is the protection of their client's property rights.

A trilogy of cases

An incremental approach was adopted in these cases. The WLC began with the *Daniels* case,² which concerned a monogamous Islamic 'marriage'.³ Then the WLC litigated the cases that culminated in the *Bhe* judgment,⁴ which concerned intestate inheritance rights under customary law. Finally, it brought the *Robinson* case,⁵ which involved maintenance rights (i.e. rights to support) upon the dissolution of domestic partnership by death. The following paragraphs of this article examine the *Bhe* case and the *Robinson* case.

The *Bhe* decision

Facts

The *Bhe* judgment concerned three related cases. The applicants in the first action were the *Bhe* sisters, aged nine and two, on whose behalf their mother (the third applicant) challenged the rule that, in the absence of a will stipulating that the girls inherit their deceased father's estate, they could not inherit the property on the grounds that they were female and illegitimate. The only asset in the estate was the girls' home. Their parents had never married and had cohabited in a permanent life partnership for twelve years.

The applicants challenged the constitutional validity of the African customary law rule of primogeniture as well as Sect. 23 of the Black Administration Act ('the Act'), in terms of which the house was deemed to be the property of the eldest male relative of their father, in this case their grandfather, who planned to sell their home in order to defray burial costs.

The second case was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust in the public interest and as a class action on behalf of all women and children prevented from inheriting by reason

2 *Daniels v. Campbell NO & Ors.* Case No. CCT40/03, 11 Mar. 2004 (the '*Daniels* case'), <http://www.constitutionalcourt.org.za/Archimages/1341.PDF>

3 See Birte Scholtz, 'Muslim Women's Inheritance Rights – The South African Position', *Housing & ESC Rights Law Quarterly*, Vol. 1, No. 2, pp. 3-4.

4 *Bhe v. Magistrate Khayelitsha & Ors.* 2005 (1) BCLR 1 (CC), 15 Oct. 2004, <http://www.concourt.gov.za/files/4903/bhe.pdf>

5 *Volks NO v. Robinson and Ors.* CCT12/04, 21 Feb. 2005 (the '*Robinson* case').

of the Act and the rule of male primogeniture ('the SAHRC case'). The third case concerned the right of a sister to inherit from her brother's intestate deceased estate under African Customary Law ('the Shibi case').⁶

With regard to the *Bhe* case, the Cape High Court ruled in September 2003 that the African customary law of succession, and relevant provisions of the Black Administration Act, were unconstitutional since the girls were barred from inheritance only because they were black and female.⁷ The Pretoria High Court made a similar order in the *Shibi* case.

The judgment

In confirmation proceedings in the *Bhe* and *Shibi* cases, and in a direct access application in the SAHRC case, the CC declared the African customary law rule of primogeniture unconstitutional and struck down the entire legislative framework regulating intestate deceased estates of black South Africans.

The Court noted that Sect. 23 of the Act was an anachronistic piece of legislation that ossified 'official' customary law and caused egregious violations of the rights of black African persons. It ruled that Sect. 23 and its regulations were manifestly discriminatory and in breach of the rights to equality and dignity, and, therefore, must be struck down.

With regard to the African customary law rule of male primogeniture, the Court held that it discriminates unfairly against women and illegitimate children on the grounds of race, gender and birth and is accordingly unconstitutional and invalid.

The effect of this order is that all deceased estates will devolve (i.e. be transferred to heirs or beneficiaries) in terms of the Intestate Succession Act 81 of 1987, under which widows and children

benefit from deceased estates regardless of their gender or legitimacy. The decision of the Court is retrospective: it applies to all deceased estates that fall under the Act where the deceased died after 1 April 1994, with the exception of those estates where there has been a final transfer of ownership of property pursuant to a distribution of an estate in terms of Sect. 23 of the Act. However, such transfers will be invalid if it is established that, when they were made, the transferee was on notice that the property in question was subject to a legal challenge on constitutional grounds. The order also provides for division of estates in circumstances where the deceased person was in a polygamous marriage and is survived by more than one spouse.

