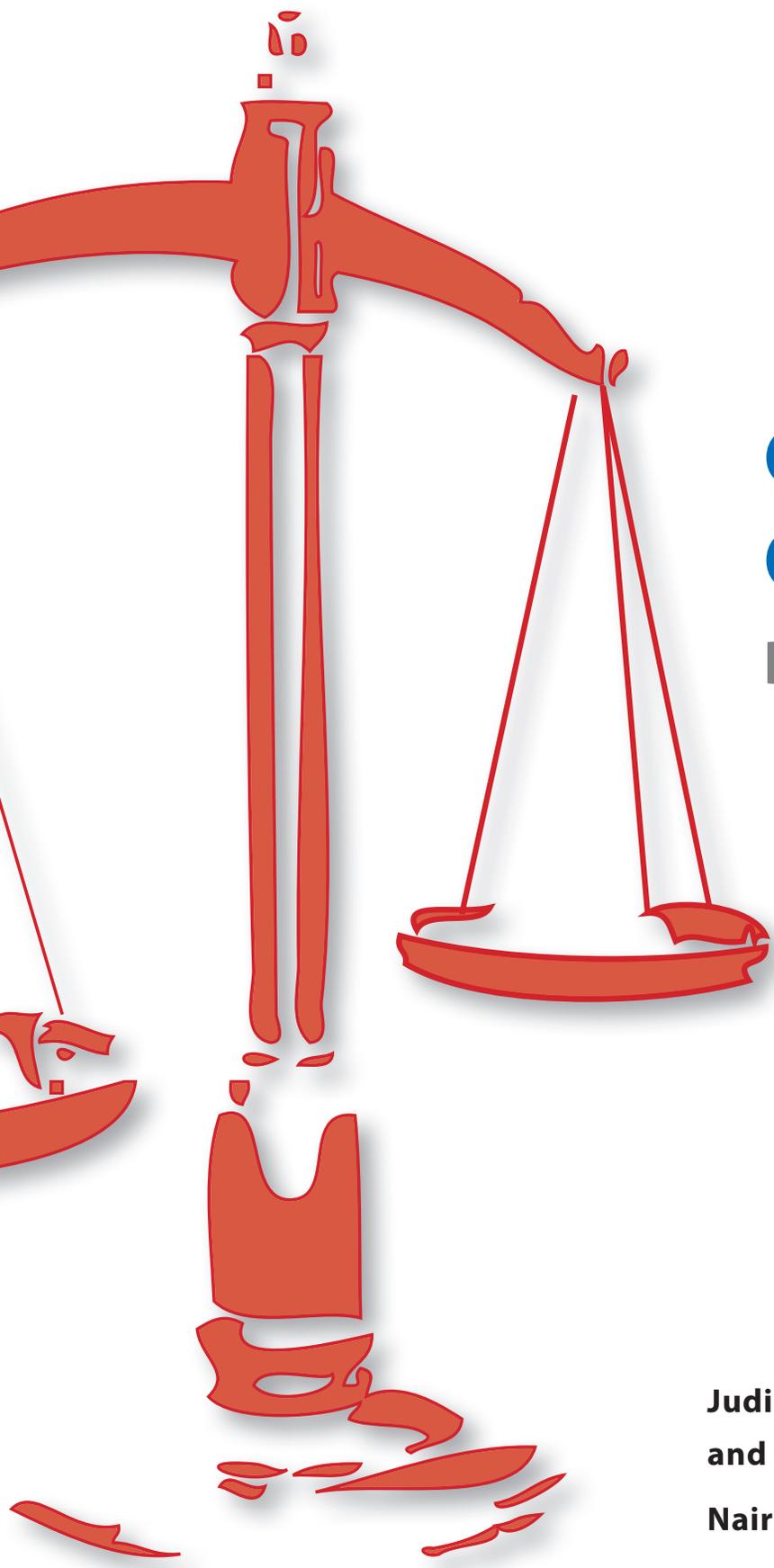




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COMPENDIUM OF JUDGMENTS

Background Material

**Judicial Dialogue on HIV, Human Rights
and the Law in Eastern and Southern Africa
Nairobi, Kenya, 28–31 October 2013**

United Nations Development Programme

HIV, HEALTH AND DEVELOPMENT

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The views expressed in this publication are those of the authors and do not necessarily represent those of the United Nations Development Programme (UNDP).

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UNITED NATIONS DEVELOPMENT PROGRAMME

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Background Material

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FOREWORD

HIV continues to be one of the greatest public health challenges of our time. As noted in the landmark report, *The Global Commission on HIV and the Law: Risks, Rights & Health*, HIV is also a crisis of law, human rights and social justice. In the context of recent scientific breakthroughs on HIV prevention and treatment, and the growing epidemic of inequality confounding health and development across the globe, addressing the legal and human rights barriers to effective HIV responses is as important as ever. It is increasingly recognized that protecting the human rights of people living with HIV and key populations is critical to ensuring access to HIV prevention, treatment, care and support for all.

The judiciary, as a protector of human rights, plays an important role in shaping legal environments for effective HIV responses, and in promoting rule of law and access to justice. Jurisprudence has at times had a positive and transformative impact on national HIV responses and on public perceptions of HIV. Across a range of countries, courts have developed enabling jurisprudence on HIV-related issues, such as non-discrimination, employment, access to education, medical insurance, treatment in prisons, segregation, confidentiality, access to medicines, same-sex relations, and the rights of sex workers and transgender people. Beyond the courts, members of the judiciary are leaders in their communities and societies. Their stance, attitudes and behaviour towards HIV-related issues, people living with HIV and key populations can influence social attitudes and challenge stigma and discrimination, inside courts and within the community at large.

As agents of justice, it is critical that members of the judiciary are empowered with up-to-date knowledge and understanding of the science of HIV transmission, prevention, treatment, care and support; epidemiological developments; and the evolving roles of the law and the judiciary in HIV responses. Enhancing the capacity of the judiciary to address HIV-related legal and human rights issues is a vital component of creating enabling legal environments that support effective national HIV responses. Building on the work of the Global Commission on HIV and the Law, *The Compendium of Judgments, HIV, Human Rights and the Law*, is a collation of progressive jurisprudence on HIV-related matters that highlights how the law has been used to protect individual rights. The compendium presents a user-friendly compilation of judgments from different national and regional jurisdictions.



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I. INTRODUCTION

The Compendium of Judgments, HIV, Human Rights and the Law aims to support lawyers' and judges' understanding of how the law has been used to protect individual rights. It is a user-friendly compilation of judgments from national and regional jurisdictions around the world, representing enabling jurisprudence on HIV-related issues. The Compendium of Judgments is a direct follow-up to the Global Commission on HIV and the Law report, HIV and the Law: Risks, Rights and Health, (July 2012).

HIV remains one of the world's most serious public health challenges. Globally, at the end of 2012, 35.3 million people were living with HIV and during 2012, 1.6 million people worldwide died from AIDS-related illnesses.¹ While several countries have experienced significant declines in new HIV infections, stigma and discrimination persist in many parts of the world, and punitive laws continue to deter those most at risk from seeking essential HIV and health services.

The epidemic continues to disproportionately affect sub-Saharan Africa, home to 70 percent of all new HIV infections in 2012.² According to the latest report from UNAIDS, diverse countries across sub-Saharan Africa have achieved notable reductions in HIV prevalence among young people (15–24 years). Results are promising with a 42 percent reduction in HIV prevalence among young people in the last decade.³ However, gender remains a concern: HIV prevalence among young women remains more than twice as high as among young men throughout sub-Saharan Africa.⁴ Evidence also indicates that efforts are needed to reduce the extremely high HIV prevalence observed in many African countries among key populations such as sex workers and men who have sex with men.⁵ Attention to key population groups and to the needs of the general population remains important for an effective HIV response in the region. Likewise, creating enabling legal environments, free of stigma and discrimination, where the rights of people living with and affected by HIV are protected and promoted through their access to justice is a critical element of the HIV response.

In addition to serious social and economic challenges, the HIV epidemic has raised new and complex legal and human rights issues. Protecting, promoting and fulfilling the human rights of people living with and vulnerable to HIV remain significant challenges in the global response to AIDS. In the June 2011 *Political Declaration on AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*, United Nations Member States—including from Africa—reaffirmed the importance of the full realization of all human rights and fundamental freedoms in the global response to AIDS, including prevention, treatment, care and support for all.⁶

Members of the judiciary play a crucial role in protecting the rights of people living with HIV, women and girls, as well as the rights of key populations. They also play an important role in ensuring that Member States meet their obligations under international human rights instruments. By interpreting normative standards and by setting important precedents, judges influence

1 UNAIDS, (2013), Global Report: UNAIDS Report on the Global AIDS Epidemic, p. 4. Available at: http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS_Global_Report_2013_en.pdf.

2 Ibid, p. 12.

3 Ibid, p. 17.

4 Ibid, p. 78.

5 Ibid, pp. 20–26.

6 United Nations General Assembly, (2011), Political Declaration on HIV/AIDS: Intensifying our efforts to eliminate HIV/AIDS, June 2011, A/RES/65/277.

social attitudes and shape legal frameworks. In that capacity, they are critical to the realization of a human rights based legal environment for an effective HIV response.

This compendium focuses on a subset of the range of issues that are critical to an effective HIV response as discussed in the report of the Global Commission on HIV and the Law.⁷ It emphasizes a set of core issues in line with those discussed at the *Judicial Dialogue on HIV, Human Rights and the Law in Eastern and Southern Africa*, 28–31 October 2013 in Nairobi, Kenya, including:

- non-discrimination, discrimination in employment and in health care settings, as well as in other settings;
- rights of women and girls in the context of HIV
- rights of children and young people in the context of HIV
- criminalization of HIV transmission, exposure and non-disclosure
- rights of key populations (i.e.: sex workers, men who have sex with men, people who use drugs, transgender people, prisoners)
- access to medicines.

The judgments selected for each issue area represent an evolution of jurisprudence, moving towards an effective judicial response to HIV that is consistent with human rights obligations. Many of the judgments are relevant to more than one topic.

The jurisdictions and courts from which the judgments have been selected further limit the scope of the compendium. The large majority of judgments are from Commonwealth jurisdictions, other English-speaking jurisdictions and regional bodies, including the African Commission of Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Commission on Human Rights. A small, representative sample of judgments has also been selected from domestic courts in other regions, including Asia and the Americas. The compendium focuses on appellate-level judgments in each jurisdiction because they hold the greatest precedential and persuasive authority. As a result, the judgments included in the compendium are not only representative of a progressive jurisprudence; they constitute binding law in the jurisdictions in which they were rendered, as detailed in the "Scope of Authority" field in each summary.

⁷ Global Commission on HIV and the Law, (2012), *HIV and the Law: Risks, Rights and Health*, available at: <http://www.hivlawcommission.org/index.php/report>.

II. JUDGMENT SUMMARIES

2.1 NON-DISCRIMINATION

DISCRIMINATION IN HEALTH CARE SERVICES

| | |
|---------------------------|---|
| CASE NAME | <i>Georgina Ahamefule v. Imperial Medical Centre</i> |
| YEAR | 2012 |
| COUNTRY | Nigeria |
| CITATION | Suit No. ID/16272000 |
| COURT/BODY | High Court of Lagos State |
| SCOPE OF AUTHORITY | Highest court in Lagos State. Decisions may be appealed to the Supreme Court of Nigeria. |
| FACTS AND LAW | <p>The Plaintiff was a nurse at a medical centre. Defendants were the medical centre and a doctor at the centre. While employed at the medical centre, the Plaintiff became pregnant and developed a skin disorder. She sought medical attention and the Defendant doctor performed several diagnostic tests. Neither the nature nor the outcome of the tests was disclosed to the Plaintiff; rather, she was asked to take a two-week medical leave and was referred to a hospital for further testing.</p> <p>At the hospital, blood samples were taken from both the Plaintiff and her husband; the nature of the tests was not disclosed. On a subsequent visit to the hospital, the Plaintiff was informed that she had tested positive for HIV, and her husband had tested negative. The Plaintiff was afforded neither pre-test nor post-test counselling services.</p> <p>The Plaintiff confronted the Defendant doctor and asked why she was not informed of his testing results prior to being referred to the hospital. The Defendant doctor reacted to the Plaintiff with hostility and requested that she collect a letter from the secretary. The letter informed the Plaintiff that she had been terminated from her position at the medical centre. The Plaintiff claimed that she did not receive compensation due to her following her termination.</p> <p>The Plaintiff further claimed that the emotional and psychological trauma she suffered as a result of the Defendants' actions contributed to a sudden miscarriage that she subsequently suffered. She claimed the Defendants denied her access to medical care at the medical centre and refused to perform the requisite cleaning operation following the miscarriage because of her HIV status.</p> <p>The Defendants claimed the Plaintiff was lawfully terminated "based on humanitarian grounds," for reasons of public safety.</p> |

Georgina Ahamefule v. Imperial Medical Centre (continued)

FACTS AND LAW
(continued)

The Plaintiff claimed her termination violated section 42(1)(a) and (2) of the Constitution of Nigeria, and article 2 of the African Charter on Human and Peoples' Rights (the Charter). The Plaintiff also noted that section 11(1) and (2) of the Protection of Persons Living with HIV/AIDS Law of Lagos State guarantees employment to people living with HIV, and that section 14(1) of that law provides that any person discriminated against on the basis of HIV can sue in a court of competent jurisdiction.

The Plaintiff also claimed that the Government of Nigeria was required to ensure that its citizens were not denied access to medical care pursuant to the right to health in article 16 of the Charter and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

ISSUE(S) AND HOLDING

1. Was the termination of the Plaintiff on the ground of her HIV status discriminatory and unlawful? Yes.
2. Did the Defendants' failure to seek and obtain consent from the Plaintiff prior to performing a test for HIV constitute unlawful battery? Yes.
3. Were the Defendants required to provide the Plaintiff pre-test and post-test HIV counselling services? Yes.
4. Did the denial of medical care to the Plaintiff on the grounds of her HIV status constitute a violation of the right to health? Yes.

DECISION AND REASONING

1. The Court held that when an employer gives a reason for terminating an employee, it must justify the reason. In this case, the onus was on the Defendants to prove that the Plaintiff's state of health posed a danger to the medical centre's staff and patients, as well as the public at large, as claimed by the Defendants. The Court held that the Defendant failed to show how the Plaintiff, an auxiliary nurse who did not participate in delivery procedures or operations involving the handling of blood or sharp objects, posed such a danger. The Court held that the Plaintiff's termination was "based on malice, done in bad faith and wrongful."
2. Without providing further explanation, the Court declared that the "Defendants' action in subjecting the Plaintiff to HIV testing without her informed consent [constituted] an unlawful battery on her."
3. Without providing further explanation, the Court declared that "Defendants' action in not affording the Plaintiff pre-test and post-test counselling services [constituted] an unlawful negligence of a professional duty to the Plaintiff."
4. Without providing further explanation, the Court declared that "Defendants' action in denying the Plaintiff medical care on grounds of her HIV positive status [constituted] a flagrant violation of the right to health" guaranteed under article 16 of the Charter, Act Cap. 10 Laws of the Federation of Nigeria and article 12 of the ICESCR.

The Court ordered the Defendants to pay the Plaintiff 5 million naira for her wrongful termination, and 2 million naira for unlawfully testing her for HIV without her informed consent, and for the Defendants' negligence.

NON-CONSENSUAL TESTING, CONFIDENTIALITY AND PRIVACY

See also *Georgina Ahamefule v. Imperial Medical Centre (2012)*, **Discrimination in Health Care Services**

| | |
|-------------------------------|--|
| CASE NAME | <i>Kingaipe and Chookole v. Attorney General</i> |
| YEAR | 2010 |
| COUNTRY | Zambia |
| CITATION | 2009/HL/86 |
| COURT/BODY | High Court of Zambia at Livingstone |
| SCOPE OF AUTHORITY | The Court has unlimited and original jurisdiction to hear civil and criminal matters under any law. Decisions may be appealed to the Supreme Court of Zambia. |
| FACTS AND LAW | <p>The Petitioners, Kingaipe and Chookole, sued the Zambian Air Force (ZAF) alleging violations of their constitutional rights to liberty, privacy, life, protection from inhuman and degrading treatment, and protection from discrimination. They also alleged violations of their rights to adequate medical and health facilities and adequate educational opportunities contained in the Directive Principles of the Constitution. Petitioners alleged that they had been subject to mandatory HIV testing, denied pre- and post-test counselling services, placed on medical treatment without their knowledge, and dismissed from the ZAF solely due to their HIV status.</p> <p>Petitioners joined the ZAF in June and July of 1989. Between 2001 and 2002, both underwent compulsory medical examinations. The Petitioners were not informed that they were being tested for HIV. Both men tested positive for HIV and were prescribed antiretroviral drugs. According to their testimony, however, they were neither informed of their HIV-positive status, nor advised about the nature of the prescribed drugs. The Petitioners were ultimately discharged from the ZAF in October 2002.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none"> 1. Had the Petitioners been tested for HIV without their informed consent in violation of the Constitution? Yes. 2. Were the Petitioners unlawfully discharged from the Zambia Air Force on the basis of their HIV status? No. |
| DECISION AND REASONING | <ol style="list-style-type: none"> 1. The Court found that both Petitioners were subjected to HIV testing without their informed consent in violation of their rights to privacy and protection from inhuman and degrading treatment. The Court held that the Petitioners were entitled to damages for mental anguish and emotional distress as a result of these violations. <p>The Court also found that the Petitioners received no pre- or post-test counselling following their testing for HIV. However, the Court dismissed the claim that the Petitioners had not been counselled about adherence to the antiretroviral drug regime they were prescribed; the Court found it improbable that antiretroviral drugs were administered without counselling in light of the doctor's testimony and the Petitioners' medical history.</p> |

Kingaipe and Chookole v. Attorney General (continued)

DECISION AND REASONING
(continued)

2. The Court did not agree that the Petitioners had been dismissed from the ZAF on the basis of their HIV status. Upon review of their medical history and the effect of their medical conditions on their ability to work, the Court concluded that the Petitioners had been discharged by the ZAF on the basis of their medical conditions and not their HIV status. The Court also dismissed a number of arguments challenging the validity of the statute under which the Petitioners had been dismissed.

The Court also rejected the Petitioners' claims related to the rights to health and education, confirming that the Directive Principles of the Constitution were non-justiciable and non-enforceable.

| | |
|-----------------------------|--|
| CASE NAME | <i>J.A.O. v. Homepark Caterers LTD and Ors.</i> |
| YEAR | 2004 |
| COUNTRY | Kenya |
| CITATION | Civil Case No. 38 of 2003 |
| COURT/BODY | High Court of Kenya at Nairobi |
| SCOPE OF AUTHORITY | Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then to the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |
| FACTS AND LAW | <p>The Plaintiff, J.A.O., was a woman living with HIV. The Defendants were her employer (Homepark Caterers), her doctor and hospital. The Plaintiff claimed the doctor and hospital subjected her to an HIV test without her consent, in violation of her constitutional right to privacy. She further claimed that the doctor disclosed her HIV status to her employer without her knowledge or consent, in violation of her constitutional right to confidentiality and the doctor's statutory duty of confidentiality. The Plaintiff also claimed that she was unlawfully terminated from her employment on the basis of her HIV status.</p> <p>The Defendants asked the Court to dismiss the suit for failure to state a reasonable cause of action. The Defendant employer claimed the reason for the Plaintiff's termination was "prolonged absenteeism on medical grounds." The Defendant doctor claimed she did not disclose the Plaintiff's HIV status to the Defendant employer and that the Plaintiff was not tested for HIV without her consent.</p> |
| ISSUE(S) AND HOLDING | Did the Plaintiff's Originating Summons establish a reasonable cause of action? Yes. |

J.A.O. v. Homepark Caterers LTD and Ors. (continued)

DECISION AND REASONING

The Court held that the Originating Summons established a reasonable cause of action. The cause of action was “redress and relief for the violation” of human rights. As to whether the cause of action was “reasonable,” the Court stated that if the Plaintiff’s dismissal from employment could be said to be the result of her HIV status, “such treatment, if proven, amounted to inhuman treatment.” The Court thus held that given “the universality of the HIV/AIDS pandemic and the development of human rights jurisprudence together with the ongoing attempts at the harmonization of the relevant conventions with domestic law,” the Plaintiff’s cause of action possessed the “required degree of ‘reasonableness.’”

Subsequent to this judgment, the parties settled the suit out of court by consent agreement. The agreement stated the following:

“Without admitting or attributing liability on the part of the Defendants in the suit, the following declarations are made:

- a) The testing of an employee or prospective employee for HIV without his/her informed consent constitutes an invasion of his/her privacy and is unlawful.
- b) That disclosure of an employee’s HIV status to the employer without the employee’s consent is unlawful.
- c) The termination of an employee on grounds only of an employee’s HIV status is unlawful.”

The Defendants were ordered to pay the Plaintiff 2,250,000 Kenya shillings “to cover and settle damages in respect of the suit plus all the legal costs.”

| | |
|---------------------------|---|
| Case Name | <i>Diau v. Botswana Building Society</i> |
| YEAR | 2003 |
| COUNTRY | Botswana |
| CITATION | IC NO 50 OF 2003; 2003 (2) B.L.R. 409 (BwIC) |
| COURT/BODY | Industrial Court of Botswana |
| SCOPE OF AUTHORITY | The Industrial Court and its divisions have the power, among other things, to hear and determine all trade disputes, except disputes of interest; to interdict any unlawful industrial action; and to hear appeals and reviews from decisions of mediators and arbitrators. The court may order, among other things, reinstatement with or without compensation, or compensation in lieu of reinstatement. |
| FACTS AND LAW | The Applicant, Diau, was employed on a probationary basis by the Respondent, Botswana Building Society. The Applicant’s employment was conditional on passing a full medical examination. Several months after commencing her employment, the Respondent informed the Applicant in a letter that she was required “to submit a certified document of [her] HIV status.” In reply, the Applicant informed the Respondent that she would not provide such documentation. Less than two weeks later, the Respondent informed the Applicant that she “would not be confirmed to the permanent and pensionable service of the society.” The Respondent did not provide a reason for the Applicant’s termination. |

Diau v. Botswana Building Society (continued)

FACTS AND LAW
(continued)

The Applicant claimed she was not confirmed and effectively terminated because of her refusal to undergo a test for HIV. She claimed this constituted inhuman and degrading treatment under section 7(1) of the Constitution. She also claimed violations of the right to equal protection of the law in section 3, the right to privacy in section 9(1), and the right to protection from discrimination in section 15(2) of the Constitution.

The Respondent claimed it had simply decided not to confirm the Applicant after the expiration of the probationary period. The Respondent denied that it terminated the Applicant on the basis of her HIV status.

ISSUE(S) AND HOLDING

1. Was the Applicant's dismissal unlawful? Yes.
2. Did the Respondent's requirement that the Applicant submit to an HIV test violate her constitutional right to privacy? No.
3. Did the Respondent's dismissal of the Applicant based on her refusal to submit to an HIV test amount to unconstitutional discrimination? No.
4. Did the Respondent's dismissal of the Applicant based on her refusal to submit to an HIV test constitute inhuman and degrading treatment under the Constitution? Yes.
5. Did the Respondent's requirement that the Applicant submit to an HIV test, and its subsequent dismissal of the Applicant based on her refusal to undergo testing, violate the Applicant's constitutional right to liberty? Yes.