The order is significant and promises to bring an end to discrimination against women, girl children, and men other than the eldest male relative, on the basis of race, sex, gender, social origin and birth. The challenge now is to ensure effective implementation of the CC decision. As the women and girls who are most vulnerable with regard to this aspect of customary law are located in rural areas, it is essential that the judgment be publicised widely and that traditional councils and tribal authorities be made aware of its existence and impact.

The majority of deceased estates are dealt with informally, so title of immovable property (i.e. land, housing) is seldom transferred through the Deeds Registry. In these circumstances, there is scope for widows and children who have been excluded from inheritance to bring enrichment claims against estates where the property has been dealt with on an informal basis and not in terms of the regulations of the Act. It will require significant assistance from Government officials and magistrates for this judgment to become a meaningful reality in women's lives.

Although the cause of action in the CC was grounded on unfair discrimination on the basis of gender and race, the case also concerns housing rights and gender discrimination. The impact of the unfairly discriminatory legislative framework and application of the rule of primogeniture was often to render a widow and girl children homeless. This constitutes an infringement of the constitutional right to property. The judgment of the Court achieves the indirect protection of the socio-economic right to housing, as the court order will protect widow's and children's socio-economic well-being through the protection of their property rights.

The Robinson case

Facts

Mrs Robinson had been involved in a monogamous life partnership for 15 years when her partner died in December 2001. She claimed maintenance from his estate. Her claim was refused by the Executor of the estate on the basis that she was not a 'spouse'. The CC was asked to determine whether the exclusion of life partners from the definitions of 'survivor', 'spouse' and 'marriage' in the Maintenance of Surviving Spouses Act 1990 (MSS) was unfairly discriminatory and in conflict with the Constitution.

The judgment

The majority of the Court concluded that, in the context of maintenance claims in deceased estates, it is not unfair to make a distinction between the survivors of marriage on the one hand, and those of heterosexual cohabiting relationships on the other.

The majority decision recognises the structural dependence of women in domestic partnerships: that many women become economically dependent on their male partners and are left destitute and suffer hardship upon their death. »

⁶ *Charlotte Shibi v. Mantabeni Freddy Sithole*.

⁷ *Bhe & Ors. v. Magistrate, Khayelitsha & Ors.* 2004 (2) SA 544 (C).

» However, the Court was of the opinion that their misery is not caused by the under-inclusiveness of the MSS. Rather, it is due to the general position of women in society and the lack of a legislative framework placing rights and obligations on people who are partners in domestic relationships during their lifetime.

Although the majority recognised that, in the case of very poor and illiterate women, the effects of this vulnerability will be more pronounced, they suggested that this is something that can be corrected through the empowerment of women and social policies by the legislature:

[I]t is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures ... It needs more than the extension of benefits under Section 2(1) [of the MSS] to survivors who are pre-deceased by their partners ... the reality is that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way.⁸

In contrast, both of the dissenting judgments, one by Justices Mokgoro and O'Regan, and the other by Justice Sachs, found

a constitutional violation of the right to equality and ordered that the legislature should remedy the violation within two years.

Justices Mokgoro and O'Regan found that the deceased and the applicant had a permanent and intimate life partnership and that not every family is founded on a marriage. Members of such families (also known as 'domestic partnerships') often play the same roles as people in families that are founded on marriage, and provide companionship, support and security to one another. Justices Mokgoro and O'Regan disagreed with the majority view that it is not unfair to discriminate between, on the one hand, relationships to which the law attaches the obligations of support and cohabitation and, on the other hand, those relationships to which the law does not attach such consequences. In the opinion of these two Justices, this approach defeats the important and constitutional purpose of the prohibition against discrimination on the ground of marital status. These Justices concluded that cohabiting partners are a vulnerable group and that, in the absence of legal regulation, the fact that they are excluded from the provisions of the MSS can have a grave impact on their interests. They held that limiting the scope

of Sect. 2(1) to married spouses constitutes unfair discrimination, which cannot be justified.