DECISION AND REASONING

1. The Court held that at the time the Applicant received the Respondent's letter informing her that she would not be confirmed as a permanent and pensionable employee, her probationary period had in fact expired and she was already a permanent and pensionable employee on account of having worked almost two months beyond the six-month probationary period.

The Court held that the "inference is irresistible" that the Applicant was dismissed because she refused to submit to an HIV test. This was supported by the fact that the Applicant was terminated soon after informing the Respondent she would not undergo the test and the Respondent's failure to provide a reason for her termination. The Court further held that the requirement that the Applicant undergo an HIV test "was irrational and unreasonable to the extent that such a test could not be said to have related to the inherent requirements of the job." The Court stated that the requirement amounted to "compulsory post-employment testing."

The Court noted that there was no specific legislation governing issues involving HIV in the workplace. However, it declared that to the extent that the National HIV/AIDS Policy (the Policy) is "consistent with the values espoused by the constitution, breach of its provisions may, in an appropriate case, constitute evidence of breach of constitutional provisions." The Court stated that the key objectives of the Policy are the "elimination of unfair discrimination and the promotion of non-discrimination." It observed that the Policy "is based and or is consistent with the national and international legal framework for eliminating unfair discrimination and the promotion of equality at the workplace."

**DECISION AND
REASONING
(continued)**

The Court held:

“The decision to terminate the applicant’s employment under the guise of exercising the right not to confirm her to a permanent and pensionable status, was so patently harsh, unjust and grossly unreasonable that no court of law and equity can properly, lawfully and fairly put its seal of approval on it.”

The Court next considered the constitutional claims of the Applicant. First, after surveying the jurisprudence in several countries regarding the horizontal application of constitutions, the Court held that the Respondent, a private organization, fell within the scope of the Bill of Rights of the Constitution. In this regard, the Court held:

“In today’s world there are private organizations that wield so much power, relative to the individuals under them, that to exclude those entities from the scope of the Bill of Rights would in effect amount to a blanket license for them to abuse human rights.

This is particularly so in an employment relationship which more often than not is characterized by unequal bargaining power between the employer and the employee.”

2. The Court stated that the Respondent’s requirement that the Applicant undergo an HIV test “undermines the applicant’s right not to be searched and or the right to privacy.” However, it held that the facts of the case did not “establish an invasion of the right to privacy, in that prima facie, no actual invasion or infringement took place.”
3. The Court stated that the Respondent’s decision to require the Applicant to submit to an HIV test “could have been premised on the suspicion or perceived HIV-positive status of the applicant.” However, it declared that based on the evidence, there was “nothing to suggest that the applicant was suspected or perceived to be HIV/AIDS positive.” The Court thus held that the Respondent’s conduct did not amount to unconstitutional discrimination.

The Court, however, noted that if it was proven that the Respondent had in fact required the Applicant to submit to an HIV test based on a perception or suspicion that she was HIV-positive, such conduct would be discriminatory under section 15(1), as read with section 15(3), of the Constitution. The Court held that HIV status and perceived HIV status were prohibited grounds under section 15(3) of the Constitution, notwithstanding that they are not listed in the section, because “[t]o dismiss a person because of perceived positive HIV status would offend against human dignity, in addition to being irrational.”

4. The Court stated that section 7(1) of the Constitution, “in so far as it prohibits inhuman and degrading treatment, is protective of the right to dignity.” The Court further declared that “the right to dignity . . . lays the foundation for the right to equality and all other rights that human being [sic] possess.”

The Court thus held that “[t]o punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human.” Punishing the Applicant for refusing to submit to an HIV test was therefore “inconsistent with human dignity.” The Court stated that this was particularly problematic in the context of HIV, “where even the remotest suspicion of being HIV [-positive] can breed intense prejudice, ostracisation and stigmatization.” The Court further stated:

Diau v. Botswana Building Society (continued)

DECISION AND REASONING
(continued)

“The symbolic effect of punishing an employee for refusing to undergo an HIV test is to say that all those who refuse to undergo an HIV/AIDS test are not competent to be employed — they should lose their jobs and by extension be condemned to unemployment — a form of economic death for simply saying, as a human being, I have decided not to test for HIV/AIDS.”

The Court further declared that it is “incompetent” to force people to undergo testing for HIV against their will. Rather, people “must be encouraged to test voluntarily through persuasion and education.” The Court held that compelling people to undergo testing “is inhuman and degrading in addition to being counter productive.” The conduct of the Respondent thus violated section 7(1) of the Constitution.

The Court further noted that the National HIV/AIDS Policy and several international instruments encourage voluntary testing based on the informed consent of the individual. Informed consent requires an individual to be made “fully aware of the consequences and implications” of his or her consent and is meant to “honour a person’s right to self determination and freedom of choice.”

5. The Court held that the right to liberty “goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from irrational and unjustified interference by others.” The Court further declared that “[c]hoosing whether to test or not is a private decision striking at the heart of personal and individual autonomy and no entity, the state or any employer ought to be permitted to interfere, barring any compelling reasons in favour of interference.”

The Court stated that the Respondent’s requirement that the Applicant submit to an HIV test was “wholly unrelated to the inherent requirement of the job” and “a veritable assault on the applicant’s right to liberty and human dignity.” The Respondent’s requirement, coupled with the Applicant’s dismissal based upon her refusal to submit to testing, thus infringed the Applicant’s right to liberty.

The Court ordered the Respondent to reinstate the Applicant and pay her the equivalent of four months’ salary as compensation.

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| CASE NAME | <i>Irvin and Johnson Ltd v. Trawler and Line Fishing Union and Ors.</i> |
| YEAR | 2003 |
| COUNTRY | South Africa |
| CITATION | (4) BLLR 379 (SALC) |
| COURT/BODY | Labour Court of South Africa |
| SCOPE OF AUTHORITY | The Court handles disputes arising from the relationship between employer, employee and trade union. The Court has exclusive jurisdiction over cases arising from the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Unemployment Insurance Act. Decisions may be appealed to the Labour Appeal Court. |

FACTS AND LAW

The Applicant, Irvin and Johnson Limited, wished to arrange for the voluntary and anonymous HIV testing of the more than 1,100 employees in its trawling division. The testing was to be based on the principle of informed consent and accompanied by pre- and post-test counselling. However, the age and job category of the tested employee was to be recorded for purposes of generating useful statistics. The Applicant asserted that it required information on HIV prevalence in its workforce:

“[T]o assess the potential impact of HIV/AIDS on the workforce; to enable the applicant to engage in appropriate planning so as to minimise the impact of HIV/AIDS mortalities and HIV/AIDS related conditions on its operation; to enable it to put in place adequate support structures to cater for the needs of employees living with HIV/AIDS; and to facilitate the effective implementation of proactive steps to prevent employees from becoming infected with HIV/AIDS.”

The Applicant had already instituted a variety of HIV education and awareness programmes in order to educate employees, offer psychological support and combat stigma. It had drafted and implemented a policy on HIV, arranged for the supply of condoms, and offered counselling for employees living with HIV. The Applicant stated that it was committed to a policy of non-discrimination against people living with HIV and it allowed employees living with HIV to continue working as long as they were able.

The Applicant sought an order declaring that such testing did not fall within the purview of section 7(2) of the Employment Equity Act 55 of 1998. Section 7(2) provides: “Testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act.” Section 50(4) provides that if the Labour Court finds that testing of an employee for HIV is justifiable, it may “make any order it considers appropriate in the circumstances,” including imposing conditions related to the provision of counselling and the maintenance of confidentiality.

ISSUE(S) AND HOLDING

Is anonymous and voluntary testing for HIV in the workplace prohibited under section 7(2) of the Employment Equity Act? No.

DECISION AND REASONING

The Court stated that there were two grounds upon which the Applicant’s proposed HIV testing could be justified: the testing was to be anonymous and also voluntary.

The Court noted that section 7(2) of the Employment Equity Act was part of the chapter addressing the prohibition on unfair discrimination. It stated that the purpose of the chapter was “to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment.” The purpose of section 7 is thus to ensure that employers do not unfairly discriminate against an employee because he suffers from a particular medical condition. To reduce the likelihood of such discrimination, section (7) limits the circumstances in which an employer may ascertain an employee’s medical condition through testing.

The Court held that when employees are tested in a way that the employer is “unable to identify which employees are suffering from the medical condition in question, the risk of discrimination based on medical condition is absent.” Therefore anonymous testing falls outside the scope of section 7. The Court noted, however, that in effect, the Applicant’s proposed testing scheme may have enabled it to identify HIV-positive employees. The Court observed that the number of employees in a particular age group was very small. The Applicant agreed to combine the group with another group in order to avoid the chance that it could deduce the HIV status of employees in the smaller group. The Court held that this adjustment was “sufficient to eliminate any reasonable possibility that an individual’s HIV status could be deduced from the statistical information.”

Irvin and Johnson Ltd v. Trawler and Line Fishing Union and Ors. (continued)

DECISION AND REASONING
(continued)

The Court stated that although its conclusion could be reached solely on the strength of anonymous testing, it was desirable to address the issue of voluntary testing. The Court defined voluntary testing as a situation where it is “entirely up to the employee to decide whether he or she wishes to be tested and where no disadvantage attaches to a decision by the employee not to submit to testing.”

The Court declared that it was “one thing to protect employees against compulsory testing,” but it was “quite another thing to place obstacles in the way of voluntary testing.” The Court noted that the Code of Good Practice: Key Aspects of HIV/AIDS and Employment (the Code) stipulates that workplace policies related to HIV should encourage voluntary testing. The Court further declared that a “climate of secrecy” was not conducive to combatting discrimination of employees living with HIV. On this point, the Code states that employers should implement mechanisms that “encourage openness, acceptance and support” for employees who voluntarily disclose their HIV status.

The Court also noted that the intention of the legislature could not have been to prohibit voluntary testing entirely, such as when an employee avails himself of health services provided by an employer at the workplace. The Court thus held that section 7 only applied to compulsory testing.

The Court further observed that if an employee determines that the benefit to taking advantage of medical testing offered by his employer outweighs the risk that the employer might use the information to discriminate against him, there is no public interest that militates against allowing him to do so. Moreover, if the employer nevertheless uses such information for discriminatory purposes, the employee still has recourse to the protections of the Employment Equity Act.

The Court thus held that anonymous and voluntary testing for HIV does not fall within the purview of section 7 of the Employment Equity Act. The Applicant therefore did not require the permission of the Court to conduct such testing.

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| CASE NAME | <i>Joy Mining Machinery v. NUMSA and Ors.</i> |
| YEAR | 2002 |
| COUNTRY | South Africa |
| CITATION | Case No: J 158/02; [2002] ZALC 7 |
| COURT/BODY | Labour Court of South Africa |
| SCOPE OF AUTHORITY | The Court handles disputes arising from the relationship between employer, employee and trade union. The Court has exclusive jurisdiction over cases arising from the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Unemployment Insurance Act. Decisions may be appealed to the Labour Appeal Court. |
| FACTS AND LAW | The Applicant, Joy Mining Machinery, was a manufacturer, supplier and service provider of mining machinery. The Applicant had attempted to determine the extent of HIV prevalence at its workplace by commissioning a study of HIV prevalence based on the demographic groups at the workplace. As this was ultimately unhelpful, the Applicant wished to determine the exact prevalence through the testing of its employees. |

Joy Mining Machinery v. NUMSA and Ors. (continued)

FACTS AND LAW
(continued)

The Applicant requested permission to test its employees for HIV pursuant to the Employment Equity Act 55 of 1998 (EEA). The EEA prohibits testing of an employee to determine the employee's HIV status "unless such testing is determined to be justifiable by the Labour Court." The EEA provides that whether medical testing is justifiable must be determined "in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job." If the Labour Court finds HIV testing is justified, it may impose conditions relating to the provision of counselling, the maintenance of confidentiality, the period during which the employee may be tested, and the categories of jobs for which the authorization for testing applies.

Pursuant to the EEA, the Minister of Labour issued a Code of Good Practice: Key Aspects of HIV/AIDS and Employment (the Code). Among other things, the Code provides that testing for HIV may only take place with the informed consent of the employee, the provision of pre- and post-test counselling, and strict procedures relating to confidentiality of the employee's HIV status.

ISSUE(S) AND HOLDING

Was the Applicant granted permission to test its employees for HIV? Yes, but only subject to several conditions

DECISION AND REASONING

The Court held that the Code of Good Practice: Key Aspects of HIV/AIDS and Employment (the Code) was intended to guide the Court and others in applying the EEA. In light of the Code, the Court held that the following considerations, among other things, are to be taken into account when determining whether the testing of an employee for HIV is justifiable: the prohibition on unfair discrimination, the need for HIV testing, the purpose of the test, employment conditions, the fair distribution of employee benefits, the inherent requirements of the job, and the category or categories of jobs or employees concerned. The Court further stated that the following considerations are relevant to "arriving at a proper decision:" whether the test is intended to be voluntary or compulsory, whether the employees are able to formulate informed consent, and whether pre- and post-test counselling will be made available.

The Court noted that employers need to know the prevalence of HIV among their work forces in order to proactively prevent the spread of HIV among its employee, treat the symptoms of the disease, and plan for contingencies and other eventualities.

The Court noted that the Applicant had been engaged "in an effort to deal with the AIDS crisis facing South Africa" since 1997. The Applicant had implemented various education and awareness campaigns, distributed condoms and provided treatment for sexually transmitted diseases at on-site clinics. The Court further observed that the Applicant had taken steps toward preparing its employees for HIV testing, including consulting with all relevant stakeholders and providing information to all employees concerning the reasons for the testing. The Applicant had also made clear to the Court that all testing would be voluntary and "no one [would] be forced to participate." The Applicant did, however, inform its employees that "it would be best" if all employees participated.

The Court stated that the results of the Applicant's testing would be anonymous and only the percentage of people who were infected would be determined from the test results, not which particular employees were HIV-positive. Moreover, the Applicant invited employee representatives to send observers to the testing sites to ensure participation was voluntary and that test specimens were anonymous. Employees who wished to learn their HIV status would be required to arrange for a private test, as the results of the Applicant's test would not be divulged to them.

Joy Mining Machinery v. NUMSA and Ors. (continued)

DECISION AND REASONING
(continued)

The Court authorized the Applicant to conduct HIV tests of its employees subject to the following conditions: testing was to be voluntary and done with the consent of the employee; testing was to be done on an anonymous basis, without obtaining the employee's name; participation in testing was not to be a condition of employment, promotion or other benefits; the Applicant was not to discriminate against HIV-positive employees, should it become aware of such status; no prejudicial inference was to be drawn from an employee's refusal to submit to testing; the Applicant was not to be made aware of which employees submitted to testing; the Applicant was only to be informed of the percentage of employees who participated and the percentage of employees within various age groups and job bands who tested positive; test results would be processed by the AIDS Management & Support company.

EMPLOYMENT DISCRIMINATION

See also *Georgina Ahamefule v. Imperial Medical Centre, (2012)*, **Discrimination in Health Care Services**

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| CASE NAME | <i>Allpass v. Mooikloof Estates (Pty) Ltd</i> |
| YEAR | 2011 |
| COUNTRY | South Africa |
| CITATION | Case No. JS178/09; [2011] ZALCJHB 7; 2011 (2) SA 638 (LC); [2011] 5 BLLR 462 (LC); (2011) 32 ILJ 1637 (LC) |
| COURT/BODY | Labour Court of South Africa |
| SCOPE OF AUTHORITY | The Court handles disputes arising from the relationship between employer, employee and trade union. The Court has exclusive jurisdiction over cases arising from the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Unemployment Insurance Act. Decisions may be appealed to the Labour Appeal Court. |
| FACTS AND LAW | <p>The Applicant, Allpass, was hired as a stable yard manager and horse-riding instructor for the Respondent, Mooikloof Estates. He had 27 years of experience in horse riding, instructing and stable yard management. At the time of his hiring, the Applicant had been living with HIV for 17 years and was in a same-sex civil union.</p> <p>During his interview for the position, the Applicant stated he was in good health. According to his medical expert, the Applicant's CD4 count was exceptionally low and his viral load was undetectable; he was said to be in good health and able to perform the duties required of him at all times. Following his hiring, the Applicant filled out a personal particulars form on which he indicated, among other things, that he was HIV-positive and taking antiretroviral medicines, that he was allergic to penicillin, and that he suffered from asthma and deep vein thrombosis. The Respondent only asked three of its 30 employees to complete such a form, and all three were men who had sex with men.</p> |

FACTS AND LAW
(continued)

The Applicant was dismissed several days after submitting his completed personal particulars form. The dismissal notice claimed the Applicant had not told the truth about his health during his interview. It further stated that he was “severely ill” and that he would “not be able to complete his duties.” A subsequent final dismissal notice stated the reason for his dismissal as “fraudulent misrepresentations.” The Respondent later claimed the Applicant was dismissed due to his allergy to penicillin, which the Respondent claimed motivated the Applicant to seek assistance when administering a required depocillin injection to a horse during his employment.

The Applicant claimed his dismissal was “automatically unfair” on the grounds of his HIV status under the Labour Relations Act (the LRA). In the alternative, he claimed his dismissal was substantively and procedurally unfair under the LRA. The Applicant further claimed the manner of his dismissal violated his constitutional rights to privacy and dignity. The Applicant sought relief for unfair discrimination on the grounds of HIV status pursuant to the Employment Equity Act, 55 of 1998.

ISSUE(S) AND HOLDING

1. Was the Applicant’s termination an “automatically unfair dismissal” due to unfair discrimination on an arbitrary ground, i.e., his HIV status? Yes.
2. Was the Applicant’s termination “justified based on an inherent job requirement” and thus lawful? No.

DECISION AND REASONING

1. The Court noted that the personal particulars form through which the Respondent learned of the Applicant’s HIV status was only given to three out of 30 of the Respondent’s employees, all three of whom were men who had sex with men. The Court held that requiring the Applicant to fill out the form “cannot be said to have been a mere administrative exercise.” Rather, the Court stated that “[a]t the very least it would appear to be an attempt to extract information about the applicant’s HIV status, and would therefore constitute unfair discrimination based on HIV.” The Court further noted the “emphasis placed by the [Respondent] on the HIV issue” during the confrontation that resulted in the Applicant’s dismissal.

The Court declared that the “inescapable facts are that the applicant had no medical or physical impediment preventing him from performing his duties.” It stated that the misconception that a person living with HIV is severely ill “emanates from a general stereotype about all people living with HIV . . . which results in loss of dignity and a sense of self.” The Court pronounced that the “misconception . . . that someone with HIV is so ill that he should not be employed assails the core of that person’s dignity and results in the unfair and unconstitutional condemnation to ‘economic death.’”

The Court thus held that the evidence established that the “real reason” for the Applicant’s dismissal was his HIV status. His dismissal was therefore “automatically unfair” under the Labour Relations Act.

2. The Court explained that the inability to perform “an inherent job requirement” was an absolute defence to both the automatically unfair dismissal claim and the unfair discrimination claim. The Court, however, declined to accept the Respondent’s assertion that reason for the Applicant’s dismissal was his inability to administer depocillin to a horse, which it claimed was a result of penicillin allergy.

Allpass v. Mooikloof Estates (Pty) Ltd (continued)

DECISION AND REASONING
(continued)

The Court noted that there was an “absence of risk assessment and objective justification that [the Applicant] would be rendered unable to perform his duties” as a result of his allergy. Instead, the Respondent relied exclusively on the testimony of another employee who lacked medical and veterinary experience. Moreover, the Court noted that the Respondent had not mentioned the Applicant’s allergy during his dismissal or in either of the dismissal notices. Instead, it was first mentioned two years after the cause of action arose in a reply to a request for particulars. The Court thus held that “the penicillin defence was ‘a thin veil’ designed to disguise the real reason for the dismissal.”

The Court held that the Applicant had proven an entitlement to relief “arising from his unfair dismissal for a discriminatory reason.” It stated that the unfair discrimination encompassed “damages for loss of dignity and privacy in that [the Applicant] was expected to disclose his HIV status.” The Court awarded the Applicant compensation “in the sum of twelve months’ remuneration, reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of HIV status.”

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| CASE NAME | <i>South African Security Forces Union v. Surgeon General AO</i> |
| YEAR | 2008 |
| COUNTRY | South Africa |
| CITATION | Case No. 18683/07 (2008) |
| COURT/BODY | High Court, Transvaal Provincial Division |
| SCOPE OF AUTHORITY | The Court, now known as the North Gauteng High Court, Pretoria, is a superior court with jurisdiction to hear all matters in the provinces of Gauteng, Mpumalanga, Limpopo (except for the former Venda) and part of North West. Its decisions are binding on magistrate courts within these areas. Decisions may be appealed to the Supreme Court of Appeal and the Constitutional Court. |
| FACTS AND LAW | <p>The parties to the dispute settled out of court based on the stipulation that the policies of the South African National Defence Force (SANDF) concerning the recruitment, deployment and promotion of people living with HIV were unconstitutional. The SANDF was given six months to set aside these policies.</p> <p>In this decision, the Court considered the request of one of the Applicants. The Applicant was a well-qualified musician who had passed all the necessary medical tests for admission to the SANDF. However, he was refused entry because he tested positive for HIV. The Applicant requested that he be immediately admitted into the SANDF, rather than having to wait until the impugned policies were set aside. The SANDF objected. It claimed that admitting the Applicant would open the floodgates to other applicants wanting to be admitted without submitting to the new health and testing policies that had yet to be formulated.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none">1. Was the Applicant, a well-qualified musician living with HIV, to be admitted to the South African National Defence Force? Yes.2. Was the South African National Defence Force’s policy that prohibited the recruitment, external deployment and promotion of people living with HIV constitutional? No. |

South African Security Forces Union v. Surgeon General AO (continued)

DECISION AND REASONING

1. The Court stated that every case must be considered individually. It noted that the “whole basis of [the] application was to the effect that people like [the Applicant] should be able to join the military.” The Court thus held that the Applicant should be immediately admitted to the SANDF.
2. The Court ordered the SANDF’s policy that prohibited the recruitment, external deployment and promotion of people living with HIV to be set aside. It held that the policy violated the right to be free from discrimination, the right to privacy and the right to dignity in sections 9(3), 14 and 10 of the Constitution. The Court further held that the policy violated fair labour practices and the right to administrative justice in sections 23(1) and 33 of the Constitution. The Court directed the Respondent to formulate “a new health classification policy” within six months of the date of the judgment.