Having maintenance claims will significantly assist poor women in domestic partnerships, as their partner's estate will often be their home. Having a maintenance claim against the deceased estate may make the difference between keeping and losing that home. The majority decision seems to suggest that the economic and social problems faced by women in domestic partnerships are so widespread that the limited assistance available to them in claiming maintenance from a partner's deceased estate is unlikely to alleviate the vulnerability that they experience. This decision also suggests that only when domestic partnerships are protected by legislation during the subsistence of the relationship will a Court be able to meaningfully consider what should happen upon the death of a partner to that relationship. It is surprising that, when faced with the opportunity to diminish the vulnerability of women at the end of a domestic partnership, the CC relied on the severity of the vulnerability of women in the group concerned to justify refusing an extension of benefits (which it regarded as palliative) to women in domestic partnerships.

8 *Robinson case*, para. 66.

GATHERING STEAM? A REVIEW OF RECENT DECISIONS OF THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS

By Malcolm Langford⁹

The Council of Europe's new collective complaints system for social rights is showing signs of gathering steam. Not only has the European Committee on Social Rights ('the Committee') decided an increasing number of cases involving labour rights, but it has also made a number of key decisions on classical 'social'

rights. More are in the pipeline.¹⁰ Some of the recent cases deal with the issues of education for persons with autism, and access to emergency healthcare and housing for non-nationals. They provide an insight into the Committee's views on positive obligations and non-discrimination. This short note provides

a critical review and examines the Committee's interesting mix of progressive and conservative legal interpretation.

The Committee is an expert and quasi-judicial body entrusted with providing a *legal assessment* of whether State practice conforms with the European Social Charter

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10 For example, Complaint No. 31/2005 *European Roma Rights Center (ERRC) v. Bulgaria*.

of 1961, or its 1996 revision, ('the Charter').¹¹ Complaints can be made by national and international employee or employer associations, or by accredited international and national human rights organisations. After reviewing the submissions of parties, the Committee submits its decision, which is neither final nor necessarily binding, to the Committee of Ministers ('the Ministers'), a body empowered to make recommendations to the State involved. Although some commentators consider that the Ministers must make detailed recommendations, they usually make a simple resolution taking note of the decision and of the measures taken by the government in question with respect to the issues raised in the complaint.

Postscript: On 8 June 2005, the Committee released its ruling in *European Roma Rights Centre v. Greece*,¹² its first decision on the merits to address violations of housing rights. The Committee found that Greece had violated the right to housing of Roma by failing to provide them with sufficient and suitable permanent and temporary housing, as well as by not protecting them from forced evictions. A full analysis will appear in a future edition of the *Quarterly*.

Access to education: Autism-Europe v. France

Although France has an array of statutory instruments relating to provision of education to persons with disabilities, Autism-Europe alleged that implementation of these instruments lagged far behind.¹³ As a result, the overwhelming majority (80-90 percent) of young adults and children with autism had no access to adequate educational services. Based on current rates of placements in

special education, Autism-Europe estimated that it would take 100 years to erase the deficit in the official waiting list, which then stood at 39 514 persons.¹⁴

The organisation also challenged the quality and structure of the relevant legislative and financial framework, arguing that insufficient provision had been made for mainstreaming of education, early intervention, and teacher training. It also asserted that the funding formula for special education took insufficient account of the number of children in need. The Government of France acknowledged that previous action plans aimed at providing education had failed, but pointed to new funding allocations and programmes, even though many of these concerned all people with disabilities, rather than those with autism specifically.

After reviewing the rights that were invoked (i.e. the right of persons with disabilities to education, the right of children and young persons to education, and the right of all persons to non-discrimination),¹⁵ the Committee made an interesting concession to States, mirroring recent jurisprudence of the African Commission on Human and Peoples' Rights.¹⁶ When the realisation of a right was "exceptionally complex and particularly expensive", the Committee stated that a government was permitted some flexibility.¹⁷ However, the Committee based this implied defence for States on the wording of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. According to the Committee, realisation of social rights must occur within a "reasonable time, with measurable progress and to an extent consistent with the maximum available resources".¹⁸

The Committee ruled that the Government's overall lack of progress in this area constituted a violation of the Charter. Noting that there had been twenty years of national debate on the subject, and that the Disabled Persons Act had been passed in 1975, the Committee found that there was an unacceptable and chronic shortage of places. It also chided the Government for its restrictive definition of autism. The Committee was not, however, prepared to censure France's method of funding special education through the State health insurance system, noting that this was a matter for State discretion.

Access to housing and healthcare for non-nationals: ERRC v. Italy, FIDH v. France

Unlike other international human rights instruments, the Charter is expressly restrictive in the case of non-nationals. Its Appendix provides that the Charter rights only extend to foreigners who are nationals of other Contracting Parties to the Charter and who are lawfully resident or work regularly within the State. However, the issue of the extent to which this is modified by other Charter provisions has arisen in two recent cases; one against Italy, the other against France.

The complaint of *European Roma Rights Centre (ERRC) v. Italy*¹⁹ concerned the right to housing of Roma in Italy.²⁰ The ERRC alleged substandard housing, racial segregation in housing, forced evictions, expulsions, abusive police raids and a failure to reduce homelessness. At the admissibility stage, the Government of Italy objected to the inclusion in the complaint of Roma who fell outside the terms of the Appendix (mentioned in the preceding paragraph). »

11 The term 'Charter' is used for both the original and revised versions, unless separately specified in the text. For a comprehensive review of the collective complaints system, see R. Churchill and U. Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', *European Journal of International Law*, Vol. 15, No. 3 (2004), pp. 417-456.

12 Complaint No. 15/2003, http://www.coe.int/T/E/Human_Rights/Esc/

13 *Autism-Europe v. France*, Complaint No. 13/2002, European Committee on Social Rights, http://www.coe.int/T/E/Human_Rights/Esc/

14 According to the World Health Organization's definition of autism, the figure was 67 147.

15 Arts. 15, 17 and E respectively.

16 See: *Purohit & Moore v. The Gambia*, Communication 241/2001, African Commission on Human and Peoples' Rights.

See also: *Housing & ESC Rights Law Quarterly*, Vol. 1, No. 1, pp. 4-5.

17 *Autisme-Europe v. France*, para. 53.

18 *Ibid.*

19 Complaint No. 27/2004, http://www.coe.int/T/E/Human_Rights/Esc/

20 The complaint is based on Art. 31 of the Revised Charter of 1996, which provides for the right to housing. It should be noted that the Committee has largely read the right to housing into Art. 16 of both the original and the revised versions of the Charter; see Conclusions XII-1 (p. 30).

» In both its original complaint and its response on admissibility, the ERRC contended that this exception was inapplicable. Firstly, systemic discrimination against Roma meant that Italy had failed to provide residency permits to many Roma (which is a violation of Articles 18 and 19 of the Charter). They include refugees and stateless persons, two categories explicitly protected in the Appendix. Secondly, the Government's argument was contrary to international human rights law, which upholds individual rights, including those of non-citizens and non-nationals. The ERRC also noted that this argument was moot since Italy's housing policies and practices were applied to Roma on the basis of their ethnicity, not their residency.

The Committee found the complaint admissible, noting that even the Government's argument would not "entirely render the complaint ill-founded", and that the matter could be better addressed during the examination of the merits of the complaint. A decision is expected late this year.