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| CASE NAME | <i>Bootes v. Eagle Ink Systems KZ Natal (Pty) Ltd</i> |
| YEAR | 2007 |
| COUNTRY | South Africa |
| CITATION | Case No: D781/05; [2007] ZALC 52 |
| COURT/BODY | Labour Court of South Africa |
| SCOPE OF AUTHORITY | The Court handles disputes arising from the relationship between employer, employee and trade union. The Court has exclusive jurisdiction over cases arising from the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Unemployment Insurance Act. Decisions may be appealed to the Labour Appeal Court. |
| FACTS AND LAW | <p>The Petitioner, Bootes, was HIV-positive. He was employed by the Respondent, Eagle Ink Systems, as a technical sales representative. The Petitioner claimed the Respondent dismissed him solely on the basis of his HIV status. The Respondent claimed the Petitioner was dismissed due to two separate charges of misconduct involving dishonesty that caused “a serious breach of the trust relationship.”</p> <p>The Petitioner was hospitalized for HIV-related illness. Following his return to work, the Respondent requested information about the Petitioner’s medication to ensure he was capable of driving, which was necessary for the performance of his duties as a sales representative. The Petitioner claimed that following his hospitalization, the Respondent disclosed the Petitioner’s HIV status to a customer without his permission. The Petitioner was readmitted to the hospital four days after returning to work. The Respondent offered the Petitioner a desk job to accommodate his illness, but rescinded the offer. The Respondent later forced the Petitioner to take paid sick leave. The Petitioner’s health, however, improved significantly over time and he insisted on remaining in his position as a sales representative. The Respondent failed to obtain a medical opinion on the Petitioner’s condition and ability to perform his job duties prior to dismissing him.</p> |
| ISSUE(S) AND HOLDING | Was the Petitioner unlawfully dismissed on the basis of his HIV status? Yes |

Bootes v. Eagle Ink Systems KZ Natal (Pty) Ltd (continued)

DECISION AND REASONING

The Court found that the Petitioner was guilty of misconduct, as alleged by the Respondent. It stated that the Petitioner had breached the trust of the Respondent by secretly engaging in a deal for personal benefit while acting in his capacity as Respondent's employee. However, the Court noted that the Respondent did not act immediately upon discovering the misconduct and it did not involve any loss to the Respondent. The Court thus held that the "misconduct could . . . not have caused the employee's dismissal," and in so far as it did, "it was unfair."

The Court held the Respondent dismissed the Petitioner "because it did not want to employ an HIV-positive technical sales representative." It stated that the Respondent's management "believed that its customers would be fearful and unwilling to be served by an HIV-positive person." The Court further held that the Respondent did not attempt to dismiss the Petitioner due to incapacity because the employee was not incapacitated. Instead, the Respondent "threw the book" at the Petitioner and "embarked on [a] misconduct proceeding determined to dismiss" the Petitioner.

The Court declared that "HIV remains a highly stigmatised infection that continues to marginalise its weak and vulnerable victims" and employers "must be deterred from discriminating against employees on the basis of their HIV positive status." It added that "[c]amouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices."

The Court stated that people living with HIV in South Africa have a "constitutionally entrenched right not to be discriminated on the grounds of their HIV positive status." It explained that anti-discrimination legislation establishes that HIV is a prohibited ground of discrimination and that dismissal of an HIV-positive employee on the basis of his HIV status constitutes an "automatically unfair labour practice."

The Court held that the Respondent "impaired the dignity of the employee by instructing him to take leave when he wanted to work, by subjecting him to an abusive disciplinary inquiry, by dismissing him and finally, by attempting to camouflage its unfairness, lack of compassion and insensitivity under the employee's misconduct." The Court ordered the Respondent to pay the Petitioner the equivalent of 16 months' remuneration as compensation.

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| CASE NAME | <i>Banda v. Lekha</i> |
| YEAR | 2005 |
| COUNTRY | Malawi |
| CITATION | Matter No. IRC 277 OF 2004; [2005] MWIRC 44 |
| COURT/BODY | Industrial Relations Court of Malawi |
| SCOPE OF AUTHORITY | The Court has original jurisdiction to hear labour disputes and other issues relating to employment, as well as disputes assigned to it under the Labour Relations Act or any other written law. Decisions may be appealed to the High Court of Malawi, but only on matters of law or jurisdiction. |

Banda v. Lekha (continued)

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| FACTS AND LAW | <p>The Respondent, Lekha, dismissed the Applicant, Banda, from employment for reasons related to the Applicant's health. The Applicant was dismissed "immediately and without any formality" after she attended "HIV Voluntary Counselling and Testing" and tested positive for HIV.</p> <p>The Applicant claimed that during her employment she had never been incapacitated as a result of her HIV status and had consistently performed her job duties to the satisfaction of the Respondent. The Respondent did not attend court during the proceedings.</p> |
| ISSUE(S) AND HOLDING | <p>Was the Applicant unlawfully discriminated against and dismissed on the basis of her HIV status in violation of her constitutional rights to equality and fair labour practices? Yes.</p> |
| DECISION AND REASONING | <p>The Court explained that the burden of showing that the reason for the Applicant's dismissal was valid lay with the Respondent. It noted that the Respondent did not appear in court during the proceedings and that the only reason proffered for the Applicant's dismissal was her HIV status. The Court stated that "[i]ncapacity due to ill health is a ground for dismissal where the person is so sick that she cannot perform the functions for which she was employed." The Court noted, however, that the Applicant testified that she was healthy and at no time unable to perform her job duties. The Court therefore held that the Applicant was dismissed solely on account of her HIV status.</p> <p>The Court noted that section 20 of the Constitution prohibits unfair discrimination in any form, including on the basis of an individual's HIV status. The Court cited the South African case <i>Hoffman v. South African Airways</i>, (10) BHRC 571 (2001), in which the Constitutional Court of South Africa held that the petitioner's right to equality had been violated when he was declined employment on the basis of his HIV status. The Court stated that the Applicant "was unfairly discriminated against for exactly the same reasons as those in the <i>Hoffman</i> case." The Court adopted the reasoning in <i>Hoffman</i>, noting that it was empowered to do so under section 11 (2) (c) of the Constitution, which allowed it to rely on comparable foreign case law. The Court noted that in <i>Hoffman</i> the Constitutional Court of South Africa relied partly on South Africa's obligation under the African Charter of Human and Peoples' Rights, which Malawi had also ratified, "to dismantle all of forms of discrimination." The Court further noted that Malawi had formulated a national AIDS policy, which, among other things, aims to ensure that all people living with HIV "are equally protected under the law."</p> <p>The Court thus held that the Applicant had been dismissed based upon prohibited grounds in violation of her right to equality and right to fair labour practices under the Constitution.</p> |

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| CASE NAME | <i>Lemo v. Northern Air Maintenance (Pty) Ltd</i> |
| YEAR | 2004 |
| COUNTRY | Botswana |
| CITATION | 2004 (2) BLR 317 (IC) |
| COURT/BODY | Industrial Court of Botswana |

Lemo v. Northern Air Maintenance (Pty) Ltd (continued)

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| SCOPE OF AUTHORITY | The Industrial Court and its divisions have the power, among other things, to hear and determine all trade disputes, except disputes of interest; to interdict any unlawful industrial action; and to hear appeals and reviews from decisions of mediators and arbitrators. The Court may order, among other things, reinstatement with or without compensation, or compensation in lieu of reinstatement. |
| FACTS AND LAW | <p>The Applicant, Lemo, was employed by the Respondent, Northern Air Maintenance, as a trainee aircraft engineer. During a period of four years, the Applicant's health deteriorated considerably. He consistently exhausted his annual and sick leave days and took unpaid leave, often for months at a time, in order to obtain medical assistance. Due to his poor attendance record, the Respondent requested the Applicant to see a private doctor, ostensibly to assess whether he was fit to perform his duties. The Applicant refused, stating that the hospital he attended best suited his medical needs. The evidence suggested that the Respondent wanted the Applicant to see a private doctor who would regard the Respondent as "family" and reveal the Applicant's medical status.</p> <p>The Applicant subsequently disclosed to the Respondent that he was HIV-positive and he received a letter of termination the following day. The letter cited the Applicant's "continual poor attendance over the last three years" as the reason for his termination. The Respondent further claimed that the Applicant's refusal to submit to medical examination by a private doctor contributed to its decision to dismiss him. The Applicant claimed he was terminated solely on the basis of his HIV status.</p> <p>The Applicant protested his dismissal at the district labour office. The labour office found that his dismissal was unfair and the Respondent was ordered to pay the Applicant the equivalent of three months' salary as compensation. The Applicant, however, was not satisfied with the decision of the labour office and he attempted, unsuccessfully, to appeal the decision to the regional labour officer. This suit followed.</p> |
| ISSUE(S) AND HOLDING | Was the Applicant unlawfully terminated on the basis of his HIV status? Yes. |
| DECISION AND REASONING | <p>The Court held that the Applicant's dismissal "was substantively unfair because there was no valid reason" for it. The Court provided four reasons for its holding. First, although the letter of dismissal indicated the Applicant's excessive absenteeism as the reason for his dismissal, the Court noted that the Respondent had tolerated the Applicant's absenteeism during a three-year period. It further stated that the Respondent "demonstrated the highest level of compassion and care, as it cooperated throughout the three years to ensure that the applicant got the medical attention he needed," even granting him unpaid leave for months at a time.</p> <p>Second, the Court rejected the Respondent's assertion that the Applicant's refusal to submit to a medical examination contributed to its decision to dismiss him. It observed that the Applicant did not in fact refuse to submit to an examination, but had rather objected to an examination by a private doctor when his doctors were capable of conducting such an examination and were already familiar with his illness. Moreover, the Respondent did not have a right to dictate to the Applicant whom he should consult.</p> <p>Third, the Court stated that there was no evidence prior to the Applicant's dismissal that he was incapacitated on account of ill-health and unable to perform his duties.</p> |

Lemo v. Northern Air Maintenance (Pty) Ltd (continued)

DECISION AND REASONING
(continued)

Fourth, the Court held that the Respondent waived its right to take action against the Applicant on account of his absenteeism by failing to do so over the course of three years.

The Court thus held that the reason offered by the Respondent for dismissing the Applicant “was a smokescreen intended to obscure the real reason, namely, that the respondent’s long held suspicion that the applicant might be HIV positive was confirmed.”

The Court held that when an employee has become ill and is absent from work for long periods of time, the normal rules of termination apply. The employee must be given a fair enquiry at which, among other things, the nature of the illness and the likelihood of recovery, improvement or recurrence must be determined. This is true for employees living with HIV. Such employees “should be able to work as long as they are medically fit for available and appropriate work.” The Court stated that “to exclude an HIV/AIDS positive employee from employment through dismissal solely because he is HIV positive and without having established that he is incapacitated, as in this case, lacks a rational foundation and is unfair.” The Court held that “[g]iven the fact that HIV is impossible to transmit through casual contact, the mere fact that a worker has HIV is not a rational basis for discriminatory treatment or for termination of services.”

The Court further held that “to dismiss an employee because he is HIV positive is a violation of his right to dignity.” It explained that “[h]uman dignity is harmed by unfair treatment or discrimination based on personal traits or circumstances which have no relationship to individual capacities.” The Court further declared that the constitutional prohibition on inhuman or degrading treatment is “immediately implicated” when an HIV-positive employee is terminated on account of his HIV status.

The Court held that reinstatement of the Applicant would be “disruptive” to the Respondent’s business. It instead ordered the Respondent to pay the Applicant the equivalent of six months’ salary as compensation for his “procedurally and substantively unfair” dismissal.

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| CASE NAME | <i>Jimson v. Botswana Building Society</i> |
| YEAR | 2003 |
| COUNTRY | Botswana |
| CITATION | (2005) AHRLR 86 (BwIC 2003) |
| COURT/BODY | Industrial Court of Botswana |
| SCOPE OF AUTHORITY | The Industrial Court and its divisions have the power, among other things, to hear and determine all trade disputes, except disputes of interest; to interdict any unlawful industrial action; and to hear appeals and reviews from decisions of mediators and arbitrators. The Court may order, among other things, reinstatement with or without compensation, or compensation in lieu of reinstatement. |

Jimson v. Botswana Building Society (continued)

FACTS AND LAW

The Applicant, Jimson, was offered and accepted employment by the Respondent, Botswana Building Society. His employment was subject to a six-month probationary period and passing a medical examination by a doctor chosen by the Respondent. On completion of the probationary period and passing the medical examination, the Applicant would be appointed a permanent and pensionable employee.

The Respondent also informed the Applicant that he was required to undergo an HIV test as a condition of employment. The doctor to whom the Respondent sent the Applicant refused to administer the test because she was not convinced the test was voluntary. A private physician eventually conducted the test at the Applicant's expense, and the results were sent directly to the Respondent. The Applicant tested positive for HIV and his employment was terminated. A copy of the Applicant's test results was enclosed in the letter of termination.

The Applicant applied to the Court to determine, among other things, whether compulsory post-employment testing for HIV was legal and whether his dismissal on the basis of his HIV status was lawful under the Employment Act.

ISSUE(S) AND HOLDING

1. Were the Respondent's compulsory post-employment HIV testing requirement and the Applicant's dismissal based upon it lawful? No.
2. Was pre-employment testing for HIV permissible? Yes, because legislation addressing such testing was not in place.
3. Was the Applicant entitled to compensation for his unlawful dismissal? Yes.

DECISION AND REASONING

1. The Court explained that an employment contract for an unspecified period of time should not be terminated unless "just cause" can be shown. It further noted that there was currently no legislation governing the employment of people living with HIV.

The Court reviewed the evidence and concluded that the Respondent's testing condition was in fact a compulsory post-employment HIV testing requirement. It held that this requirement "was in breach of the contract of employment entered into between the applicant and the respondent." The Applicant's dismissal as a result of this test was thus "in breach of his contractual rights" and "substantively unfair." The Court stated that after the Applicant passed the medical examination, "the deal was done" and the Applicant's admission into the permanent and pensionable service could only be denied based on "poor performance or misconduct."

2. The Court reiterated that there was no law in place directly regulating the employment of people living with HIV. It stated that the Applicant was dismissed because the Respondent "took advantage of the absence of restraining legislative instruments." The Court noted that the National Policy on HIV/AIDS, based on World Health Organization and International Labour Organization guidelines, provides that "[p]re-employment HIV testing as part of the assessment of fitness to work is unnecessary and should not be carried out." However, the Court held that this was only a policy and did not have the force of law. It was therefore not binding on the Respondent, particularly as the Respondent was not a public entity.

The Court identified another HIV-related national policy that established a national objective to "develop and implement laws, regulations and measures to eliminate stigma and discrimination against" people living with HIV. In light of this objective, the Court stated that it "would be remiss if it did not comment on the moral force" of the Applicant's case.

Jimson v. Botswana Building Society (continued)

DECISION AND REASONING
(continued)

To this end, the Court reproduced in full the testimony of a medical expert in the South African case *Hoffmann v. South African Airways*, (10) BHRC 571 (2001). The expert identified and explained in detail the four stages in the progression of untreated HIV infection. The evidence indicated that during the asymptomatic immunocompetent stage, an individual “functions completely normal.” In light of this information, the Court declared it was time for the Government to “develop and implement laws, regulations and measures to eliminate stigma and discrimination against” people living with HIV.

3. The Court declared that although the National Policy on HIV/AIDS did not have the force of law, it had “persuasive moral force.” It stated that the Applicant “received the most unfair treatment that can be meted out to an HIV sufferer by a commercial entity.” The Court noted that Respondent “casually enclosed” the Applicant’s HIV test results in his letter of dismissal, “oblivious of the most likely traumatic impact” the information would have on the Applicant. It stated that “morally reprehensible treatment of an employee is an aggravating factor” in determining the amount of compensation.

The Court observed that the National Policy on HIV/AIDS provides that when private commercial entities require HIV testing, “they should ensure that counselling accompanies testing.” It noted that this raised an ethical issue, even if it was not legally binding. The Court thus held that the Respondent’s failure to provide the Applicant with counselling services in connection with his HIV test constituted an “aggravation of the unfairness of the procedural aspects of the case.” The Court ordered the Respondent to pay the Applicant the equivalent of six months’ wages as compensation, as well as the cost of the HIV test.

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| CASE NAME | <i>Hoffmann v. South African Airways</i> |
| YEAR | 2000 |
| COUNTRY | South Africa |
| CITATION | (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146 |
| COURT/BODY | Constitutional Court |
| SCOPE OF AUTHORITY | Highest court for matters of constitutional law. Judgments are binding throughout the country. |
| FACTS AND LAW | In 1996, the Appellant applied for employment as a cabin attendant with South African Airways (SAA). At the end of the selection process, he was found to be a suitable candidate for employment. He was then subject to a medical examination, which found him clinically fit and thus suitable for employment. However, a blood test revealed that he was HIV-positive. SAA subsequently deemed him unsuitable for the position. |

Hoffmann v. South African Airways (continued)

FACTS AND LAW (continued)

The Appellant challenged the constitutionality of the refusal to employ him based on his HIV status in the Witwatersrand High Court (the High Court). He claimed unfair discrimination in violation of his constitutional right to equality, human dignity and fair labour practices. SAA denied these claims and argued they were justified in their hiring practices on the basis of safety, medical and operational concerns. They contended that they were attempting to mitigate the risk of transmission of HIV to passengers. SAA further asserted: (1) their hiring practice was aimed at detecting all kinds of disability, and did not single out HIV; (2) life expectancy of people living with HIV was too short to invest in their training; and (3) other major airlines had similar hiring practices.

The High Court held in favour of SAA. The Court found SAA's hiring practices to be sufficiently based on considerations of medical, safety and operational concerns. The Appellant filed an appeal of the High Court's decision with the Constitutional Court.

ISSUE(S) AND HOLDING

Was SAA's policy of refusing to hire people living with HIV as cabin attendants in violation of the South African Bill of Rights? Yes.

DECISION AND REASONING

The Court declared that people living with HIV "must be treated with compassion and understanding" and they "must not be condemned to 'economic death' by the denial of equal opportunity in employment." The Court held that "the refusal by SAA to employ the appellant as a cabin attendant because he was HIV-positive violated his right to equality guaranteed by section 9 of the Constitution."

The Court stated that SAA's contention that its hiring practices were justified on the basis of safety, medical and operational concerns was not only incorrect, but also in conflict with the medical evidence proffered in the company's defence. In an affidavit, SAA's medical expert testified to the High Court that only people living with HIV who had reached the stage of immunosuppression and whose CD4 count had dropped below 300 cells per microliter of blood were prone to medical, safety and operational hazards. SAA's assertions were therefore not true of all people living with HIV. In particular, they were not true of the Appellant, as he had not reached the immunosuppressed stage. The Court further held that the practice of other airlines was not relevant in determining the constitutionality of SAA's actions.

The Court upheld the appeal and set aside the decision of the High Court. The Court ordered SAA to make an offer of employment to the Appellant immediately, and to pay the Appellant the cost of employing legal counsel in both the High Court and the Constitutional Court.

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| CASE NAME | <i>Haindongo Nghidipohamba Nanditume v. Minister of Defence</i> |
| YEAR | 2000 |
| COUNTRY | Namibia |
| CITATION | Case No.: LC 24/98 |
| COURT/BODY | Labour Court of Namibia |
| SCOPE OF AUTHORITY | One of three lower courts in the country. The Court hears disputes under the Labour Act No. 6 of 1992. Its decisions may be appealed to the High Court, then to the Supreme Court of Namibia. |

Haindongo Nghidipohamba Nanditume v. Minister of Defence (continued)

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| FACTS AND LAW | <p>Pursuant to section 65(2) of the Defence Act, the Applicant underwent a medical examination as part of his application to serve in the Namibian Defence Force. The examination included an HIV test, but did not include a CD4 count test or a viral load test. Nevertheless, the Namibian Defence Force denied the Applicant admission to the force based solely on a positive HIV test.</p> <p>The Applicant, by way of a Notice of Motion, applied to the Labour Court of Namibia for relief, claiming that the Namibian Defence Force's refusal to enlist him violated Namibia's non-discrimination obligations under section 107 of the Labour Act of 1992. Alternatively, he claimed that the Namibian Defence Force discriminated against him on the ground of a disability, which contravened section 107 of the Labour Act. Specifically, the Applicant requested an order directing the Government of Namibia to discontinue discriminating against him by permitting him to enlist in the Namibian Defence Force, as well as directing the Namibian Defence Force to process his application without regard to his HIV status.</p> |
| ISSUE(S) AND HOLDING | <p>Did the Namibian Defence Force unlawfully discriminate against the Applicant in denying him admission to the force based solely on his HIV status? Yes.</p> |
| DECISION AND REASONING | <p>The Court held that the Namibian Defence Force had an obligation to enlist the Applicant, if he reapplied for enlistment, as long as the Applicant's CD4 count was not below 200 and his viral load was not above 100,000.</p> <p>Furthermore, the Namibian Defence Force was ordered to include a CD4 count and viral load test, along with an HIV blood test, in all its medical examinations in order to obtain a more accurate bill of health of its applicants and to avoid denying applicants admission based solely on an HIV blood test.</p> <p>In addition to the Labour Act, the Court considered the Government of Namibia's 'Guidelines for the Implementation of a National Code on HIV/AIDS in Employment' (the Guidelines). The Guidelines extended non-discrimination protections to the Namibian Defence Force's enlistment procedures and reinforced the non-discrimination obligations established in the Labour Act.</p> |

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| CASE NAME | <i>X v. The Commonwealth</i> |
| YEAR | 1999 |
| COUNTRY | Australia |
| CITATION | [1999] HCA 63 |
| COURT/BODY | High Court of Australia |
| SCOPE OF AUTHORITY | The highest court and final court of appeal in the Australian judicial system. Its functions are to interpret and apply the law of Australia; to decide cases of special federal significance, including challenges to the constitutional validity of laws; and to hear appeals, by special leave, from federal, state and territory courts. |

X v. The Commonwealth (continued)

FACTS AND LAW

X was discharged from the Australian Defence Force after he tested positive for HIV, in accordance with an Australian Defence Force policy that sought to avoid transmission of HIV between soldiers. He subsequently filed a complaint with the Human Rights and Equal Opportunity Commission (the Commission), claiming his discharge constituted unlawful discrimination under the Disability Discrimination Act 1992 (the Act). It is unlawful under the Act to discriminate against an individual on the basis of a disability, including in employment. However, section 15(4) of the Act creates an exception whereby it is not unlawful discrimination if, because of an individual's disability, he or she is unable to carry out the "inherent requirement of the particular employment" or would require assistance to do so, the provision of which would place an unjustifiable hardship on the employer.

The Commission found that X's employment had been terminated unlawfully. The Commonwealth appealed the decision to the Federal Court. The Federal Court held that the Commission had made an error of law in its interpretation of the phrase "inherent requirements of the particular employment" contained in section 15(4). It ordered that the matter be remitted back to a differently constituted Commission. X then appealed to the High Court of Australia.

During each stage of the proceedings, HIV was considered to be a 'disability' in accordance with the Act. The Commonwealth, in fact, conceded that X had been discriminated against on the basis of this disability. It argued, however, that the discrimination was not unlawful because X was unable to perform the inherent requirements of his particular employment. The Commonwealth argued that deployment was an inherent requirement of service in the army. Because of the risk of injury during training or combat, and because in the case of X, injury could also lead to transmission of HIV to another soldier, X could not be deployed and therefore could not perform an inherent requirement of his employment.

ISSUE(S) AND HOLDING

Did the Australian Defence Force unlawfully discriminate against X when it discharged him after testing positive for HIV? The Court did not reach a conclusion on this issue. Instead, it held that the Commission had interpreted section 15(4) of the Act too narrowly and remanded the matter to be reconsidered in accordance with its decision.

DECISION AND REASONING

The central question in the appeal was how the phrase "unable to carry out the inherent requirements of the particular employment" would apply to an HIV-positive soldier.