In *International Federation of Human Rights Leagues (FIDH) v. France*,²¹ the Committee clarified its stance on the rights of foreign nationals, in particular those who reside illegally. FIDH claimed that France had violated the right to medical assistance (Article 13) by ending the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment. The rights of children to protection (Article 17) were also said to have been contravened. A 2002 legislative reform restricted access to medical services for children of illegal immigrants. FIDH argued (as an aside) that these children were lawful residents because residency permits were not required for those under 16 years. Such children had to wait three months to qualify for medical assistance, and were only accorded assistance in "situations that involve an immediate threat to life".

The Committee began assessing the case by addressing the scope

of the Appendix. Drawing on the Vienna Convention on the Law of Treaties, it emphasised that the Charter must be interpreted in a purposive manner. This means that it should be interpreted consistently with the principles of individual human dignity and any restrictions should, therefore, be read narrowly. The analysis led the Committee to conclude, by a 7 to 6 majority, that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter."

However, the implications of this purposive interpretation are not as clear as they might appear. Firstly, in its legal analysis, the Committee supported its argument by pointing to the undeniable link between the right to medical assistance and the right to life. However, the extent to which illegal immigrants are covered by all social rights in the Charter is yet to be determined, particularly with respect to those rights with weaker connections to the right to life. This was confirmed by the Committee, which stated that the restriction in the Appendix has different implications for each of the various rights.

Secondly, in its analysis of the facts of the case, the Committee partially retreated from its legal finding. By a majority of 9 to 4, it found no violation of Article 13, since illegal immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for "emergencies and life threatening conditions". This finding was reached despite evidence of significant problems with the implementation of the legislation. The Committee was, however, prepared to find a violation of Article 17, even though children had similar access to healthcare as adults. The reasoning for this conclusion can be found in paragraph 36 of the decision. The Committee notes that Article 17 of the Revised Charter was inspired by the UN Convention on the Rights of the Child and that Article 17 provides more general-

ised rights to care and assistance. Article 13, on the other hand, is more restrictive in its wording.

The decision is certainly bold. The attempt by the Committee to read the Charter as consistently as possible with the human rights of individuals should be welcomed. Furthermore, the cautious approach evident in the Committee's findings indicates that it is alert to the difficulties of reconciling the various provisions of the Charter. Nevertheless, the Committee will face some criticism for its restrictive reading of the Appendix.

In response to the decision, the Government of France changed its policy. On 4 May 2005, the Committee of Ministers took note of the Committee's legal decision and noted information received from the Government. This included a circular, issued on 16 March 2005, which provided that "all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement".²²

Conclusion

Recent social rights cases before the European Committee on Social Rights provide a clear picture of the types of complaints that are likely to become more frequent in future; namely, failure to ensure the rights of the socially excluded and denial of effective access to existing programmes or services. The above decisions indicate that the Committee can engage meaningfully with such cases and provide relatively clear guidelines to States on how to conform with the Charter. It is also interesting to note the growing influence of international human rights law upon the Committee's reading of the Charter.

However, the Committee's authority will ultimately depend on the quality of its legal reasoning, even among those Council of Europe Member States whose courts customarily produce relatively short judgments. The Committee should therefore consider the possibility of providing more in-depth reasoning when confronted with difficult and complex cases.

21 Complaint No. 14/2003, http://www.coe.int/T/E/Human_Rights/Esc/

22 CIRCULAR DHOS/DSS/DGAS. For further information, please contact the author.

A RECENT SOUTH AFRICAN ESC RIGHTS CASE

*Prinsloo & Anor. v. Ndebele-Ndzundza Community & Ors.*²³

Supreme Court of Appeal of South Africa

Restitution – dispossession – compensation

The matter at issue was whether the claimants had established that they were entitled to restitution of a right in land – in this case, portions of a Transvaal farm – as contemplated by Sect. 2 of the Restitution of Land Rights Act 22 of 1994. The action was an appeal against a decision by the Land Claims Court (LCC) in favour of the claimants, members of the Ndebele-Ndzundza tribe, whose ancestral lands had been seized in 1883 and distributed to white farmers. The tribe was then scattered by the enforcement of a system of indentured labour on white farms. In the late 19th century, one of the claimants' predecessors (CPs) and some of his followers settled on some of this ancestral land, including the farm at issue.

Decision

The Court held that, on the facts, the CPs constituted a group of people who had lived on and worked the farm continuously for 50 years until they were relocated

to another farm in the late 1930s. Although their settlement at the new farm was initially intended to be temporary, it ended up being near-permanent. Although the CPs were not the legal owners of the land at issue, they had held it exclusively, as a group and in common with each other, in accordance with the customs and traditions of the Ndebele-Ndzundza people. The Court held that the claimants had rights in the land in terms of the Act in (at least) the form of a customary law interest and the rights of labour tenants and sharecroppers. The Court also held that “*the fact that registered title exists neither necessarily extinguishes the rights in land that the statute contemplates, nor prevents them from arising*”.²⁴ With regard to whether the claimants were a ‘community’ within the Act, the Court held that the CPs constituted a group, or part of a group, whose rights in land were derived from shared rules determining access to and use and enjoyment of land they held in common. In the Court’s view, the fact that there had been no physically forced removal did not mean that there was no

‘dispossession’. In this case, the residents had not been given any real choice: they had had to relocate to a different area, and work and live in changed circumstances, or remain on the farm under conditions that were significantly changed. They no longer had control or use of the land over which, for many decades, they had enjoyed unrestricted access and control.

The Court then dealt with whether Sect. 2(2) of the Act applied. Sect. 2(2) provides that no one shall be entitled to restitution of a right in land if just and equitable compensation calculated at the time of dispossession was received in respect of such dispossession. The ‘compensation’ at issue was the farm to which the community had been relocated. The Court remanded the issue of the application of Sect. 2(2) to the Land Claims Court on the basis that, unlike the LCC, it did not consider that compensation originally intended as temporary can never be included in the calculation of just and equitable compensation. Nor could the fact that the compensation was provided as part of a manifestly discriminatory process necessarily invalidate it for statutory purposes.

Prepared by Aoife Nolan

²³ Case no. 106/2004, 31 May 2005.

²⁴ *Ibid.* para 36.

A CASE TO WATCH

At its 37th Ordinary Session, the African Commission on Human and Peoples’ Rights decided to be seized of *Communication 296/05 – Centre on Housing Rights and Evictions/The Sudan* (‘the Communication’). With this communication, COHRE seeks to hold the Government of Sudan accountable for the forced evictions and accompanying human rights violations that have plagued the people of the Darfur region for well over a year – violations that have left some 1.6 million persons homeless and some

50 000 dead. The Communication alleges not only a series of serious human rights violations but also a massive violation of human rights that are protected by the African Charter on Human and Peoples’ Rights (‘the Charter’), in particular Articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22. With respect to ESC rights, the Communication relies on the jurisprudence of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*²⁵ (‘SERAC’) to argue that there have been vio-

lations of the implied rights to food and adequate housing (in particular the prohibition on forced evictions), which were identified in that case. In addition, the Communication relies on the Commission’s analysis in *SERAC* to argue that the right to water – which, *subsequent* to that case, was recognised by the Committee on Economic, Social and Cultural Rights in its General Comment No. 15 – should also be regarded as implicitly included in the Charter. The admissibility of COHRE’s communication will be considered at the 38th Ordinary Session of the African Commission in late 2005.