The majority of the Court held that the Commission had made an error of law in its interpretation of section 15(4) of the Act. The Commission had interpreted the phrase "inherent requirements of the particular employment" too narrowly by limiting it to the "tasks or skills for which [the Appellant was] specifically prepared." The Commission should have instead considered "the places and the circumstances in which the tasks of a soldier are to be performed." The Court did not rule on what the inherent requirements of employment as a soldier in the Australian Defence Force would be.

The Court observed that in order for discrimination to be lawful under section 15(4) of the Act, five conditions must be met:

- There must be a causal relationship between the disability and the inability to carry out the inherent requirements of the particular employment.
- An inability to perform the inherent requirement of the particular employment, not simply a difficulty, must be demonstrated.

X v. The Commonwealth (continued)

DECISION AND REASONING *(continued)*

- Reference must be made to the “inherent requirements of the particular employment.”
- The “inherent requirements” are the “characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral.”
- The “particular employment” includes “not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on.”

At the initial hearing, the Commission held that deployment was not inherent but rather an incident of employment in the army. On appeal, the question of whether deployment was an inherent requirement was not decided. However, the Court held that an employee must be able to perform the inherent requirements of their particular employment with safety to themselves and to those with whom they come into contact in the course of their employment.

The Court did not determine whether the acknowledged discrimination was unlawful in this case. It did not examine the level of risk that a soldier living with HIV might pose to his fellow soldiers, nor did it examine the lawfulness of the Army’s policy to discharge soldiers living with HIV. The Court declared that these were “not questions that can be resolved in the present appeal.” Only one Justice attempted to quantify, albeit briefly, the risk of transmission of HIV and thereby X’s ability to carry out the inherent requirements of the job.

The appeal was dismissed and it was ordered that the matter be remitted back to the Commission, differently constituted, for further hearing in accordance with the Court’s interpretation of the Act.

See a short summary, for further reading:

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| CASE NAME | <i>Monare v. Botswana Ash</i> |
| YEAR | 2004 |
| COUNTRY | Botswana |
| CITATION | 2004 (1) BLR 121 (IC) |
| COURT/BODY | Industrial Court of Botswana |
| BRIEF SUMMARY | <p>The Applicant, who was HIV-positive, worked for Botswana Ash for seven years as a personnel officer in charge of industrial relations. As his medical condition deteriorated, his employment was terminated. The Applicant sued Botswana Ash, alleging his dismissal was unfair because it was based on his HIV status.</p> <p>The Court held that the termination was substantively fair but procedurally unfair, and awarded the Applicant compensation. In reaching its decision, the Court reiterated the principle that an individual’s HIV status cannot in itself be a valid ground for termination. However, the Court found that Botswana Ash did not dismiss the Applicant because of his HIV status, noting that Botswana Ash had been aware of the Applicant’s HIV status for years, but only dismissed him after his deteriorating health impacted his work.</p> |

NON-DISCLOSURE, CONFIDENTIALITY AND PRIVACY OUTSIDE THE EMPLOYMENT SETTING

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| CASE NAME | <i>C.O.M. v. Standard Group Limited and Anor.</i> |
| YEAR | 2013 |
| COUNTRY | Kenya |
| CITATION | Petition 192 of 2011 |
| COURT/BODY | High Court of Kenya at Nairobi |
| SCOPE OF AUTHORITY | Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals then the Supreme Court. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |
| FACTS AND LAW | <p>The Petitioner, C.O.M., agreed to conduct an interview with the Respondent, Standard Group Limited, regarding “the plight of persons living with HIV.” The Petitioner was HIV-positive and undergoing antiretroviral treatment. Several photographs of the Petitioner were taken during the interview. The Respondent published an article based on the interview titled “Thanks for the drugs but where is the food?” It included a photograph of the Petitioner and his name. The Petitioner testified that he agreed to conduct the interview on the condition that his photograph and name would not appear in the article, and that he did not give express or written consent to the Respondent to disclose his health status.</p> <p>The Petitioner claimed the Respondent’s disclosure of his HIV status was unlawful under section 2 of the HIV and AIDS Prevention and Control Act (Act No.14 of 2006). He further claimed violation of his right to privacy under article 31 of the Constitution, article 17 of the International Covenant on Civil and Political Rights, and article 12 of the Universal Declaration of Human Rights. The Petitioner also alleged violation of his right to human dignity under article 28 of the Constitution. As a result, the Petitioner claimed he lost respect from friends, suffered heightened stigmatization and loss of business, and was forced to move his children to a different school. He requested a permanent injunction against the Respondent’s use of his photograph and name and sought damages under the Constitution.</p> <p>The Respondent claimed the Petitioner consented to the publication of his photograph and name when he consented to the interview and was made aware that the story would be published in print media. It noted that the Petitioner had told his story to other media organizations in the past. The Respondent further asserted that the Petitioner’s claims lied in tort rather than constitutional law.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none"> 1. Did the Respondent violate the Petitioner’s constitutional right to dignity when it disclosed the Petitioner’s HIV status and published his photograph and name without his express or written consent? Yes. 2. Did the Respondent violate the Petitioner’s constitutional right to privacy when it disclosed the Petitioner’s HIV status and published his photograph and name without his express or written consent? Yes. 3. Was the Petitioner eligible to receive damages for the violation of his constitutional rights to dignity and privacy? Yes. |

C.O.M. v. Standard Group Limited and Anor. (continued)

DECISION AND REASONING

1. The Court noted that the Constitutional Court of South Africa had held that “the disclosure of a person’s HIV status by another violated the dignity and psychological integrity of that person.” The Court stated that the record lacked “clear evidence” indicating that the Petitioner gave his consent to the Respondent to publish his photograph and name. The Court thus held that “the disclosure of the Petitioner’s personal details in the publication by the Respondent amounted to a violation of his dignity.”
2. The Court observed that section 2 of the HIV and AIDS Prevention and Control Act provides that in order to disclose the HIV status of an individual, one must acquire the individual’s written consent. The law further provides that consent must be “given without any force, fraud or threat and with full knowledge and understanding of the medical and social consequences of the matter to which the consent relates.” The Court also noted that the Respondent was required under the Code of Conduct and Practice of Journalism in Kenya to “avoid publication when there is a possibility of harming the persons concerned.”

The Court reiterated that the Petitioner’s consent had not been obtained for the publication of his photograph and name. It thus held that the Respondent had violated the Petitioner’s right to privacy in publishing his photograph and name and disclosing his HIV status.
3. The Court declined to grant the Petitioner special or punitive and exemplary damages. The Court stated that that Petitioner had not proved loss of business and that punitive and exemplary damages were not appropriate in the case. The Court also declined the grant the Petitioner general damages for pain and suffering. However, the Court observed that it had the authority to issue “an order of compensation generally” under article 23(3)(e) of the Constitution. The Court thus granted the Petitioner 1,500,000 Kenyan schillings for the violation of his constitutional rights.

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| CASE NAME | <i>NM and Ors. v. Smith and Ors.</i> |
| YEAR | 2007 |
| COUNTRY | South Africa |
| CITATION | Case CCT 69/05; [2007] ZACC 6 |
| COURT/BODY | Constitutional Court |
| SCOPE OF AUTHORITY | Highest court for matters of constitutional law. Judgments are binding throughout the country. |
| FACTS AND LAW | <p>The Respondents authored and published a book that disclosed the names and HIV-positive statuses of the three Appellants. The Appellants claimed their names and HIV statuses had been published without their consent. They sent a letter to the Respondents’ attorney requesting that their names be removed from the book. The Respondents replied that they were not accountable to the Appellants and would defend legal action if necessary.</p> <p>The Appellants claimed their rights to privacy, dignity and psychological integrity had been violated. They requested damages based on the <i>actio iniuriarum</i> against the respondents jointly and severally.</p> |

FACTS AND LAW
(continued)

The Respondents claimed that the publication of the Appellants' names and HIV statuses was not intentional or negligent. They contended that the HIV status of the Applicants was not a private fact at the time of publication. The Respondents claimed that the publication of the Appellants' HIV statuses was not unlawful because the Appellants had previously consented to having their names included in a report on the investigation of a medical study they participated in and in their application to the High Court.

The Respondents made an offer to the Appellants without prejudice and without acceptance of liability on the first day of trial. The terms were that the Respondents would pay each Appellant 35,000 South African rand, make a private apology to each Appellant, pay the costs of the suit, and remove the Appellants' names from all unsold copies of the book. The Appellants did not accept the offer in time and the trial proceeded. The lower court held partly in favour of the Appellants and partly in favour of the Respondents. This appeal followed.

ISSUE(S) AND HOLDING

1. Did the Respondents' publication of the Appellants' names and HIV statuses in a book without their express consent violate their right to privacy? Yes.
2. Did the Respondents' publication of the Appellants' names and HIV statuses in a book without their express consent violate their right to dignity? Yes.
3. Did the Respondents' publication of the Appellants' names and HIV statuses in a book without their express consent constitute an invasion of privacy under the common law? Yes.

DECISION AND REASONING

The Court first considered whether the case involved a constitutional issue. The Court held that the issue was "clearly worthy of constitutional adjudication" because it involved a "nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, [and the] privacy and dignity" of the Appellants.

1. The Court held that privacy "encompasses the right of a person to live his or her life as he or she pleases." It further explained that private facts are "those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private."

The Court stated that the Appellants' use of their names in an application to the High Court did not amount to consent to have their names published in a book widely circulated throughout South Africa. It declared that "[p]rivate and confidential medical information contains highly sensitive and personal information about individuals," which "reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy." The Court held that protection against indiscriminate disclosure of an individual's HIV status was critical due to "the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure." The Court further declared:

"The affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS."

The Court thus held that it was "imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure."

DECISION AND REASONING
(continued)

The Court stated that “[t]he assumption that others are allowed access to private medical information once it has left the hands of authorised physicians . . . is fundamentally flawed” because “it fails to take into account an individual’s desire to control information about him or herself.” The Court pronounced that there must be “a pressing social need” to justify the interference with an individual’s right to privacy and there “was no such compelling public interest in this case.” The Court thus held that the publication of the Appellants’ names and HIV statuses constituted a wrongful publication of a private fact in violation of their right to privacy.

2. The Court stated that “the social construction and stigma associated with [HIV] make fear, ignorance and discrimination the key pillars that continue to hinder progress in its prevention and treatment.” It further declared that “an acceptance that HIV/AIDS should be treated like any other disease would help to destigmatise negative perceptions and pave the right channels to encourage positive change in the lives of those afflicted with HIV/AIDS, as well as in the treatment of the disease.”

The Court declared that it is “an affront” to the dignity of a person living with HIV for another person to disclose details about the person’s HIV status or any other private medical information without his or her consent. The Court stated that “[i]f human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected.” The Court thus held that Respondents violated the Appellants’ dignity and psychological integrity through the disclosure of their HIV statuses and the disclosure could not be shown to be in the public interest.

3. The Court explained that for a common law action for invasion of privacy to succeed, the applicant must prove (1) impairment of the applicant’s privacy, (2) wrongfulness, and (3) intention. Negligence is not sufficient to hold a wrongdoer liable under this formulation. The Appellants, however, raised the issue whether the common law should be developed to impose liability on those who negligently publish an individual’s HIV status without first obtaining the express consent of the individual or unless the public interest clearly demands the publication. The Court declined to take this approach.

The Court noted that the Appellants had suffered harm as a result of the disclosure of their HIV statuses: the first Appellant had her shack burned down by her boyfriend who then left her; the second Appellant withdrew from society for fear of being ostracized by her family; the third Appellant was depressed, avoided her family, and did not tell members of her family that she was HIV-positive.

The Court reviewed the evidence and concluded that the Respondents had not rebutted the presumption that the disclosure of the Appellants’ HIV statuses was done with the intent to harm them. In support of this holding, the Court stated that it had no doubt that the Respondents were aware that they had not obtained the express consent of the Appellants before publication of the book and that the Respondents’ claim that the use of the Appellants’ real names, instead of pseudonyms, enhanced the authenticity and credibility of the book aggravated their position.

The Court stated that although the assessment of damages is especially within the province of the trial court, “there may be situations where the dictates of justice would be better served by interference by an appellate court.” The Court held that this case presented such a situation. It thus increased the award of damages to each the Appellant from 15,000 to 35,000 South African rand.

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| CASE NAME | <i>Harvey and Anor. v. PD</i> |
| YEAR | 2003 |
| COUNTRY | Australia |
| CITATION | 59 NSWLR 639; [2004] NSWCA 97 |
| COURT/BODY | Supreme Court of New South Wales |
| SCOPE OF AUTHORITY | The highest court in the state of New South Wales. It has unlimited jurisdiction within the state for civil matters and hears the most serious criminal matters. Matters of appeal can be submitted to the New South Wales Court of Appeal and Court of Criminal Appeal, both of which are constituted by members of the Supreme Court. Appeals by special leave may be made to the High Court of Australia. |
| FACTS AND LAW | <p>The Respondent, PD, was a patient of the Alpha Medical Centre (the Centre) from October 1997 until February 1999. On 16 November 1998, she participated in a joint medical consultation with her husband-to-be, FH. The Appellants, Dr. Harvey and Dr. Chen, were their treating physicians. The couple met with Dr. Harvey for the purpose of undergoing blood tests to ensure that neither were HIV-positive or suffering from other sexually transmitted diseases. At the time, PD and FH were not living together and had not had unprotected sex. The Appellant did not inform either PD or FH that their consent would be required for him to disclose the HIV status of one to the other. The trial judge found that PD “reasonably” believed that she would have access to FH’s results and that he would have access to hers.</p> <p>On 23 November 1998, the Appellant received PD’s test results, which were negative for both Hepatitis B and HIV. The following day, he received FH’s test results, which were positive for Hepatitis B and HIV. PD returned to the Centre to receive a copy of her test results and she requested FH’s results as well. The receptionist informed her that his results were confidential and could not be given to her. On 24 November 1998, the Appellant called FH and informed him that he had “very bad news” and that he had tested positive for HIV. The Appellant informed FH that it was unlikely that he would be able to have children and instructed him not to have unprotected sex. The Appellant did not ask whether FH would share his results with PD, nor did he seek FH’s consent to inform PD.</p> <p>PD informed FH of her negative test results. FH said that he had also tested negative. She pressed him for a copy of his results and was shown a forged or fraudulently obtained report confirming his deception. PD and FH began living together and married in July 1999. In September 1999, while pregnant, PD discovered that she was HIV-positive. She gave birth to their child in February 2000.</p> <p>The trial judge found that the Appellants breached their duty of care to the Respondent by, among other things: failing to discuss with PD and FH at the initial consultation the method by which they wanted to receive their test results, given the distinct possibility of discordant results; permitting a receptionist, rather than a medical practitioner, to divulge PD’s test results to her; failing to provide pre-test counselling to PD and FH; failing to provide adequate post-test counselling to FH, especially in relation to his obligation to disclose his HIV status to sexual partners; failing to ask FH whether he intended to inform PD of his condition; and failing to take steps designed to make PD aware that she was exposed to the danger of infection at a time when the Appellants knew or ought to have known such was the case.</p> |

Harvey and Anor. v. PD (continued)

**FACTS AND LAW
(continued)**

This finding was challenged on appeal and a cross-appeal was launched by PD. The Appellants relied on section 17 of the Public Health Act 1991 (NSW). Section 17(2)(b) requires doctors to take all reasonable steps to prevent disclosure of information relating to a patient's HIV status to another person. The Appellants argued that this provision created a positive obligation to take steps to prevent disclosure and thus they could not lawfully have done anything to protect PD.

PD and FH divorced in May 2001. Later that year, PD began a new relationship, became engaged and had a child. The child was born without HIV. On cross-appeal, PD sought the costs associated with the care of her second child for the period during which she would be incapacitated due to HIV.

**ISSUE(S) AND
HOLDING**

Did the Appellant owe the Respondent a duty to provide her with pre-test counselling for HIV testing? Yes.

**DECISION AND
REASONING**

The Court held that Dr. Harvey owed both PD and FH a duty to address, during the initial consultation, the need for consent to disclose and the possibility of discordant results. This duty arises from the obligation the law imposes on medical practitioners to exercise reasonable care and skill not just in treatment but also in the provision of professional advice.

The Court held that section 17(2)(b) of the Public Health Act did not preclude the provision of pre-test counselling addressing the need for consent to disclose, how to receive test results, and dealing with the possibility of discordant results. The Court declared that it would be unreasonable to prevent a doctor from raising such issues during pre-test counselling simply because doing so might encourage a patient's consent to a process of mutual disclosure via the medical practitioner. Moreover, at the time of pre-test counselling, there would be no test results yet to be disclosed. The Court thus held that there was nothing unreasonable in taking a lead from the couple's own wishes expressed in their joint consultation in order to facilitate mutual disclosure in the presence of their doctor.

The trial judge had found, as a matter of fact, that it was likely that both parties would have allowed disclosure to one another had appropriate pre-test counselling occurred. It also found that if FH had refused his consent to mutual disclosure PD would have discontinued the relationship. The Court thus held that the failure to provide adequate pre-test counselling was the cause of the damage suffered by PD.

The Court held that there was no need to consider post-test counselling as it had already found that the Respondent's loss resulted from Dr. Harvey's negligence in failing to provide pre-test counselling.

The Court also considered whether Dr. Harvey's negligence resulted in the need for additional childcare for PD's second child, or whether this loss resulted from PD's independent act. The Court held that Dr. Harvey's negligence was a historical cause of the damages related to the care of PD's second child. However, the Court held that it was not reasonable for PD to recover these additional damages. The potential for damages of an indeterminate amount was a serious concern. The Court further held that the causal link between Dr. Harvey's negligence and PD's loss was attenuated by her independent decision to have the child, knowing of her condition.

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| CASE NAME | <i>Jansen van Vuuren and Anor. NNO v. Kruger</i> |
| YEAR | 1993 |
| COUNTRY | South Africa |
| CITATION | Case No. 675/91; [1993] ZASCA 145; 1993 (4) SA 842 (AD); [1993] 2 All SA 619 (A) |
| COURT/BODY | Supreme Court of Appeal |
| SCOPE OF AUTHORITY | Highest court of appeal in South Africa except for constitutional matters, over which the Constitutional Court exercises final jurisdiction. |
| FACTS AND LAW | <p>The Appellants were the executor of the estate of Mr. McGeary, the original Plaintiff in the case. The Plaintiff died during the course of the trial due to an HIV-related illness. The Respondent was the Plaintiff's general medical practitioner.</p> <p>The Plaintiff had applied for a life insurance policy, which required a medical report of his HIV status. The Respondent prepared the Plaintiff's medical report. He referred the Plaintiff to a separate medical laboratory for HIV testing. The Plaintiff tested positive for HIV and requested the Respondent to keep his HIV status confidential. However, the Respondent disclosed the Plaintiff's HIV status to two other doctors during a golf game the following day, one of whom was the Plaintiff's dentist. These individuals in turn disclosed the information to others. When approached by the Plaintiff, the Respondent denied disclosing the information, and instead suggested that the testing laboratory was responsible for the disclosure.</p> <p>The Plaintiff brought suit claiming the Respondent "wrongfully and unlawfully" disclosed his HIV status in breach of his duty of confidentiality to the Plaintiff, in violation of the Plaintiff's right of personality and his right to privacy. The Plaintiff requested sentimental damages for the breach.</p> <p>The Respondent claimed the disclosure had been made in a privileged setting, that the information disclosed was truthful and in the public interest, and it was objectively reasonable in the public interest in light of <i>boni mores</i>. He asserted that he had informed the Plaintiff's dentist because he feared the dentist might have been exposed to HIV during the treatment of the Plaintiff. He further claimed that he had informed the other doctor of the Plaintiff's HIV status because the doctor might at times be on call as a general practitioner and might have to treat the Plaintiff.</p> |
| ISSUE(S) AND HOLDING | Was the Respondent's disclosure of the Plaintiff's HIV status wrongful and in violation of the Plaintiff's right to privacy? Yes. |
| DECISION AND REASONING | <p>The Court explained that the issue before it was the alleged invasion of the Plaintiff's right of privacy, as encompassed in the right to personality, by means of the public disclosure of private facts.</p> <p>The Court noted that the Hippocratic Oath requires medical practitioners «to keep silence» about information acquired in their professional capacity relating to a patient, "counting such things to be as sacred secrets." The South African Medical and Dental Council states that it is unprofessional conduct to reveal "any information which ought not to be divulged regarding the ailments of a patient except with the express consent of the patient." The Court further declared that the duty of a physician to respect the confidentiality of his patient "is not merely ethical but is also a legal duty recognised by the common law."</p> |

DECISION AND REASONING
(continued)

The Court noted, however, that the right of confidentiality was not absolute and a physician was not required to keep patient information confidential “where his obligations to society would be of greater weight than his obligations to the individual.” In this regard, the Court observed that the South African Medical and Dental Council’s guidelines regarding HIV and AIDS provided that “the patient has to be informed of the doctor’s obligation to make a disclosure.” The Court noted that in this case the Respondent “not only did not seek to obtain the plaintiff’s consent to a disclosure; to the contrary, he promised not to divulge the information.” The Court further noted that HIV and AIDS were not “notifiable” medical conditions according to the Minister of Health.

The Court observed that HIV was “considered by many to be the major health threat of our day.” It noted, however, that even though HIV is contagious, it can only be transmitted through the exchange of certain body fluids. It further noted that “[n]ot a single case of occupationally acquired HIV [had] been confirmed in South Africa,” and that although health care workers were at risk, it was a small risk.

The Court declared that disclosure of a patient’s HIV-positive status has “serious personal and social consequences.” It stated that the patient “is often isolated or rejected by others which may lead to increased anxiety, depression and psychological conditions that tend to hasten the onset of so-called full-blown AIDS.”

The Court held that the Respondent did not have a moral or social duty to disclose the Plaintiff’s HIV status to the other doctors and the doctors did not have a right to receive the information. The Court stated that even though HIV is a dangerous disease it does not diminish the right to privacy of people living with HIV, especially when the right is founded upon the doctor-patient relationship, as in this case. The Court thus held that the Respondent’s disclosure to the two doctors was “unreasonable and therefore unjustified and wrongful.”

As to the Plaintiff’s request for damages, the Court declared that “the right of privacy is a valuable right and the award must reflect that fact.” It stated that the fact that the doctor-patient relationship “was abused notwithstanding an express undertaking to the contrary” was an aggravating factor in this determination. The Court observed that “the publication of a person’s HIV condition increases mental stress,” the Plaintiff “was seriously distressed by the disclosure,” and stress hastens the onset of AIDS. The Court noted that this may have in fact occurred in the Plaintiff’s case. The Court thus awarded the Appellants 500,000 South African rand in damages.

DISCRIMINATION OUTSIDE THE EMPLOYMENT SETTING

See also *Midwa v. Midwa*, (2004), **Rights of women**

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| CASE NAME | <i>State v. Marapo</i> |
| YEAR | 2002 |
| COUNTRY | Botswana |
| CITATION | Criminal Appeal No. 15 of 2002; (2002) AHRLR 58 (BwCA 2002) |
| COURT/BODY | Court of Appeal |

State v. Marapo (continued)

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| SCOPE OF AUTHORITY | The Court is an intermediate court of appeal. It hears appeals from magistrate courts in each district. Decisions may be appealed to the High Court of Botswana. |
| FACTS AND LAW | <p>The Respondent, Moatlhodi Marapo, was arrested and charged with rape. He was not entitled to bail pursuant to Penal Code section 142(1)(i), which provided that any person charged with the offence of rape was not entitled to be granted bail. The Respondent claimed that section 142(1)(i) violated his constitutional right to personal liberty, in particular section 5(3) of the Constitution. He also claimed the impugned section was in violation of his right to be presumed innocent until proven guilty under section 10(2)(a) of the Constitution.</p> <p>The State argued that the prohibition on the granting of bail for persons charged with rape was justified due to the HIV epidemic in Botswana and the escalation in the incidence of crimes of rape. The State asserted that section 142(1)(i) was “designed to promote public safety and public health and was thus in the public interest.”</p> |
| ISSUE(S) AND HOLDING | Was Penal Code section 142(1)(i), which denied the granting of bail for persons charged with rape, constitutional? No. |
| DECISION AND REASONING | <p>The Court declared that it was “beyond [its] comprehension how depriving a person of his liberty merely because he is alleged to have committed rape—not, it must be stressed, because he is found guilty of it—can in any way reduce the crime rate, including rape or serve to contain or restrict the incidence of HIV/AIDS.” It noted that not all persons charged with rape were HIV-positive. The Court further stated that denying all persons charged with rape the opportunity for bail was not an effective deterrent to the act of rape.</p> <p>The Court noted that the fundamental rights and freedoms in the Constitution must be given a “generous and purposive construction.” The Court declared that the right to personal liberty is “one of the most basic of human rights in a democratic society and its deprivation or curtailment must occur only within the most narrow of confines.” The Court stated that it was required “to balance the concept of the public interest against the right of personal freedom.” In this regard, the Court held:</p> <p style="padding-left: 40px;">“[D]enial of entitlement to bail of a person who is only alleged to have committed rape to satisfy the public interest that serious crime should be confined, does not . . . weigh up against the infringement of that person’s right of personal freedom and his deprivation of it on the mere allegation of his having committed the offence.”</p> <p>The Court thus held that Penal Code 142(1)(i) violated section 5(3)(b) of the Constitution, as “the denial of bail where a person is alleged to have committed the offence of rape is not in the public interest.”</p> |

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| CASE NAME | <i>Makuto v. State</i> |
| YEAR | 2000 |
| COUNTRY | Botswana |
| CITATION | Criminal Appeal No. 31 of 1999; [2000] BWCA 21; [2000] 2 BLR 130 (CA) |
| COURT/BODY | Court of Appeal |
| SCOPE OF AUTHORITY | The Court is an intermediate court of appeal. It hears appeals from magistrate courts in each district. Decisions may be appealed to the High Court of Botswana. |
| FACTS AND LAW | <p>The Appellant, Dijaje Makuto, was convicted of rape. He was required to undergo a test for HIV prior to his sentencing. He tested positive for HIV and was sentenced to 16 years in prison.</p> <p>The Penal Code (Amendment) Act 1998 provided that the minimum sentence for a person convicted of rape not attended by violence was 10 years. However, section 142(4)(a) provided that a person convicted of rape who tested positive for HIV, but was unaware of his HIV status, was to be sentenced to a minimum of 15 years in prison. Section 142(4)(b) provided that a person convicted of rape was to be sentenced to 20 years in prison if he was HIV-positive and it was proved on a balance of the probabilities that he was aware of his HIV status.</p> <p>The Appellant claimed that section 142(4) was discriminatory and unjust in so far as it provided for a harsher sentence for persons convicted of rape who were HIV-positive. The Appellant further contended that section 142(4) violated the right to be free from discrimination in section 15 of the Constitution. He also claimed section 142(4) was unjust and unfair in so far as it presumed that persons convicted of rape living with HIV must have been HIV-positive at the time the rape occurred and must have transmitted the disease to victim. There was no requirement that the prosecution prove the convicted person was HIV-positive at the time of the offence or that the victim of the rape was HIV-positive.</p> |
| ISSUE(S) AND HOLDING | Was Penal Code section 142(4), which imposed harsher sentences for persons living with HIV who were convicted of rape, constitutional? Yes, but only in so far as it applied to persons who were HIV-positive at the time of the act of rape. |
| DECISION AND REASONING | <p>The Court first noted that section 15 of the Constitution did not explicitly mention health or physical disability in the list of prohibited grounds of discrimination. However, the Court observed that the framers of the Constitution did not likely intend to list all possible groups or classes that might be affected by discrimination in the enumerated grounds of section 15. Instead, the Court acknowledged that the enumerated categories “might grow or change.” The Court held that an “identifiable group or class of persons who suffer discrimination as such group or class for no other reason than the fact of their membership of the group or class is entitled to challenge [a] law in court as invalid under the Constitution.”</p> <p>The Court next considered subsection 4 of section 15, which provides that a discriminatory law may be constitutional if «having regard to its nature and to special circumstances pertaining to those persons [affected by the law] . . . [it] is reasonably justifiable in a democratic society.” The Court noted that exceptions to provisions conferring rights and freedoms in the Constitution, including subsection 4, ought to be narrowly construed. The Court declared that the issue for determination was whether Penal Code section 142(4) was “reasonably justifiable in a democratic society,” having regard to the nature of the law and to “special circumstances pertaining to persons with the HIV syndrome.”</p> |

**DECISION AND
REASONING**
(continued)

The Court held that Penal Code section 142 discriminated against the group of men who are found to be HIV-positive following conviction for rape. It stated, however, that it did not believe Parliament intended the provision to apply to persons who were not HIV-positive before they committed the act of rape. The Court noted that the possibility that the convicted person contracted HIV during the course of the offence or afterward could not be ruled out. The Court observed that such an application would be unjust and ineffective for the prevention of the offence, as it bore no relationship with the crime it intended to deter and punish. It would also be in violation of the right to be free from discrimination in section 15 of the Constitution because it would impose a more severe sentence based solely on HIV-positive status on persons convicted of rape.

The Court thus held that the enhanced penalties required under Penal Code section 142(4) for people living with HIV must apply only to persons who were HIV-positive at the time of the act of rape. The Appellant's 16-year sentence was therefore reduced to 10 years, as it had not been proved that he was HIV-positive at the time of the offence.

2.2 RIGHTS OF WOMEN IN THE CONTEXT OF HIV

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| CASE NAME | <i>LM, MI and NH v. Namibia</i> |
| YEAR | 2012 |
| COUNTRY | Namibia |
| CITATION | Case No: I 1603/2008, Case No: I 3518/2008, Case No: I 3007/2008 |
| COURT/BODY | High Court of Namibia, Main Division, Held at Windhoek |
| SCOPE OF AUTHORITY | The Court has original jurisdiction to hear all civil disputes and criminal prosecutions, including cases that involve the interpretation, implementation of the Constitution. The Court also has jurisdiction to hear appeals from lower courts. Its decisions are binding on lower courts and may be appealed to the Supreme Court of Namibia. |
| FACTS AND LAW | <p>The Petitioners were three women living with HIV who alleged that they were sterilized without consent by doctors employed in the Ministry of Health and Social Services. They claimed the sterilizations were done as part of a practice of discrimination against women living with HIV. They alleged the non-consensual sterilizations violated their basic human rights guaranteed by the Constitution of Namibia, including the right to life, the right to liberty, the right to human dignity, the right to found a family, and the right equality and freedom from discrimination. They also claimed the operations breached the duty of care owed to them by the doctors who performed the sterilizations.</p> <p>The Government of Namibia (the Defendant) contended that the doctors had obtained the written consent of each woman “after the procedure was explained fully . . . together with the risks and consequences thereof and also after alternative contraception methods had been explained.”</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none"> 1. Were the Plaintiffs unlawfully sterilized without their informed consent? Yes. 2. Were the Plaintiffs sterilized because they were HIV-positive, as part of a discriminatory policy against women living with HIV? No. |
| DECISION AND REASONING | <ol style="list-style-type: none"> 1. The Court held that “the required consent must be given freely and voluntarily and should not have been induced by fear, fraud or force.” It added that consent “must also be clear and unequivocal” and that “[a]dequate information” is a requisite of the knowledge required to make an informed decision. <p>The first Plaintiff testified that she signed a consent form while on a stretcher about to enter the delivery room, in severe pain. A nurse informed her that she would be sterilized “since all women who are HIV-positive go through that procedure.» She did not know whether the consent form was for the delivery or the sterilization and she felt forced to sign the form.</p> <p>The second Plaintiff testified that she was not asked whether she wanted to be sterilized, but was rather told by the doctor that she would be “whether she wanted it or not.” Moreover, the doctor spoke in a forceful manner in telling her so. She was given several forms to sign while she lay on a bed in severe pain, experiencing contractions. When asked about the forms, she was told that the doctor had already explained them and that she simply needed to sign them. She was also “made to understand that there is a policy in place that women who are HIV-positive should be sterilised.”</p> |

LM, MI and NH v. Namibia (continued)

DECISION AND REASONING
(continued)

The third Plaintiff requested termination of the pregnancy but was told it was not possible. She was given forms to sign while in severe pain, experiencing contractions. She “did not understand anything contained in the documents,” including the acronym used to represent the name of the sterilization procedure.

The Court declared that the consent obtained from the Plaintiffs for the sterilization procedures was obtained during the height of labour, in circumstances “under which no consent should be obtained from a patient by a surgeon.” The Court thus held that the women were unlawfully sterilized without their informed consent.

2. The Court held that the onus was on the Plaintiffs to prove “on a preponderance of probabilities” that the sterilization procedures had been performed because they were HIV-positive. The Court, however, found «no credible and convincing evidence” that this was in fact the case. It thus dismissed this claim.

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| CASE NAME | <i>Law and Advocacy for Women in Uganda v. Attorney General</i> |
| YEAR | 2010 |
| COUNTRY | Uganda |
| CITATION | [2010] UGCC 4; Constitutional Petition No. 8 of 2007 |
| COURT/BODY | Constitutional Court of Uganda at Kampala |
| SCOPE OF AUTHORITY | The highest court and final court of appeal for matters of constitutional law in the country. |
| FACTS AND LAW | <p>The Petitioner, a non-governmental organization, sought a declaration that the custom and practice of female genital mutilation (FGM), practiced by several tribes in Uganda, was inconsistent with the Constitution. It requested that FGM be declared null and void and unconstitutional.</p> <p>The Petitioner claimed FGM caused excruciating pain and was in violation with the right to be free from torture or cruel, inhuman or degrading treatment in article 24 of the Constitution. It claimed FGM sometimes led to death and was therefore in violation of the right to life in article 22(1) of the Constitution. The Petitioner further alleged that FGM was performed using crude implements that were reused on other victims, leading to the spread HIV, which also endangers the right to life. The Petitioner contended that FGM led to urinary incontinence, which “leads the victim to smell and become a social outcast.” It argued that this constituted a form of torture or cruel or degrading treatment and was against the dignity, integrity and status of women in violation of article 24 and article 33 of the Constitution. The Petitioner also claimed FGM was performed on girls and women “in the open” without regard to their privacy in violation of the right to privacy in article 27(2) of the Constitution.</p> <p>The Respondent Attorney General claimed no cause of action had been stated and that it had not by any act or omission violated the Constitution.</p> |
| ISSUE(S) AND HOLDING | Does the practice of female genital mutilation violate the Constitution of Uganda? Yes. |

DECISION AND REASONING

The Court held that the petition raised serious questions for constitutional interpretation.

The Court first addressed a number of foundational issues: it defined the practice of FGM, determined why and where it was practiced in Uganda, and discussed the consequences of the practice. The Court defined FGM as comprising “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.” The Court observed that FGM was practiced by a number of tribes in Uganda, as well as by immigrants and refugees within the country. The Court listed five primary reasons cited as justifications for the practice: custom and tradition, women’s sexuality, social pressure, economic gain and religion. The Court stated that FGM has immediate and long-term, psychosexual consequences and social consequences for women’s physical and mental health. It listed a number of both, including loss of blood, transmission of blood-borne diseases, such as HIV, recurrent urine tract infections, obstetric complications, difficulties in menstruation and sexual dysfunction. The Court further noted that FGM was closely related to maternal morbidity and mortality.

The Court next considered the testimony of a female community activist who was a member of a community that practiced FGM. The witness testified, among other things, that FGM causes excruciating pain and excessive bleeding, is performed by unqualified “traditional surgeons,” exposes victims to HIV, causes many deaths and paralysis, and has no medical or social benefits to the community. The Court noted that the evidence was unchallenged and thus accepted as truth by the Court.

The Court stated that article 37 of the Constitution, which protects cultural rights, does not permit cultural practices that violate certain rights and freedoms, including the right to be free from torture or cruel, inhuman or degrading treatment. Article 32(2) further provides that “[l]aws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group . . . are prohibited.” The Court also observed that articles 33(1) and (3) protected the right of women to be accorded full and equal dignity and required the state to take into account their “unique status and natural maternal functions in society.” The Court thus held that “[a]ny person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment.”

The Court next reproduced a lengthy portion of the UN Interagency Statement on Eliminating Female Genital Mutilation, published by the World Health Organization. The statement discusses the many negative health consequences and social implications associated with FGM.

The Court held that FGM “grossly violates the rights of women” in violation of articles 21(1), 24, 32(2), 33(1) and 44(a) of the Constitution. It further held that, to the extent FGM resulted in death, it violated the right to life in article 22(1). The Court stated that it was “clear beyond any doubt” that the practice of FGM was condemned by both the Constitution of Uganda and international law. The Court thus declared the custom of FGM void.

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| CASE NAME | <i>Democratic Republic of Congo v. Burundi, Rwanda and Uganda</i> |
| YEAR | 2004 |
| COUNTRY | Burundi, Rwanda and Uganda |
| CITATION | (2004) AHRLR 19 (ACHPR 2003); Communication 227/99 |
| COURT/BODY | African Commission of Human and Peoples' Rights |
| SCOPE OF AUTHORITY | The Commission was established by the African Charter on Human and Peoples' Rights (the Charter). It is a quasi-judicial body tasked with promoting and protecting human and peoples' rights throughout Africa, interpreting the Charter, and considering individual complaints of violations of the Charter. |
| FACTS AND LAW | <p>The Communication was filed by the Democratic Republic of Congo alleging grave and massive violations of human and peoples' rights committed by the armed forces of Burundi, Rwanda and Uganda, the Respondents. The Democratic Republic of Congo claimed a number of serious rights violations, including armed aggression and the brutal massacres of civilians. The Democratic Republic of Congo also alleged that the forces of Uganda and Rwanda purposefully spread HIV through the rape of women and girls. It claimed that approximately 2,000 HIV-positive soldiers were sent to the eastern provinces of the Democratic Republic of Congo to spread the disease with an aim to decimate the local population. The Democratic Republic of Congo asserted that 75 percent of the Ugandan army was living with HIV at the time. It detailed a number of alleged instances of the rape of women and girls in the eastern provinces.</p> <p>Uganda denied its soldiers committed rape and called the allegation that it intentionally spread HIV "the most ridiculous allegation." Burundi, Rwanda and Uganda asserted that they could not be held jointly responsible for violations and that the claims against them needed to be confirmed by an independent body or fact-finding commission. Uganda also alleged that the Democratic Republic of Congo was itself responsible for violations in its eastern provinces.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none"> 1. Did the armed forces of Burundi, Rwanda and Uganda commit acts rape in the Democratic Republic of Congo in violation of international human rights law? Yes. 2. Did the armed forces of Burundi, Rwanda and Uganda intentionally spread HIV through the rape of women and girls in the Democratic Republic of Congo? The Court did not address this allegation. |
| DECISION AND REASONING | <ol style="list-style-type: none"> 1. The Commission found that allegations of rape fell within the purview of humanitarian law covered by the four Geneva Conventions and their Protocols. It stated that since the Commission had found the Respondents' occupation of parts of the Democratic Republic of Congo to be in violation of the African Charter on Human and Peoples' Rights (the African Charter), the Commission could not "turn a blind eye to the series of human rights violations attendants upon such occupation." |

Democratic Republic of Congo v. Burundi, Rwanda and Uganda (continued)

DECISION AND REASONING
(continued)

The Commission found that the killings, massacres, rapes, mutilations and other human rights abuses committed while the Respondents' armed forces were in occupation of the eastern provinces of the Democratic Republic of Congo were "inconsistent with their obligations under Part III of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol I to the Geneva Conventions." The Commission also found such abuses to be "flagrant violations of article 2 of the African Charter, as such acts were directed against the victims by virtue of their national origin, and article 4, which guarantees respect for life and the integrity of one's person and prohibits the arbitrary deprivation of rights.

The Commission noted that the rape of women and girls was not refuted by the Respondent States. It found that rape was prohibited under article 76 of the first Protocol Additional to the Geneva Conventions of 1949, which provides that "[w]omen shall be . . . protected in particular against rape, forced prostitution and any other forms of indecent assault." The Commission also observed that article 27 in Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 provides for "the protection of women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." The Commission also found that rape offends both the African Charter and the Convention on the Elimination of All Forms of Discrimination Against Women. The Commission thus found that the Respondent States were in violation of the African Charter for the rape of women and girls.

2. The Commission did not directly address claims that the Respondents' armed forces intentionally spread HIV through the rape of women and girls in the Democratic Republic of Congo.

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| CASE NAME | <i>Midwa v. Midwa</i> |
| YEAR | 2004 |
| COUNTRY | Kenya |
| CITATION | [2000] 2 EA 453 (CAK) |
| COURT/BODY | High Court of Kenya at Nairobi |
| SCOPE OF AUTHORITY | Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then to the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |

Midwa v. Midwa (continued)

FACTS AND LAW

The Applicant was a wife and mother living with HIV. Her husband petitioned for divorce on grounds of cruelty, contending that the Applicant endangered his life because she was HIV-positive. The Applicant sought a stay of execution of an order from a lower court by which she was expelled during the pendency of the divorce proceedings from her “matrimonial home and consigned into the servants’ quarter, euphemistically labeled an outhouse.” The Applicant submitted that the servants’ quarter was “unfurnished, unpainted and incomplete” and that she was denied enjoyment of the matrimonial home while money was deducted from her salary every month for the home’s mortgage.

ISSUE(S) AND HOLDING

Did the lower court err in expelling the Applicant, a wife and mother living with HIV, from her matrimonial home during the pendency of divorce proceedings? Yes.

DECISION AND REASONING

The Court held that the lower court “ignored the medical condition of the wife and the tender age of the children” and “made certain orders which plainly cry loudly for justice.” It stated that the lower court’s ruling “smacks of insensitivity and total inconsideration of the facts” and that it was “traumatizing and dehumanizing to order [the Applicant] to live in the servants quarter of her own house.” It further noted that in such conditions the Applicant’s health was “likely to be adversely affected.”

The Court stated that it sympathized with the husband as to the risk the Applicant might pose to his health. However, it noted that the Applicant had submitted that she was “strong and healthy despite the fact that she was diagnosed HIV-positive about five years ago.” The Court further noted that the wife had a 50 percent ownership stake in the entire property and that her salary paid the mortgage of the home. The Court held that it would be “morally wrong” for the husband to desert his wife under such circumstances.

The Court also held that the lower court had not properly considered the welfare of the children, which was the “paramount consideration” in a custody case, and that “there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.”

The Court granted a stay of execution of the lower court order expelling the Applicant from her matrimonial home and ordered the Applicant to be put back in the home.

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| CASE NAME | <i>Reitmair v. Reitmair</i> |
| YEAR | 2002 |
| COUNTRY | Kenya |
| CITATION | [2001] LLR 2071 (HCK) |
| COURT/BODY | High Court of Kenya at Nairobi |
| SCOPE OF AUTHORITY | Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals then the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |

Reitmair v. Reitmair (continued)

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| FACTS AND LAW | The Petitioner petitioned the Court for dissolution of her marriage on grounds of cruelty. She had learned five years prior to the proceedings that her husband, the Respondent, had engaged in a sexual relationship with a woman suspected to be living with HIV. The woman and the woman's husband later died from the disease. The Petitioner urged the Respondent to be tested for HIV, but he refused. The Respondent began drinking heavily and on occasion took money from the Petitioner's business for personal use. The Petitioner and the Respondent had been living apart for five years. |
| ISSUE(S) AND HOLDING | Was the Petitioner entitled to dissolution of her marriage on grounds of cruelty based on her husband's refusal to undergo testing for HIV despite his sexual relationship with a woman who had died from the disease? Yes. |
| DECISION AND REASONING | The Court stated that the Petitioner's evidence had not been challenged and it was therefore entitled to accept the evidence. The Court held that the evidence presented "caused the breakdown of the marriage." The Court thus dissolved the marriage between the Petitioner and the Respondent. The Court provided no further reasoning for its ruling. |

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| CASE NAME | <i>Mmusi and Ors. v. Ramantele and Anor.</i> |
| YEAR | 2013 |
| COUNTRY | Botswana |
| CITATION | CACGB-104-12 High Court Case No. MAHLB-000836-10 |
| COURT/BODY | Court of Appeal |
| SCOPE OF AUTHORITY | The Court of Appeal is an appellate court receiving matters from lower courts, particularly the High Court and the Industrial Court. The Court of Appeal operates as a final court of appeal in all criminal and civil matters in Botswana. |
| FACTS AND LAW | <p>At the centre of the case was Edith Mmusi, an 80-year-old widow, and her three sisters (the Respondents), who had used their own money to renovate and build their family home. Their nephew (the Appellant) filed suit in 2007 in Botswana's Customary Court, claiming that he was legally entitled to inherit the property even though he had never lived there. The Respondents asserted that this would violate the Constitution and the Customary Law Act.</p> <p>The Customary Court ruled in favour of the Appellant, citing the Ngwaketse culture. Ngwaketse culture dictates that a male child inherits his family's home and a female child inherits the home she marries into.</p> <p>The Respondents appealed the Customary Court's decision before the High Court. In October 2012, the High Court struck down the customary rule denying women the right to inherit the family home as violating the right to equality under section 3(a) of the Constitution. The Appellant filed this appeal.</p> |

Mmusi and Ors. v. Ramantele and Anor. (continued)

ISSUE(S) AND HOLDING

Does the customary rule on property inheritance violate the guarantee of equal protection in the Constitution? Yes.

Is the Appellant entitled to inherit the property of the family? No.

DECISION AND REASONING

The Court of Appeal confirmed the judgment of the High Court by affirming gender equality under customary law.

Although the Constitution prohibits gender discrimination, it exempts all laws addressing “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” from this prohibition. This exemption, often referred to as a ‘clawback clause’, is found in a number of constitutions throughout southern Africa, including in Lesotho and Swaziland.

The Court found, however, that such exemptions “are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest.” The Court found that denying the Respondents their property would not be in the public interest and would not harm the rights and freedoms of others.

The Court applied three key principles of interpretation to determine whether customary law was constitutional: (1) laws should only be declared unconstitutional if there is no way of reading them to be in line with the Constitution, (2) rights must be given broad and generous interpretation, and (3) limitations on rights should be interpreted narrowly.

In applying these principles the Court stated that “[a]ny customary law or rule which discriminates in any case against a woman unfairly solely on the basis of her gender would not be in accordance with humanity, morality or natural justice. Nor would it be in accordance with the principles of justice, equity and good conscience.”