Prepared by Bret Thiele

²⁵ African Commission on Human and Peoples’ Rights, Case No. 155/96, decision made at 30th Ordinary Session, Banjul, The Gambia, from 13 to 27 Oct. 2001. See, for full text, <http://www.cesr.org/nigeria>

ROUND-UP OF RECENT DECISIONS IN ESC RIGHTS CASES

Travellers/housing rights - In *Carty & Ors v. Kildare County Council*,²⁶ the High Court of Ireland held that Kildare County Council had breached its legal obligations by failing to deliver on the commitments made in its Traveller Accommodation Programme (TAP). The applicant families had been living by the side of the road for over five years without electricity, running water, refuse collection or toilet facilities. Under the terms of the TAP, the authority had committed itself to developing a six-unit group housing scheme that would free up permanent halting sites for the applicant families. However, the housing scheme was four years behind schedule. As the families had been assessed by the local authority as having a right to accommodation as part of its TAP, the judge held that the authority was bound by that duty.²⁷ Describing the families' situation as "an emergency", the Court demanded an "urgent solution to the accommodation needs" of the families. On 27 May, the High Court adjourned judgment of the case after Kildare County Council undertook to provide emergency facilities within a four-week adjournment.

Roma/education rights - In *D.H. & Ors v. the Czech Republic*,²⁸ the European Court of Human Rights declared admissible the applicants' complaint of racial discrimination in the enjoyment of the right to education (Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, combined with Article 2 of its Protocol 1). The case involves the assignment of Roma children to 'special schools' for the mentally disabled. The applicants allege that they have been discriminated against in the enjoyment of their right to education by reason of their race and colour, the fact of their belonging to a national minority, and their ethnic origin. Given that an inordinately high number of Roma pupils are placed in special schools, whose educational standards are substantially inferior to those of primary schools, the applicants regard theirs as a case of differentiated treatment, and one that has no objective or rational justification.²⁹

Eviction/compensation - *President of the Republic of South Africa & Anor. v. Modderklip Boerdery & Ors*.³⁰ concerned the State's failure to enforce an eviction order granted by the High Court against illegal occupiers of private land. The Constitutional Court of South Africa primarily based its ruling on Modderklip's constitutional right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or another independent, impartial tribunal of forum".³¹ The Court held that the obligation on the State goes further than mere provision of a legislative framework, mechanisms and institutions such as the courts and an infrastructure to facilitate the execution of court orders. The State is also obliged to take reasonable steps to ensure that "large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law". The Court stated further that it is unreasonable for a private entity to be forced to bear the burden, which should be borne by the State, of providing the occupiers with accommodation. The circumstances of this case were extraordinary in that it was not possible to rely on mechanisms normally employed to execute evictions. The Court stated that to execute the eviction order granted in this case and evict tens of thousands of people would cause social chaos, misery and disruption, "[i]n the circumstances of this case, it would also not be consistent with the rule of law". The State was constitutionally obliged to take reasonable steps to ensure that Modderklip was provided with effective relief. It could have done so by expropriating the property in question or by providing other land. It had not done so and thus violated Modderklip's right to an effective remedy. The Court upheld the award of compensation to Modderklip as "appropriate relief" for violation of its constitutional rights. Such compensation would be offset against any compensation to be given were the State to expropriate the land.

²⁶ 1 May 2005.

²⁷ This case note is largely based on K. Holland, 'Court says council must comply with obligations to Travellers', *Irish Times*, 2 May 2005.

²⁸ Petition no. 57325/00, 1 Mar. 2005. For full text, please contact quarterly@cohre.org. Andrea Coomber's help with this case note is gratefully acknowledged.

²⁹ *Ibid.* p.7.

³⁰ Case CCT 20/04, 13 May 2005. For details of the Supreme Court of Appeal's decision in this case, see: *Housing and ESC Rights Law Quarterly*, Vol. 1, No. 2.

³¹ Sect. 34, Constitution of the Republic of South Africa.

EVENTS

- The Committee on the Rights of the Child will hold its 40th Session from 12 to 30 September 2005 in Geneva. The Committee will consider the State Reports of China with Hong Kong and Macau, Trinidad and Tobago, Uganda, the Russian Federation, Denmark, Australia, Saudi Arabia, Finland and Algeria.

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