The Court recognized that customary law is flexible and evolves over time to keep pace with changing social mores. The Court noted great changes in society over the last 30 years, including the “values of equality before the law, and the increased levelling of the power structures with more and more women heading households and participating with men as equals.” As a result, it found that “there is no rational and justifiable basis for sticking to the narrow norms of days gone by.”

(The *Mmusi* decision has important public health ramifications. Equal access to property is inextricably linked to HIV. Without access to property, women are more likely to fall into poverty, limiting their ability to protect themselves from HIV infection and to seek treatment.)

2.3 RIGHTS OF CHILDREN AND YOUTH IN THE CONTEXT OF HIV

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| CASE NAME | <i>Association for Social Justice and Research v. Union of India and Ors.</i> |
| YEAR | 2010 |
| COUNTRY | India |
| CITATION | W.P. (CRL) 535 of 2010 |
| COURT/BODY | High Court of Delhi |
| SCOPE OF AUTHORITY | Highest court and final court of appeal of the Union Territory of Delhi, including the Indian capital New Delhi. Decisions may be appealed to the Supreme Court of India. |
| FACTS AND LAW | <p>The Petitioner, the Association for Social Justice and Research, filed a habeas corpus petition to determine the whereabouts of a minor girl, Chandni Chandrawati. The Petitioner claimed the girl was 11 to 12 years old. The Petitioner claimed the girl's parents had married her to a 40-year-old man for consideration. The police were unable to locate the girl, her father or her husband. The matter was directed to the Crime Branch, which successfully located all three individuals. The girl's father and husband were arrested and remanded into judicial custody by a magistrate judge.</p> <p>The girl stated that she was 17 years old, that she had consented to the marriage, and that money had not been given to her father in return for her marriage. Both the father and the husband also denied money had been exchanged. A medical examination determined the girl's age to be between 16 and 18 years old. The husband claimed he was 35 years old. The girl's father stated that he married his daughter because he was unable to provide her with an education.</p> |
| ISSUE(S) AND HOLDING | Was the minor girl's marriage to a 35-year-old man lawful? No. |
| DECISION AND REASONING | <p>The Court held that the marriage was in violation of the Prohibition of Child Marriage Act, 2006 (the Act), which prohibits minors under the age of 18 from marrying. The Court stated that the purpose of the Act is to prevent children from marrying when they are "neither psychologically nor physically fit" to do so.</p> <p>The Court noted that experts attributed the phenomenon of child marriage to a number of factors, including poverty, traditional social and cultural values based on patriarchal norms, a lack of education, and the perception that girls are financial burdens. The Court noted that child marriage reinforces the gendered nature of poverty and compromises the development of girls, often resulting in early pregnancy, social isolation and a lack of educational opportunities.</p> <p>The Court stated that girls who are married at an early age are at higher risk for contracting sexually transmitted diseases, including HIV. They are often subjected to domestic violence and physical, psychological and sexual abuse. Young married girls also experience higher rates of maternal and child mortality and are often deprived of education and meaningful work opportunities.</p> <p>The Court noted that although the Hindu Marriage Act prohibits girls under 18 from marrying, courts had not held such marriages null and void in the past; they simply ordered the husband to pay a small fine. In these cases, the minor girls were allowed to remain in their husbands' homes; however, this aspect of the rulings was under consideration by the Full Bench at the time of this decision.</p> |

Association for Social Justice and Research v. Union of India and Ors. (continued)

DECISION AND REASONING
(continued)

Nevertheless, the Court declared that previous cases interpreting the Hindu Marriage Act had not taken the Prohibition of Child Marriage Act into account. The Court held that given the adverse effects of child marriage and the prohibitions in the Act, the custody of the minor girl could not be granted to her husband. The Court further held that to protect the interests of the girl, she must stay with her parents until the age of 18. Until that time, the marriage was not to be consummated, and the marriage ceremony was not to be performed. The Court stated that when the girl reached the age of 18, she could decide whether to accept the marriage or not. If she chose not to accept the marriage, it was null and void under the law.

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| CASE NAME | <i>In re C (a child)</i> |
| YEAR | 1999 |
| COUNTRY | United Kingdom |
| CITATION | [1999] EWCA Civ 3007 |
| COURT/BODY | Court of Appeal, Civil Division |
| SCOPE OF AUTHORITY | The second highest court in the English legal system. The Civil Division hears appeals from the County Courts and the High Court of Justice. Decisions may be appealed to the Supreme Court of the United Kingdom. |
| FACTS AND LAW | <p>The parents of an infant appealed the decision of a lower court directing the child to be tested for HIV. The mother was HIV-positive, but the father was not. Upon discovering the mother's HIV status, the mother's doctor sent the parents and the child to a hospital that specializes in treating children living with HIV. The parents, however, refused to have the child tested for HIV or to receive any treatment at the hospital. The mother was breastfeeding the child at the time.</p> <p>Local authorities applied for a court order directing the child to be tested for HIV. At a hearing, medical experts agreed that there was a 25- to 30-percent chance that the child was HIV-positive. They further agreed that there was a chance the child could contract HIV through breastfeeding. The experts agreed that the child should be tested for HIV and treatment commenced if the child was HIV-positive.</p> <p>The parents did not acceptance the evidence presented by the medical experts. They argued that they ought to be free to make decisions regarding the care of their child without interference from the court. The parents further claimed that such interference was the cause of great stress.</p> |
| ISSUE(S) AND HOLDING | Did the child have a right to be tested for HIV given the likelihood that she might be HIV-positive? Yes. |

In re C (a child) (continued)

DECISION AND REASONING

The Court held that the “welfare of the child [was] paramount” and that the issue was a matter of determining the rights of the child. The Court declared that it had “no doubt at all” that it was “right” for the child to be tested for HIV. It stated that the child “was clearly at risk” if her HIV status was unknown, given the likelihood that she may be HIV-positive. The Court further declared that the degree of intrusion into the child from a medical test as well as the intrusion into the parents associated with taking the child to the hospital for testing was “slight.”

The Court held that it was not in the best interest of the child for her parents to remain ignorant to whether the child was HIV-positive. It held that the “child has the right to have sensible and responsible people find out whether or not she is or is not HIV positive, either as a result of the birth to her mother, or as a result of the breastfeeding.” The child thus had a right to be tested for HIV.

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| CASE NAME | <i>Nyumbani Children’s Home v. The Ministry for Education and the Attorney General</i> |
| YEAR | 2004 |
| COUNTRY | Kenya |
| CITATION | Application No. 1521 of 2003 (OS) |
| COURT/BODY | High Court of Kenya at Nairobi |
| SCOPE OF AUTHORITY | Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then to the Supreme Court. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |
| FACTS AND LAW | The Applicant, Nyumbani Children’s Home, represented 91 HIV-positive children who were prohibited from attending public schools on account of their HIV status. The Applicant requested a declaration from the High Court requiring public schools to permit HIV-positive children to enrol as students. Of the represented children, 41 attended costly private schools and the remaining 50 studied informally at home. The Applicant alleged that public school officials were using HIV status as a factor in determining which students to admit. Jointly with the Chamber of Justice, the Applicant claimed that the public schools’ policy unlawfully discriminated against children on the basis of their HIV status, and that there was no justifiable reason to preclude children living with HIV from attending public schools. The Applicant offered scientific evidence demonstrating that HIV-positive children can live normal and healthy lives without affecting the well-being of other children. Education officials claimed they were willing to accommodate the children subject to the availability of space in the respective schools. |
| ISSUE(S) AND HOLDING | Did public school officials unlawfully discriminate against HIV-positive children and deny them enrolment based on their HIV status? The Court did not hear the issue because the parties settled out of court. |
| DECISION AND REASONING | The parties settled the matter privately prior to a hearing. The public schools agreed to abolish the admission policy prohibiting the enrolment of HIV-positive children. |

2.4 CRIMINALIZATION OF TRANSMISSION, EXPOSURE AND NON-DISCLOSURE

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| CASE NAME | <i>R. v. Mabior</i> |
| YEAR | 2012 |
| COUNTRY | Canada |
| CITATION | 2012 SCC 47; 2010 MBCA 93 |
| COURT/BODY | Supreme Court of Canada |
| SCOPE OF AUTHORITY | Highest court and final court of appeal in Canada. Judgments are binding throughout the country. |
| FACTS AND LAW | <p>The Respondent was charged with nine counts of aggravated assault based on his failure to disclose his HIV-positive status to nine Complainants before engaging in sexual intercourse with them. None of the Complainants tested positive for HIV.</p> <p>At trial, the Respondent was convicted on six counts and acquitted on three. He was acquitted on the basis of the principle that sexual intercourse using a condom when viral loads are undetectable does not place a sexual partner at a “significant risk of serious bodily harm.” On appeal, the Court of Appeal held that either low viral loads or condom use could negate the “significant risk of serious bodily harm.” The Respondent was thus acquitted of four more counts, leaving two convictions in place. This appeal followed.</p> |
| ISSUE(S) AND HOLDING | Is there a duty to disclose one’s HIV-positive status if one’s viral load at the time of sexual relations is low and a condom is used? No. |
| DECISION AND REASONING | <p>The Court noted that in <i>R. v. Cuerrier</i>, 2 S.C.R. 371 (1998), it established that “failure to disclose that one has HIV may constitute fraud vitiating consent to sexual relations.” The Court explained that fraud consisted of two components: (1) a dishonest act, including either falsehoods or failure to disclose one’s HIV status; and (2) deprivation, “denying the complainant knowledge which would have caused him or her to refuse sexual relations that exposed him or her to a significant risk of serious bodily harm.” The Court thus held that failure to disclose one’s HIV-positive status “may amount to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm.”</p> <p>The Court declared that the values of equality, autonomy, liberty, privacy and human dignity in Canadian Charter of Rights and Freedoms (the Charter) are “particularly relevant” to the determination of what constitutes fraud vitiating consent to sexual relations. In this regard, the Court stated that the requirement of “significant risk of serious bodily harm” requires disclosure of HIV status only “if there is a realistic possibility of transmission of HIV.” The Court further held that a realistic possibility of transmission of HIV is negated if “(i) the accused’s viral load at the time of sexual relations was low and (ii) condom protection was used.” The Court stated that this standard respects “the interest of a person to choose whether to consent to sex with a particular person or not,” in line with the values of autonomy and liberty in the Charter.</p> |

R. v. Mabior (continued)

DECISION AND REASONING
(continued)

The Court rejected the Crown’s submission that all HIV-positive people should be required to disclose their HIV status to all sexual partners in all cases. It observed that under this approach, individuals “who act responsibly and whose conduct causes no harm and indeed may pose no risk of harm, could find themselves criminalized and imprisoned for lengthy periods.” The Court added that the “absolute disclosure approach” was “arguably unfair and stigmatizing to people with HIV, an already vulnerable group.” It noted that people living with HIV who act responsibly and pose no risk of harm to others “should not be put to the choice of disclosing their disease or facing criminalization.”

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| CASE NAME | <i>Simon Maregwa Githiru v. Republic</i> |
| YEAR | 2011 |
| COUNTRY | Kenya |
| CITATION | Misc. Crim. App. No. 24 of 2011, HC Embu |
| COURT/BODY | High Court of Kenya at Embu |
| SCOPE OF AUTHORITY | Court of first instance for the Embu District, with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |
| FACTS AND LAW | The Applicant suffered from pulmonary tuberculosis. He defaulted on his treatment and was charged with and pled guilty to wilfully exposing and spreading infectious disease to the community in violation of the Public Health Act. The Applicant was sentenced to six months in prison. |
| ISSUE(S) AND HOLDING | Was the Applicant wrongfully imprisoned for defaulting on his treatment for tuberculosis? Yes. |
| DECISION AND REASONING | The Court noted that it was not clear whether the Applicant had pled guilty to defaulting on his treatment for tuberculosis or exposing the public to the disease. The Court stated that the Prosecutor had not adequately stated the facts of the offence and had not given the Applicant an opportunity to dispute or explain the facts or add additional facts. The Court noted that the Applicant was a first-time offender and should not have been sentenced to imprisonment. It further declared that the lower court should have “empathised” with the Applicant given his medical condition. The Court quashed the conviction, set aside the sentence and ordered the Applicant released. |

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| CASE NAME | <i>D.N. and Anor. v. Attorney General</i> |
| YEAR | 2010 |
| COUNTRY | Kenya |
| CITATION | Petition No. 3 of 2010, HC Eldoret |
| COURT/BODY | High Court of Kenya at Eldoret |
| SCOPE OF AUTHORITY | Court of first instance for the Uasin Gishu District, with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |
| FACTS AND LAW | <p>The Petitioners suffered from tuberculosis. Pursuant to the Public Health Act, the Nandi Central District Tuberculosis Defaulter Tracing Coordinator ordered them to be detained in prison for eight months for defaulting on their treatment.</p> <p>The Petitioners claimed their detention violated their rights to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, and to freedom of movement under articles 47(1) and 39(1) of the Constitution.</p> |
| ISSUE(S) AND HOLDING | Were the Petitioners lawfully imprisoned for defaulting on their treatment for tuberculosis? No. |
| DECISION AND REASONING | <p>The Court held that confining the Petitioners to prison was “the worst of choices.” It held that detention for a period of eight months was “unreasonably long,” particularly as it “was not backed by any medical opinion.” The Court wondered why the Petitioners were held in a prison rather than a medical facility, and it questioned whether the Petitioners had in fact committed any crime.</p> <p>The Court thus held that the detention of the Petitioners in prison was unconstitutional. It further held that such detention was not in compliance with the Public Health Act. The Court ordered the Petitioners to be released to their homes where they would continue treatment for tuberculosis under the supervision of a public health officer.</p> |

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| CASE NAME | <i>Enhorn v. Sweden</i> |
| YEAR | 2005 |
| COUNTRY | Sweden |
| CITATION | Application No. 56529/0 |
| COURT/BODY | European Court of Human Rights |
| SCOPE OF AUTHORITY | The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on the parties in each case. |

FACTS AND LAW

The Applicant was an HIV-positive man who had sex with men. He had transmitted HIV to another, young man through a sexual encounter prior to his diagnosis. He was subsequently instructed by the county medical officer, among other things, not to have sexual intercourse without first informing his partner that he was HIV-positive, to use a condom, and not to consume large amounts of alcohol. The Applicant failed to appear for several scheduled medical appointments. The county medical officer petitioned the county Administrative Court to order that the Applicant be compulsorily confined in a hospital for up to three months, pursuant to the 1988 Infectious Diseases Act. The county medical officer and a specialist in psychiatry testified that the Applicant was at risk of transmitting HIV due to his refusal to modify his behaviours and extensive alcohol abuse. The Administrative Court found that the Applicant had failed to comply with the measures prescribed by the county medical officer and ordered the Applicant to be compulsorily confined in a hospital for up to three months.

The Applicant's confinement was repeatedly prolonged every six months. The order of confinement was in force for a period of almost seven years, during which time the Applicant absconded on multiple occasions for months at a time. His actual confinement lasted for one and a half years in total.

The Applicant claimed his compulsory confinement violated his right to liberty and security of person in article 5 of the European Convention on Human Rights (the Convention). The Government argued that the Applicant's confinement was lawful pursuant to article 5, section 1(b) and (e) of the Convention, which allow for the detention of a person "for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law" and "for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

ISSUE(S) AND HOLDING

Did the Applicant's compulsory confinement based on the risk that he may transmit HIV violate his right to liberty and security of person in article 5 of the European Convention on Human Rights? Yes.

DECISION AND REASONING

The Court first noted that the parties agreed that the compulsory isolation orders and the Applicant's involuntary confinement in a hospital amounted to a "derivation of liberty" under article 5 of the Convention.

The Court next stated that article 5, section 1(e) of the Convention, which allows for the detention of a person in order to prevent the spread of an infectious disease, was applicable. The Court held that where a deprivation of liberty is concerned, the law under which the person is detained must be clearly defined and sufficiently accessible to allow the person to foresee the consequences of a given action. The detention must also be free from arbitrariness and in accordance with the principle of proportionality. It is therefore justified only where "less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest."

Enhorn v. Sweden (continued)

DECISION AND REASONING (continued)

The Court next held that the “essential criteria” when determining the lawfulness of the detention of a person “for the prevention of the spreading of infectious diseases” are (1) “whether the spreading of the infectious disease is dangerous to public health or safety;” and (2) “whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.” The Court held that it was undisputed that the HIV virus is dangerous to public health and safety. The Court next stated that the Government had not provided any examples of less severe measures, aside from confinement, which were considered and deemed insufficient to safeguard public interest.

The Court noted that although the Applicant had failed to comply with a number of instructions from the county medical officer, there was no evidence that during the nearly seven-year period of the compulsory confinement order that the Applicant had transmitted HIV to another person, or had sexual intercourse without first informing his partner that he was HIV-positive, or that he did not use a condom. It had not been established that he engaged in sexual relations at all after being diagnosed HIV-positive. Last, the Court noted that while it had been established that the Applicant had transmitted HIV to another man previously, there was no evidence that this occurred intentionally or as a result of gross neglect on the part of the Applicant.

The Court thus held that the compulsory confinement of the Applicant “was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest.” It further held that the Government had “failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant’s right to liberty.”

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| CASE NAME | <i>Police v. Dalley</i> |
| YEAR | 2005 |
| COUNTRY | New Zealand |
| CITATION | (2005) 22 CRNZ 495 |
| COURT/BODY | District Court at Wellington |
| SCOPE OF AUTHORITY | The Court is a trial court for the area of Wellington. It hears both criminal and civil claims (of disputes involving \$200,000 or less). Decisions may be appealed to the Court of Appeal and then the High Court of New Zealand. |
| FACTS AND LAW | The Defendant, Dalley, was HIV-positive. He met the Complainant, a woman, through an internet dating site. The Complainant was unaware that the Defendant was HIV-positive. The two engaged in unprotected oral intercourse and protected vaginal intercourse, using a condom. The condom was used appropriately during vaginal intercourse and the Defendant had a low viral load at the time. The Complainant testified that she would not have had sexual intercourse with the Defendant if she had known that he was HIV-positive. |

Police v. Dalley (continued)

FACTS AND LAW
(continued)

The Defendant was charged with committing a criminal nuisance by omitting to discharge a legal duty: “(1) Before having oral intercourse informing the Complainant that he was HIV-positive knowing that such omission would endanger the Complainant’s health; and (2) Before having vaginal intercourse informing the Complainant that he was HIV-positive knowing that such omission would endanger the complainant’s health.” The statute prohibiting criminal nuisance provides that an individual is guilty if he omits to discharge a legal duty that he knew “would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.” The legal duty allegedly breach by the Defendant requires persons “in charge of dangerous things” to “take reasonable precautions against and to use reasonable care to avoid” endangering human life.

ISSUE(S) AND HOLDING

Was the Defendant guilty of endangering the lives, safety or health of the public or any individuals by failing to disclose that he was HIV-positive before engaging in unprotected oral intercourse and protected vaginal intercourse with the Complainant? No.

DECISION AND REASONING

The Court first considered testimony from several medical professionals concerning the nature of the risk of transmission of HIV under a variety of circumstances. It also heard testimony as to the content of counselling provided to persons living with HIV toward promoting safe sexual behaviour.

The Court first held that the Defendant was under a legal duty “to take reasonable precautions against and to use reasonable care to avoid” endangering human life, as the “HIV virus present in semen may endanger human life.” It further added that there was nothing in the statue that implied that there must be a “significant risk of the danger.”

The Court next considered whether the Defendant breached his duty by engaging in unprotected oral intercourse with the Complainant. The Court held that the “risk of transmission of the virus as a result of oral intercourse without a condom is not zero because it is biologically possible, but it is so low it does not register as a risk.” It further noted that the Defendant did not ejaculate during oral intercourse. The Court thus held the Defendant had not breached his duty by engaging in unprotected oral intercourse.

The Court next considered whether the use of a condom during vaginal intercourse was sufficient to constitute “reasonable precautions against and reasonable care to avoid the transmission of HIV.” The Court noted that the risk of transmission of HIV even where the male is HIV-positive and does not use a condom “is relatively low.” The Court noted that condoms significantly reduce this low risk, as they are 80 to 85 percent effective. The Court next observed that the evidence demonstrated that as far as “public health needs are concerned, the steps necessary to prevent the transmission of HIV can be met without the requirement for disclosure.” For the purpose of protecting public health, “the use of a condom for vaginal intercourse is considered sufficient.” Finally, the Court stated that there was “no evidence to suggest that experts in the area consider that prevention of the transmission of HIV requires disclosure.” The Court further noted that the legal duty “is not to take failsafe precautions,” but rather to take reasonable precautions. It therefore held that the Defendant had taken “reasonable precautions and care” by using a condom during vaginal intercourse and had not breached his duty.

The Court observed that “most people would want to be told that a potential sexual partner was HIV positive.” It therefore reasoned that there “may well be a moral duty to disclose that information.” However, the Court held that there is “a difference between a moral duty and a legal duty, the legal duty in this case being to take reasonable precautions against and use reasonable care to avoid transmitting the HIV virus.”

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| CASE NAME | <i>R. v. Dica</i> |
| YEAR | 2004 |
| COUNTRY | United Kingdom |
| CITATION | [2004] EWCA Crim 1103 |
| COURT/BODY | Supreme Court of Judicature, Court of Appeal (Criminal Division) |
| SCOPE OF AUTHORITY | The Court has jurisdiction over criminal appeals from the Crown Court and the Magistrates' Courts. Decisions may be appealed to the Supreme Court of the United Kingdom. |
| FACTS AND LAW | <p>The Appellant, Dica, was HIV-positive. He engaged in unprotected sexual intercourse with two women. Both women tested positive for HIV subsequent to their sexual encounters with the Appellant. It was not clear whether the women were aware of the Appellant's HIV status at the time of the encounters.</p> <p>The prosecution did not argue that the Appellant intended to transmit HIV to the Complainants. Rather, it alleged that he was "reckless" as to whether they might contract the disease. The trial court withdrew from the jury the issue of whether the women knew the Appellant was HIV-positive and thus consented to the risk of transmission of the disease. The trial court held that whether the Complainants knew the Appellant was HIV-positive was irrelevant because they did not have "the legal capacity to consent to such serious harm." The Appellant was convicted of two counts of causing grievous bodily harm and sentenced to eight years' imprisonment.</p> |
| ISSUE(S) AND HOLDING | Did the trial court err in withdrawing from the jury the issue of whether the Complainants knew the Appellant was HIV-positive and thus consented to the risk of transmission of the disease during sexual intercourses? Yes, consent to the risk of transmission of HIV during sexual relations constitutes a defence to a charge of causing grievous bodily harm. |
| DECISION AND REASONING | <p>The Court held that the question as to consent was whether the women were "consenting to the risk of infection with HIV," not merely to engage in sexual intercourse. The Court held that if the Appellant had concealed his HIV status from the women, their consent to engage in sexual intercourse would not be sufficient in law to constitute a defence to the charge of causing grievous bodily harm; they must have instead consented to the risk of HIV transmission.</p> <p>The Court next declared that "unless the activity is lawful, the consent of the victim to the deliberate infliction of serious bodily injury on him or her does not provide the perpetrator with any defence." In the context of sexual relations, the Court held that "violent conduct involving the deliberate and intentional infliction of bodily harm is and remains unlawful notwithstanding that its purpose is the sexual gratification of one or both participants." The Court however, further held that it does not follow that "consensual acts of sexual intercourse are unlawful merely because there may be a known risk to the health of one or other participant." The Court noted that risks have "always been taken by adults consenting to sexual intercourse." The Court stated:</p> <p style="padding-left: 40px;">"The problems of criminalising the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact. The process would undermine the general understanding of the community that sexual relationships are pre-eminently private and essentially personal to the individuals involved in them."</p> |

R. v. Dica (continued)

DECISION AND REASONING
(continued)

The Court also noted the Government's response to a proposal by the Law Commission (independent body established by Parliament in 1965 to keep the law of England and Wales under review and to recommend reform when it's needed) to prosecute unintentional or reckless transmission of disease. The Home Office opposed such prosecutions, in part because they may be seen as discriminating against people living with HIV. The Home Office stated:

"[T]he criminal law should apply only to those whom it can be proved beyond reasonable doubt had deliberately transmitted a disease, intending to cause serious injury. It added "this aims to strike a sensible balance between allowing very serious intentional acts to be punished while not rendering individuals liable for prosecution of unintentional or reckless acts . . ."

The Court held that if an individual consents to the risk of transmission of HIV during a sexual encounter, it constitutes a defence to a charge of causing grievous bodily harm. The Court thus allowed the appeal and ordered a retrial.

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| CASE NAME | <i>R. v. Cuerrier</i> |
| YEAR | 1998 |
| COUNTRY | Canada |
| CITATION | [1998] 2 S.C.R. 371 |
| COURT/BODY | Supreme Court of Canada |
| SCOPE OF AUTHORITY | Highest court and final court of appeal in the country. Judgments are binding throughout Canada. |
| FACTS AND LAW | <p>The Respondent, a man living with HIV, was instructed by a public health official to use a condom when he engaged in sexual intercourse and to inform prospective sexual partners that he was HIV-positive. The Respondent rejected this advice and had unprotected sexual intercourse on multiple occasions with two different women. He did not inform either woman he was HIV-positive. Both women testified that if they had known the Respondent was HIV-positive they would not have engaged in unprotected intercourse with him.</p> <p>Respondent was charged with two counts of aggravated assault. At the time of trial, neither woman had tested positive for HIV. The trial judge entered a directed verdict acquitting the Respondent on both counts. The Court of Appeal refused to set aside the acquittals. This appeal followed.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none">1. In the case of aggravated assault, is consent to engage in unprotected sexual intercourse vitiated by fraud when an individual knows he is HIV-positive and either fails to disclose or deliberately deceives his partner about it? Yes.2. Does the use of a condom by an HIV-positive individual during sexual intercourse reduce the risk of harm associated with the transmission of HIV such that the duty to disclose may not arise? Yes. |

DECISION AND REASONING

1. The Court explained that to prove aggravated assault the Crown must show that the accused's acts put the victim at a "significant risk of serious bodily harm" and that the accused "intentionally applied force without the consent of the complainant." As to the first part, the Court held that there was "no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse." It further noted that it was not necessary to prove that harm actually resulted from the act. It was thus not necessary to establish that the women had tested positive for HIV.

As to the second part, the Court stated that "the essential elements of fraud are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation." The Court held that the greater the risk of deprivation from the act, the higher the duty of disclosure. It stated that since the failure to disclose one's HIV status can lead to an illness with fatal consequences, there exists a positive duty to disclose if one is HIV-positive. The Court further held that under these circumstances consent "cannot simply be to have sexual intercourse." It must be "consent to have intercourse with a partner who is HIV-positive."

The Court thus held: "Persons knowing that they are HIV-positive who engage in sexual intercourse without advising their partner of the disease may be found to fulfil the traditional requirements for fraud namely dishonesty and deprivation. That fraud may vitiate a partner's consent to engage in sexual intercourse." The Court further held, however, that the Crown was still required to prove beyond a reasonable doubt that "the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive."

2. The Court held that "the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation." In this regard, the Court reiterated that to prove aggravated assault there must be a significant risk of serious bodily harm. In the absence of such a risk, "the duty to disclose will not arise."

2.4 RIGHTS OF KEY POPULATIONS

RIGHTS OF MIGRANTS

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| CASE NAME | <i>Eneh v. Holder</i> |
| YEAR | 2010 |
| COUNTRY | United States |
| CITATION | 601 F.3d 943 (2010) |
| COURT/BODY | United States Court of Appeals, Ninth Circuit |
| SCOPE OF AUTHORITY | The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands. Decisions may be appealed to the Supreme Court of the United States. |
| FACTS AND LAW | <p>The Petitioner, Lawrence Amaechi Eneh, was a native and citizen of Nigeria. He had contracted HIV while working as a nurse in the United States. He was living with HIV-related illness at the time of the proceedings.</p> <p>The Petitioner was convicted for the sale of marijuana and sentenced to 36 months' imprisonment. The US Department of Homeland Security issued the Petitioner a Notice to Appear and charged him as removable due to his conviction. The Petitioner applied for asylum, withholding of removal, and withholding and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).</p> <p>The Petitioner was taking 35 pills a day to treat his HIV-related illness and was informed by prison doctors that he would die without this medication. He feared removal to Nigeria because citizens convicted of crimes in foreign countries were immediately taken into custody and imprisoned. He testified that prison conditions in Nigeria were poor and that he would not have access to treatment for HIV. He further claimed that people living with HIV were socially ostracized and that he would be tortured in prison on account of his HIV status. The Petitioner also submitted a US State Department report that indicated that prison officials in Nigeria often withheld medical treatment as a form of punishment.</p> <p>The immigration judge concluded that the Petitioner was statutorily ineligible for asylum and withholding of removal as a result of his controlled substance conviction. The judge also denied his deferral of removal claim under the Convention Against Torture, holding that medical deprivation and ostracism in Nigeria would not amount to torture under the Convention. The Board of Immigration Appeals dismissed the Petitioner's appeal.</p> <p>The Petitioner appealed the Board of Immigration Appeal's denial of his claim for deferral of removal under the Convention Against Torture.</p> |
| ISSUE(S) AND HOLDING | Did the Board of Immigration Appeals err in denying the Petitioner's claim for deferral of removal under the Convention Against Torture due to the likelihood that he would be tortured in prison in Nigeria because of this HIV status? The Court vacated the Board of Immigration Appeals' ruling in part and remanded for further consideration of the evidence. |

Eneh v. Holder (continued)

DECISION AND REASONING

The Court stated that to prevail on a claim under the Convention Against Torture an applicant “must prove that it is more likely than not that he or she will be tortured if removed to the designated country.” The Court noted that the limited analysis in the Board of Immigration Appeals’ (BIA) decision made it difficult to review the decision in an adequate manner.

The Court held that the evidence did not support the BIA’s statement that the Petitioner was not likely to be detained upon return to Nigeria. It noted that the Seventh Circuit Court of Appeals had confirmed that Nigeria had an official policy of imprisoning its citizens for drug-related crimes committed abroad. The Court held that the BIA’s reasoning was “at odds with the [immigration judge’s] decision, [the Petitioner’s] credible testimony, and judicially-noticeable facts.” The Court thus vacated the BIA’s denial of deferral or removal under the Convention Against Torture and remanded the matter to the BIA for a clearer explanation of its decision.

The Court further held that the BIA and the immigration judge had failed to acknowledge or analyze the Petitioner’s claim that he “would be individually and intentionally targeted for mistreatment because of his HIV status and associated medical problems.” The Court stated that for the purposes of the Convention Against Torture, the Petitioner needed to show that “a government official or private actor . . . specifically intended to torture him.” In this regard, the Court observed that the Petitioner had provided credible evidence showing that he would be “intentionally tortured” in prison because of his HIV status, and that prison officials sometimes withhold medicine as a form of punishment. The Court held that the BIA and immigration judge had overlooked this evidence and that it may demonstrate the likelihood that the Petitioner would be subjected to torture.

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| CASE NAME | <i>Bosede v. Mukasey</i> |
| YEAR | 2008 |
| COUNTRY | United States |
| CITATION | 512 F.3d 946 (7th Cir. 2008) |
| COURT/BODY | United States Court of Appeals, Seventh Circuit |
| SCOPE OF AUTHORITY | The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in the states of Illinois, Indiana and Wisconsin. Decisions may be appealed to the Supreme Court of the United States. |
| FACTS AND LAW | <p>The Petitioner, Stephen Bosede, was a Nigerian citizen who had lived in the United States for 27 years. He had been granted permanent residency and was married to a United States citizen. He had been living with HIV and receiving antiretroviral treatment for approximately 10 years at the time of the proceedings.</p> <p>The Petitioner was ordered removed from the United States after he was convicted twice for possession of small amounts of cocaine and once for retail theft. He applied for asylum, withholding of removal and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). The Petitioner claimed he would be persecuted on the basis of his religion and his HIV status if he returned to Nigeria.</p> |

Bosede v. Mukasey (continued)

FACTS AND LAW
(continued)

In support of his claims, he maintained that during a visit to Nigeria authorities had detained him at the airport when they discovered he was HIV-positive. He further asserted that he would be imprisoned upon his return pursuant to Decree 33, which mandates a five-year sentence for any Nigerian citizen “found guilty in any foreign country of an offense involving narcotic drugs or psychotropic substances.” The Petitioner also claimed that he would face “extreme hardship” in prison because of his HIV status and that a return to Nigeria was “akin to a death sentence.”

The immigration judge concluded that the Petitioner was statutorily ineligible for withholding of removal under the Convention Against Torture because his two drug offenses constituted drug trafficking and were thus “particularly serious crimes.” The immigration judge further stated that it would have denied the Petitioner’s application even if he was not statutorily barred from bringing it because he had not proven that he would be imprisoned in Nigeria because of crimes in the United States, or that he would suffer torture in prison based on his HIV status. The immigration judge also suggested that the Petitioner could pay a bribe to avoid imprisonment. The Board of Immigration Appeals affirmed the immigration judge’s ruling.

The Petitioner argued that the immigration judge had erroneously concluded that his drug offenses were “particularly serious crimes.” He further contended that the immigration judge violated his constitutional right to due process by rejecting his application for withholding of removal relief.

ISSUE(S) AND HOLDING

Was the Petitioner entitled to a new hearing to determine whether he qualified for withholding of removal under the Convention Against Torture due to the likelihood that he would be imprisoned and face hardship based on his HIV status if removed to Nigeria? Yes.

DECISION AND REASONING

The Court stated that the immigration judge’s presumption that the Petitioner’s drug offenses constituted drug trafficking and were thus “particularly serious crimes” was not preclusive. The Court held that the immigration judge failed to give serious consideration to whether the Petitioner had rebutted the presumption. The Court noted that the Board of Immigration Appeals had established that an applicant could rebut such a presumption by “showing unusual circumstances.” This involves, among other things, showing that a drug trafficking crime involved a very small quantity of drugs and did not involve violence or the threat of violence. In this regard, the Court noted that the Petitioner’s offenses were for possession of less than one gram of cocaine and that he was not involved in dealing drugs. The Court also stated that other facts in the record further supported the argument that the Petitioner had established unusual circumstances. The Court thus held that the immigration judge’s failure to consider all the evidence led it “to question the adequacy of [the Petitioner’s] hearing.”

The Court next held that the immigration judge’s “cavalier attitude” toward the Petitioner’s claims was also reflected in the immigration judge’s rejection of the Petitioner’s assertion that he was likely to be imprisoned upon his return to Nigeria. The Court stated that it was “appalled that the [immigration judge] would rest his decision on the absurd proposition that [the Petitioner] could evade imprisonment, mistreatment, and possibly death by approaching his jailers and trying to buy his way out.” The Court further declared that it was “confused” as to what further proof the immigration judge needed beyond the US State Department’s confirmation that Decree 33 was still in effect, as the Decree made it clear the Petitioner would be imprisoned.

Bosede v. Mukasey (continued)

DECISION AND REASONING
(continued)

The Court noted that aliens are entitled to due process and are “protected against arbitrary government action that ‘shocks the conscience’ and cannot be justified by any government interest.” The Court thus held that the immigration judge’s “flawed reasoning and reliance on an improper consideration constitute a ‘fundamental failure of due process.’” The Court further declared that the immigration judge “cared little about the evidence and instead applied whatever rationale he could muster to justify a predetermined outcome.” The Court held that the Petitioner was entitled to a new hearing.

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| CASE NAME | <i>De Bruyn v. Minister of Justice and Customs</i> |
| YEAR | 2004 |
| COUNTRY | Australia |
| CITATION | (2004) 143 FCR 162; (2004) 213 ALR 479; [2004] FCAFC 334 |
| COURT/BODY | Full Court of the Federal Court of Australia |
| SCOPE OF AUTHORITY | The Court is the appeals division of the Federal Court. The Federal Court is a superior court of record that has jurisdiction to deal with most civil disputes governed by federal law, with the exception of family law matters, and some criminal matters. Decisions may be appealed from the Full Court to the High Court of Australia. |
| FACTS AND LAW | <p>The Appellant, De Bruyn, was a citizen of South Africa. The Respondent, the Minister of Justice and Customs (the Minister), ordered the Appellant to be surrendered to South Africa for an extradition offense. The Appellant was to be charged in South Africa with defrauding the First National Bank of South Africa.</p> <p>The Treaty on Extradition between Australia and the Republic of South Africa provides that the Government may decline an extradition request if:</p> <p>“[W]hile also taking into account the nature of the offence and the interests of the Requesting State, considers that, in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.”</p> <p>The Appellant claimed that there was conclusive proof that the prison system in South Africa was “inhumane and unjust” due to the prevalence of gang rapes, assault and murder, and the high risk of contracting HIV. He presented substantial evidence in support of these claims, including a UNAIDS report that indicated that 70 to 80 percent of suspects held in South African prisons were raped by fellow prisoners before they were charged. The report also claimed that a prison sentence in South Africa was “tantamount to a death sentence by HIV/AIDS.” Another report from the Inspecting Judge of Prisons claimed that 6,000 of the 10,000 prisoners released monthly from prison in South Africa were HIV-positive.</p> <p>The Minister concluded that there was “no information available” to support the conclusion that the Appellant would be subjected to torture on surrender to South Africa. It further determined that there was no certainty that the Appellant would contract HIV if he was imprisoned in South Africa.</p> |

De Bruyn v. Minister of Justice and Customs (continued)

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| FACTS AND LAW <i>(continued)</i> | In reviewing the Minister’s decision, the lower court considered whether the Appellant was denied procedural fairness; whether the Minister erred in concluding that the Appellant would not be subjected to torture in South Africa; and whether the Minister erred in not declining to surrender the Appellant on the basis that it would be unjust, oppressive or incompatible with humanitarian considerations to do so. The lower court rejected all three of the Appellant’s claims. This appeal followed. |
| ISSUE(S) AND HOLDING | Did the high risk of contracting HIV in prison in South Africa constitute a humanitarian consideration weighing against the extradition of the Appellant to South Africa? Yes. |
| DECISION AND REASONING | <p>The Court first held that torture was limited to “institutionalised conduct by government authorities for the purpose of punishment, intimidation or coercion.” Therefore conduct identified by the Appellant involving violence among prisoners did not constitute torture. The Court further stated that such conduct was not converted to torture even if “corrupt wardens ignore or even encourage it.”</p> <p>The Court stated that an extradition request may be denied “where it would be incompatible with humanitarian considerations to surrender the person.” It added that the “circumstances of the case,” including the personal circumstances of the person subject to extradition, were to be taken into account in this determination.</p> <p>The Court rejected the Minister’s conclusion that, unless it was certain that the Appellant would contract HIV in prison, it would not be oppressive or contrary to humanitarian considerations to extradite him. The Court held that this approach denied “the prospect that exposure to a level of risk of infection should be considered as incompatible with humanitarian considerations.” The Court stated that “exposure to the risk of HIV/AIDS may amount to a threat to the life and well-being” a person. It further declared that if such a threat arose from prison conditions, it may be viewed as associated with the punishment the person would receive if extradited. The Court clarified that it was not suggesting that any exposure to the risk of contracting HIV would constitute a humanitarian consideration weighing against extradition. However, it held that “there may well be a point where the level of risk or threat arising from conditions in the prison of the requesting country is so high as to” weigh against extradition. The Court thus held that Minister’s decision involved “an incorrect understanding of what may amount to humanitarian considerations.”</p> <p>The Court allowed the appeal, set aside the orders of the lower court, and quashed the Minister’s surrender warrant.</p> |

RIGHTS OF PEOPLE WHO USE DRUGS

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| CASE NAME | <i>New Directions Treatment Services v. City of Reading</i> |
| YEAR | 2007 |
| COUNTRY | United States |
| CITATION | 490 F.3d 293 (2007) |
| COURT/BODY | United States Court of Appeals, Third Circuit |

New Directions Treatment Services v. City of Reading (continued)

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| SCOPE OF AUTHORITY | The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in the following US states and territory: Delaware, New Jersey, Pennsylvania and the Virgin Islands. Decisions may be appealed to the Supreme Court of the United States. |
| FACTS AND LAW | <p>New Directions Treatment Services (New Directions, or the Petitioner) was a reputable, long-standing provider of methadone maintenance treatment. It sought to locate a new clinic in the City of Reading (the City). A state zoning statute provided that methadone clinics could not be established or operated within 500 feet of, among other things, an existing school, public playground, public park, residential housing area, child-care facility or church, unless the governing body of the municipality, by majority vote, voted in favour of issuing a permit. The proposed location for the New Directions new clinic fell within the purview of the statute and the City did not vote in favour of issuing the permit.</p> <p>New Directions and individual methadone patients brought suit on constitutional and statutory grounds, raising both facial and as-applied challenges to the law. They alleged that the zoning statute, on its face and as applied, violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act, both of which prohibit discrimination on the basis of a disability, and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none">1. Did the zoning statute, which prohibited the establishment and operation of methadone clinics within 500 feet from a list of enumerated premises, violate the Americans with Disabilities Act and the Rehabilitation Act? Yes.2. Did the City violate the Equal Protection Clause of the Fourteenth Amendment to the US Constitution in voting to deny a permit to the methadone clinic? The Court remanded the issue to the trial court, as it found that the Petitioners could prove a violation. |
| DECISION AND REASONING | <ol style="list-style-type: none">1. The Court held that a law that “singles out methadone clinics, and thereby methadone patients, for different treatment” is facially discriminatory under the ADA and the Rehabilitation Act. The Court cited several decisions from federal appellate courts that addressed the same issue. It notes that “[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension, as the challenges facing recovering drug addicts.” <p>The Court then considered whether New Directions’ clients posed a “significant risk to the health or safety of others,” pursuant to the Rehabilitation Act, also referred to as a “direct threat” under the ADA, which would permit an exception to the prohibition on discrimination under the ADA. The Court held that the “purported risk must be substantial, not speculative or remote” and that “methadone patients, as a class, do not pose a significant risk.” It noted that the record demonstrated “no link between methadone clinics and increased crime” and that “less than six percent of patients enrolled for more than six months” in methadone maintenance treatment tested positive for illegal drugs at an existing New Directions clinic.</p> <p>Finally, the Court quoted the sponsor of the impugned zoning statute from the City Council. The sponsor had stated that the statute was meant to keep methadone clinics “away from people who have kept themselves clean and free of drugs and should not be confronted by this kind of a pollution in their community.” The Court held that this amounted to a “speculative, hypothetical, unsupported” statement at odds with the purpose of the Rehabilitation Act and the ADA, which is to protect disabled individuals «from deprivations based on prejudice, stereotypes, or unfounded fear.”</p> |

New Directions Treatment Services v. City of Reading (continued)

DECISION AND REASONING
(continued)

2. Legal classifications based on individuals with disabilities, including recovering heroin addicts, are reviewed under the rational basis test, which requires the statute to constitute a rational means to serve a legitimate end. The Court observed that the records of the City Council hearings contained “numerous statements by both public participants and council members expressing opposition based on what can only be characterized as generalized prejudice, stereotypes, and fear of [New Directions] clientele.” The Court also noted that the prior occupant of the proposed methadone clinic “treated recovering drug and alcohol addicts as well as mentally ill patients” and the record contained “no evidence of complaints from nearby residents.” The Court thus held that, on remand, the lower court could find that “no reasonably conceivable state of facts . . . could provide a rational basis» for the City’s denial of a permit to New Directions.

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| CASE NAME | <i>McGlinchey v. United Kingdom</i> |
| YEAR | 2003 |
| COUNTRY | United Kingdom |
| CITATION | Application No. 50390/99; (2003) 37 EHRR 41; [2003] All ER (D) 359 (Apr) |
| COURT/BODY | European Court of Human Rights |
| SCOPE OF AUTHORITY | The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case. |
| FACTS AND LAW | <p>The Applicants were family members of an individual who used heroin and who died in prison. They alleged that the State violated article 3 (freedom from torture and inhuman or degrading treatment or punishment) and article 13 (right to effective remedy) of the European Convention on Human Rights (the Convention). They claimed the prisoner, Ms. McGlinchey, manifested heroine-withdrawal symptoms, but did not receive adequate medical attention. According to the applicants, this amounted to inhumane and degrading treatment.</p> <p>While in prison, McGlinchey, who had a long history of heroin use, vomited frequently and lost a significant amount of weight as she experienced symptoms associated with heroin withdrawal. She was seen by a doctor on three occasions and was eventually admitted to a hospital where she died.</p> <p>Her family alleged that McGlinchey suffered inhuman and degrading treatment prior to her death in violation of article 3 of the Convention. Her family also claimed to have suffered distress stemming from the knowledge of her inadequate medical treatment and that the United Kingdom had not provided an effective remedy in violation of article 13 of the Convention.</p> |
| ISSUE(S) AND HOLDING | Did the United Kingdom violate articles 3 and 13 of the European Convention on Human Rights by failing to provide McGlinchey with adequate medical care while she experienced symptoms associated with heroin withdrawal in prison and by failing to provide an adequate remedy under law? Yes. |

McGlinchey v. United Kingdom (continued)

DECISION AND REASONING

The Court held that prison authorities failed to comply with their duty to provide McGlinchey with the medical care she required. Authorities improperly monitored McGlinchey's weight loss, which resulted in a gap in the monitoring of her condition and caused her further physical suffering and distress. The United Kingdom's treatment of McGlinchey thus amounted to inhuman and degrading treatment in violation of article 3 of the Convention. Moreover, since there was no compensation available under English law for the deceased's suffering and distress, Applicants had no possibility of obtaining damages, which violated article 13 of the Convention. Accordingly, the United Kingdom was ordered to pay non-pecuniary damages to the Applicants, as well as costs and expenses of the litigation.

RIGHTS OF PRISONERS AND DETAINEES

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| CASE NAME | <i>Dudley Lee v. Minister for Correctional Services</i> |
| YEAR | 2012 |
| COUNTRY | South Africa |
| CITATION | [2012] ZACC 30 |
| COURT/BODY | Constitutional Court |
| SCOPE OF AUTHORITY | Highest court for matters of constitutional law. Judgments are binding throughout the country. |
| FACTS AND LAW | <p>The Applicant was a prisoner incarcerated at a maximum security prison in Pollsmoor, South Africa (the prison). After three years in detention, he was diagnosed with tuberculosis (TB); he was not infected at the time of his incarceration. The prison was extremely congested and provided ideal conditions for transmission of TB. Inmates were confined in close contact with other prisoners for as many as 23 hours a day, single cells housed three inmates and communal cells contained double and triple bunk-beds, and prisoners were transported for court appearances "stuffed into vans like sardines."</p> <p>Following his diagnosis, the Applicant was returned to his cell and confined for 23 hours with at least one other person. The Applicant claimed the Respondent, the Minister for Correctional Services, failed to provide him with adequate medical treatment and medication to cure his condition and to prevent further transmission of the disease. He also claimed his numerous requests for adequate treatment were not addressed.</p> <p>The Applicant claimed that the Respondent violated his right to respect for and protection of his physical integrity under the common law. He further claimed violations of his right to human dignity in section 10, right to life in section 11 and right to freedom and security of the person in section 12(1) of the Constitution. The Applicant also claimed violation of his right to be detained in conditions consistent with human dignity, including the provision, at state expense, of adequate accommodation, nutrition, and medical treatment in section 35(2)(e) of the Constitution.</p> |

Dudley Lee v. Minister for Correctional Services (continued)

**FACTS AND LAW
(continued)**

The Western Cape High Court found the Respondent liable for damages suffered by the Applicant as a result of contracting TB in detention. The Supreme Court of Appeal, however, absolved the Respondent from liability, holding that the Applicant failed to establish a causal link between his infection and the negligent omission on the part of the Respondent. This appeal followed.

**ISSUE(S) AND
HOLDING**

Was the Respondent, the Minister of Correctional Services, liable for the harm done to the Applicant resulting from his contraction of TB while in prison? Yes.

**DECISION AND
REASONING**

The Court held that there had been a negligent breach on the part Respondent in “failing to maintain an adequate system for management of TB” in the prison. The Court next considered whether the negligent omission caused the Applicant to be infected with TB. This determination required the application of a two-part test under which the Applicant must prove both factual and legal causation. In order to prove factual causation, the Applicant was required show that “on a balance of probabilities . . . the conduct of the [Respondent] caused” the Applicant to be infected with TB. In making this determination, the Court held that the Supreme Court of Appeal erred in requiring the Applicant to prove that “reasonable systematic adequacy [in the prison] would have altogether eliminated the risk of contagion.” The Court instead held that the appropriate question was “whether the factual conditions of [the Applicant’s] incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions.”

The Court noted that it was not in dispute that the responsible authorities at the prison “were aware that there was an appreciable risk of infection and contagion of TB in crowded living circumstances” and that they had a constitutional duty to provide “conditions of detention that are consistent with human dignity.” The Court held that even though it may have been impossible to completely eliminate the risk of TB contagion in the prison, the Respondent nevertheless had a duty to at least “reduce the risk of contagion.” In this regard, the Court noted that prison regulations called for the screening of prisoners for medical problems on admission, a medical examination by a medical practitioner within 24 hours, the immediate reporting of communicable or contagious diseases, and the isolation of persons suffering from these diseases. The Court stated that these measures would likely have been effective in reducing the risk of infection and contagion of TB in the prison.

Therefore in order to prove factual causation the Applicant was only required to show that he “found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures.” This was especially the case given that the source of a TB infection cannot be identified with precision. The Court thus held that the Applicant had proven factual causation.

The Court next declared that prisoners “are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations.” It held that when the State imprisons an individual “it must assume the obligation . . . inherent in the right . . . to conditions of detention that are consistent with human dignity.” The Court held that the law must therefore recognize a claim for damages to vindicate prisoners’ rights. The failure to do so would amount to a failure “to give effect to [prisoners’] rights to human dignity, bodily integrity and the right to be detained in conditions that are consistent with human dignity under the Constitution,” including “the provision, at state expense, of adequate accommodation, nutrition and medical treatment.”

Dudley Lee v. Minister for Correctional Services (continued)

DECISION AND REASONING
(continued)

The Court next considered the issue of legal causation: whether there was a reasonable connection between the breach and the harm done. The Court held that there was a “probable chain of causation between the negligent omissions by the responsible authorities and [the Applicant’s] infection with TB.” The Court further held that the “rule of law requires that all those who exercise public power must do so in accordance with the law and the Constitution, . . . including the requirements of accountability and responsiveness.” The Court stated that this provided a further basis for finding in favour of the Applicant and imposing liability on the Respondent.

The Court remitted the case to the High Court for a determination of damages.

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| CASE NAME | <i>Mazibuko v. Minister of Correctional Services</i> |
| YEAR | 2005 |
| COUNTRY | South Africa |
| CITATION | Case No: 38151 / 05; [2007] JOL 18957 (T) |
| COURT/BODY | High Court, Transvaal Provincial Division |
| SCOPE OF AUTHORITY | The Court, now known as the North Gauteng High Court, Pretoria, is a superior court with jurisdiction to hear all matters in the provinces of Gauteng, Mpumalanga, Limpopo (except for the former Venda) and part of North West. Its decisions are binding on magistrate courts within these areas. Decisions may be appealed to the Supreme Court of Appeal and the Constitutional Court. |
| FACTS AND LAW | <p>The Applicant, Simon Musi Mazibuko, was a prisoner living with HIV. He had been convicted murder, assault with intent to do grievous bodily harm, robbery, theft, and unlawful possession of a firearm and ammunition, and sentenced to life in prison. The Applicant was suffering from several opportunistic infections, including tuberculosis, and his CD4 count had registered at 96. He claimed he did not receive proper medical care or pain control medication and that he lacked access to antiretroviral treatment in prison.</p> <p>The Correctional Services Act provides that a prisoner:</p> <p style="padding-left: 40px;">“whose placement on parole is expedient on the grounds of his physical condition . . . may at any time, on the recommendation of the medical officer, be placed on parole by the commission, provided that a prisoner sentenced to imprisonment for life, shall not be placed on parole, without the consent of the Minister.”</p> <p>A medical parole board (the Board) recommended that the Applicant be placed on medical parole. The Board stated that the Applicant had a lesion on his lung suggestive of cancer, his condition was deteriorating daily and his life expectancy was uncertain. The Board proposed that he be accommodated at home. The Regional Commissioner of Correctional Services declined to release the Applicant and instead sought a second opinion.</p> <p>The Applicant sought an order to review and set aside the Commissioner’s refusal to release him on medical parole.</p> |

Mazibuko v. Minister of Correctional Services (continued)

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| ISSUE(S) AND HOLDING | Was the Applicant, a prisoner living with HIV and suffering from several opportunistic infections, entitled to be released from prison on medical parole? Yes. |
| DECISION AND REASONING | <p>The Court stated that it was “clear from all medical reports, the recommendations of the parole board, and the averments by the applicant” that he suffered from a terminal disease that had no cure. The Court declared that it was “expedient to qualify him to meet the requirements” of medical parole. It stated that there was nothing in the Correctional Services Act (the Act) that required the Minister of Correctional Services to base his decision on a second opinion. The Court thus held that the Applicant was entitled to medical parole.</p> <p>The Court stated that it was necessary to consider whether the continued incarceration of the Applicant served any purpose and whether he would enjoy life at his home. In this case, the Court held that continued incarceration served no purpose and, because of his deteriorating condition, the Applicant would not enjoy his life at home. The Court stated that there was “no good life for him outside prison when his health is deteriorating daily.” It declared that granting the Applicant medical parole would “serve him, his relatives and the community well” and would accord him his “right to security and control over his body.”</p> <p>The Court declared that prisoners were “entitled to their personal rights and personal dignity.” It held that to deny the Applicant release on medical parole was “to deny him his dignity and respect” and was “unjust, unlawful, unreasonable, and procedurally unfair.” The Court thus held that the refusal to grant parole constituted an infringement of the right to just administrative action guaranteed by article 33 of the Constitution. The Court stated that mercy was “a hallmark of a civilised and democratic country” and the Applicant deserved “to be treated with mercy, within the precincts of the law,” and should be “allowed to go home and complete his life there.”</p> |

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| CASE NAME | <i>Yakovenko v. Ukraine</i> |
| YEAR | 2007 |
| COUNTRY | Ukraine |
| CITATION | Application No. 15825/06 |
| COURT/BODY | European Court of Human Rights |
| SCOPE OF AUTHORITY | The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on the parties in each case. |
| FACTS AND LAW | The Applicant was convicted of burglary and sentenced to three years in prison. He claimed he was subjected to ill treatment by the police and coerced into confessing to the crime while in pre-trial detention. Following incarceration, the Applicant alleged that prison conditions were very poor. He complained of overcrowding, a shortage of beds, lack of daylight, poor ventilation, an infestation of rodents and insects, and insufficient nutrition. The Government disputed these claims. |

FACTS AND LAW
(continued)

The Applicant was convicted of burglary and sentenced to three years in prison. He claimed he was subjected to ill treatment by the police and coerced into confessing to the crime while in pre-trial detention. Following incarceration, the Applicant alleged that prison conditions were very poor. He complained of overcrowding, a shortage of beds, lack of daylight, poor ventilation, an infestation of rodents and insects, and insufficient nutrition. The Government disputed these claims.

The Applicant tested positive for HIV while in detention. He claimed, however, that neither he nor his family was informed of the diagnosis. The Applicant's health began to deteriorate. He suffered from fever and an acute respiratory virus infection. He was subsequently diagnosed, on two different occasions, as suffering from tuberculosis (TB) and, according to the Applicant, hospitalization was recommended. However, the Applicant alleged that prison administrators refused to hospitalize him, claiming they could not afford to provide officials to guard him at the hospital. The Government claimed that doctors did not recommend hospitalization on either occasion. Several weeks later, the Applicant was transferred to a specialized TB health centre and then to an HIV clinic, where he received appropriate treatment.

The Applicant was transported twice a month to and from two different detention facilities during his imprisonment. He claimed the transportation took between 36 and 48 hours; the Government claimed the trips began at 8 a.m. and ended at 4 p.m. the same day. The Applicant claimed the police vans and trains used for transport were overcrowded, dimly lit and inadequately ventilated. He further alleged that he was not fed before or during the trips.

The Applicant claimed that the lack of medical assistance and inhuman conditions of his detention and transportation constituted a violation of his right to be free from torture and inhuman or degrading treatment or punishment under article 3 of the European Convention on Human Rights.

ISSUE(S) AND HOLDING

1. Did the poor material conditions of the Applicant's detention amount to degrading treatment in violation of article 3 of the European Convention on Human Rights? Yes.
2. Did the Applicant's lack of access to medical treatment for HIV and TB amount to inhuman and degrading treatment in violation of article 3 of the European Convention on Human Rights? Yes.
3. Did the conditions of the Applicant's transport during his imprisonment amount to a violation of article 3 of the European Convention on Human Rights? Yes.

DECISION AND REASONING

The Court first reiterated that state authorities are obligated to protect the health of persons deprived of liberty and that a lack of appropriate medical care may amount to treatment contrary to article 3 of the European Convention on Human Rights (the Convention).

1. The Court held that the Applicant's claims of overcrowding, sleep deprivation, lack of natural light and inadequate ventilation had been sufficiently substantiated. The Court observed that there were no more than 1.5 square metres of space per inmate in the Applicant's cells. It noted that there was a shortage of beds and inmates were forced to take turns sleeping. The Court also noted that constant artificial lighting in the cell contributed to the inmates' sleep deprivation, and there was an insufficient amount of natural light and inadequate ventilation. The Court held that detention under these conditions amounted to degrading treatment under article 3 of the Convention.

Yakovenko v. Ukraine (continued)

DECISION AND REASONING
(continued)

2. The Court held that the failure to provide timely and appropriate medical assistance to the Applicant for his HIV and TB infections amounted to inhuman and degrading treatment within the meaning of article 3 of the Convention. The Court observed that following the Applicant's diagnosis as HIV-positive, no urgent medical measures were taken, the Applicant was not provided access to an infectious diseases doctor for antiretroviral treatment, nor was he monitored for opportunistic infections. He was instead returned to a prison facility that did not have a medical practitioner on staff. The Court further noted that on two occasions, doctors prescribed the Applicant medication to treat his TB, but there was no indication that it was provided to him.
3. The Court held that the treatment to which the Applicant was subjected during his repeated transports "exceeded the minimum level of severity" and amounted to a violation of article 3 of the Convention. The Court noted that the Government's account of the conditions of transport was "remarkably terse" and gave rise to the drawing of inferences in favour of the Applicant. The Court observed that the space allotted to prisoners during transport, no more than 0.3 square metres, was "unsuitable for transporting a person, no matter how short the duration." The Court further noted the an independent report confirmed that the police vans were dimly lit and poorly ventilated, food was not provided and water was in short supply.

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| CASE NAME | <i>EN and Ors. v. South Africa</i> |
| YEAR | 2006 |
| COUNTRY | South Africa |
| CITATION | 2006 (6) SA 543 (D); 2007 (1) BCLR 84 (D) |
| COURT/BODY | High Court, Durban and Coast Local Division |
| SCOPE OF AUTHORITY | The Court is now known as the KwaZulu-Natal High Court, Durban (commonly referred to as the Durban High Court). It is a court of first instance with general jurisdiction over the coastal districts of KwaZulu-Natal. It is a local division subordinate to the KwaZulu-Natal High Court, Pietermaritzburg and appeals from the magistrates' courts must be heard at Pietermaritzburg. Decisions may then be appealed to the Supreme Court of Appeal or the Constitutional Court. |
| FACTS AND LAW | An urgent application was filed on behalf of 15 prisoners living with HIV who required antiretroviral treatment while incarcerated at the Westville Correctional Centre (WCC) in KwaZulu-Natal province. The Applicants were acting in their individual capacities and as representatives of the class of prisoners incarcerated at WCC. The sixteenth applicant was the Treatment Action Campaign (TAC), which was acting in the public interest for the purposes of securing the effective enforcement of the constitutional rights of the prisoners. The Respondents were the Government of South Africa and representatives of national and provincial government departments responsible for the health of incarcerated persons. |

FACTS AND LAW
(continued)

The Applicants contended that they, along with the class of prisoners they represented, had a right to adequate medical treatment and that the Respondents bore a corresponding obligation to fulfil the right under articles 27 and 35(2)(e) of the Constitution. The Applicants also argued that the Respondents were in breach of their constitutional obligations by delaying, without good cause, to ensure the Applicants and other prisoners living with HIV incarcerated at WCC received adequate medical treatment.

The Applicants sought an order requiring the Respondents:

- To remove the restrictions preventing the Applicants, and all other similarly situated prisoners at WCC who met the criteria as set out in the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment in South Africa (the Operational Plan), from accessing antiretroviral treatment at an accredited public health facility;
- To ensure the Applicants, and all other similarly situated prisoners at WCC who met the criteria as set out in the Operational Plan, were immediately provided with antiretroviral treatment at an accredited public health facility; and
- To furnish the Registrar of the Court, within one week of the order being granted, with an affidavit setting out the manner in which compliance with the relief sought would be ensured.

The Respondents contended that they were not in breach of their constitutional obligations. They claimed they were taking reasonable steps to ensure the Applicants and other similarly situated prisoners living with HIV at WCC received adequate medical treatment. The Respondents did not raise the issue of a lack of resources.

ISSUE(S) AND HOLDING

Had the Government of South Africa met its constitutional and legislative obligations concerning the right of prisoners living with HIV at Westville Correctional Centre to receive adequate medical treatment? No.

DECISION AND REASONING

The Court held that the Respondents had not met their constitutional and legislative obligations to the Applicants and other prisoners living with HIV at WCC. It held that the treatment and medical care provided to prisoners living with HIV was neither adequate nor reasonable.

The Court further held that the implementation of the laws and policies that pertained to the provision of adequate medical treatment to prisoners living with HIV at WCC was unreasonable because it was inflexible and characterized by unjustified and unexplained delays. The Court also declared that several steps taken by the Respondents in response to the institution of the legal proceedings were irrational. The Court thus held that the Government breaches its constitutional obligations when it unreasonably implements an otherwise reasonable programme aimed at the fulfilment of its constitutional obligations.

The Court ordered the Respondents to immediately remove the restrictions preventing the Applicants and other prisoners living with HIV at WCC from accessing antiretroviral treatment at an accredited public health facility; and to immediately provide antiretroviral treatment at an accredited public health facility, in accordance with the Operational Plan, to the Applicants and other similarly situated prisoners living with HIV at WCC.

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| CASE NAME | <i>Odafe and Ors. v. Attorney General and Ors.</i> |
| YEAR | 2004 |
| COUNTRY | Nigeria |
| CITATION | (2004) AHRLR 205 (NgHC 2004) |
| COURT/BODY | Federal High Court of Nigeria, Port Harcourt Judicial Division |
| SCOPE OF AUTHORITY | The High Court of Rivers State in Nigeria. The Court has both original and appellate jurisdiction and judgments are binding in the State. Decisions may be appealed to the Federal Court of Appeal, then the Supreme Court of Nigeria. |
| FACTS AND LAW | The Applicants were detainees living with HIV. They had been awaiting trial for up to four years. The Applicants claimed their the continuous detention and segregation from the general prison population was a violation of their rights to dignity of the human person and freedom from discrimination in sections 34(1)(a) and 42(1) of the Constitution. They further claimed they had a right to proper medical treatment while in prison under the Prisons Act, the Prisons Regulation Law and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Last, they claimed that the failure to provide them proper medical attention amounted to inhuman and degrading treatment in violation of section 34 and section 42 of the Constitution, and article 5 of the African Charter on Human and Peoples' Rights (the African Charter). |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none"> 1. Did the Applicants have a right to receive proper medical treatment for HIV while in detention? Yes. 2. Were the Applicants unconstitutionally discriminated against as a result of being segregated from the general prison population on the basis of their HIV status? No. 3. Did the State's failure to provide the Applicants with medical treatment for HIV while in detention constitute torture? Yes. 4. Did the State's failure to provide the Applicants with medical treatment for HIV while in detention violate their right to life? The Court declined to rule on this issue. |
| DECISION AND REASONING | <ol style="list-style-type: none"> 1. The Court first noted that every detained accused is entitled to a fair hearing. It further held that regardless of whether Applicants are arraigned in court, each has a right under the Prison Act "to be treated for any serious illness once certified" and to be removed to a hospital for treatment upon the recommendation of a medical officer. As to whether AIDS was a "serious illness," the Court declared that the word "serious" was "an understatement" and that HIV was the "greatest threat to public health in their country." The Court further noted that the Applicants could not seek medical treatment themselves as they were detained in state custody. <p>The Court observed that article 16 of the African Charter, which has been incorporated into Nigerian law, provides that "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health." The Court held that this "places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." Because the Respondents, the Attorney-General and others were all federal agents, the Court held that they were "under a duty to provide medical treatment for the applicants."</p> |

Odafe and Ors. v. Attorney General and Ors. (continued)

DECISION AND REASONING
(continued)

- The Court thus ordered the Applicants to be removed to a hospital in order to receive proper medical treatment for HIV pursuant to the Prison Act.
2. The Court noted that the constitutional right to be free from discrimination did not cover discrimination based on illness, virus or disease. The Court further stated that since HIV was very contagious, it was not “surprise[ing] that the prisons officials are discriminating against the applicants.”
 3. The Court held that failure to provide the Applicants medical treatment during their continuous detention amounted to torture. The Court declared that torture includes “mental torture where the person’s mental orientation is disturbed” and that the “average person diagnosed with HIV/AIDS ... will be greatly disturbed and will live in perpetual fear of the enemy attack.”
 4. The Court held that it had not been presented with expert medical evidence as to the nature of HIV. It could therefore not determine whether the lack of medical treatment would result in the Applicants’ death.

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| CASE NAME | <i>R. v. Secretary of State for the Home Department, ex parte Glen Fielding</i> |
| YEAR | 1999 |
| COUNTRY | United Kingdom |
| CITATION | [1999] EWHC Admin 641 |
| COURT/BODY | High Court of Justice, Queen's Bench Division |
| SCOPE OF AUTHORITY | The Queen's Bench Division is one of the three divisions of the High Court, which is one of the Senior Courts of England and Wales. The High Court is a court of first instance for all high value and high importance cases, and also has supervisory jurisdiction over all subordinate courts and tribunals, with a few statutory exceptions. Appeals from the High Court in civil matters are made to the Court of Appeal (Civil Division); in criminal matters appeal from the Divisional Court are made only to the Supreme Court of the United Kingdom. |
| FACTS AND LAW | <p>The Applicant, Glen Fielding, was sentenced to four years’ imprisonment. While incarcerated, the Applicant, a man who had sex with men, requested condoms but was refused on the basis that it was against Prison Service policy to provide condoms to a prisoner who was not HIV-positive; there was no evidence that the Applicant was HIV-positive. The decision to prescribe condoms to an inmate was at the discretion of the prison medical officer.</p> <p>The Applicant’s solicitors were informed about the policy in a number of letters from both the prison where the Applicant was incarcerated and the Prison Service itself. These letters indicated that the Prison Service did not wish to be perceived, by prisoners or the wider community, as encouraging homosexual activity in prisons. As such, condoms were not made freely available to prisoners. The Prison Service, however, recognized that homosexual activity did in fact occur, which necessitated that prisons take steps to protect the health of inmates by encouraging prison doctors to provide condoms where there was a risk of HIV infection.</p> |

R. v. Secretary of State for the Home Department, ex parte Glen Fielding (continued)

FACTS AND LAW
(continued)

The Applicant challenged the condom policy of the Prison Service as irrational. He argued that the refusal to provide condoms was an interference with his ability to express his sexuality by practicing safe sex and thereby a breach of his right to respect for his private life, contained in article 8(1) of the European Convention on Human Rights (the Convention).

ISSUE(S) AND HOLDING

Was the prison's policy not to provide prisoners with condoms unless they were HIV-positive, in part, because the Prison Service did not wish to be perceived as encouraging homosexual activity, lawful? Yes; however, in this case, the prison was wrong not to provide the Applicant condoms.

DECISION AND REASONING

The Court held that the Prison Service's policy was lawful, but that the decision to deny condoms to the Applicant was a misinterpretation of the policy.

The Court held that it was acceptable for prisons to control inmate access to condoms since they could be used for purposes other than safe sex. The Court found that the underlying rationale for the policy was that the Prison Service did not wish to be seen as encouraging homosexual activity in prison despite recognizing that such activity did occur. The Court noted that the Prison Service also recognized that prisons needed to prevent the spread of communicable diseases such as HIV and ensure the health of prisoners and the population at large. However, while the Court recommended that the Prison Service continue to control condom use, it held the policy should be reformulated so that prison doctors were better informed about the parameters of their discretion whether to prescribe condoms. The Court thus held that the policy itself was not irrational or unlawful.

In the case of the Applicant, however, the Court held that the policy had been misinterpreted and that the prison had been wrong not to provide him with condoms merely on the ground that he was not HIV-positive. The Court held that "whenever a prison medical officer is satisfied that a request for condoms is from a genuine homosexual who is intent on indulging in what would otherwise be unsafe sex, he should prescribe condoms." The Court added that to make this determination, a prison could require investigation by the medical officer.

The Court did not rely on article 8(1) of the Convention because at the time the matter was before the court (1999), the Applicant was not yet entitled to rely directly on the Convention.

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| CASE NAME | <i>Van Biljon and Ors. v. Minister of Correctional Services and Ors.</i> (<i>B v. Minister of Correctional Services</i>) |
| YEAR | 1997 |
| COUNTRY | South Africa |
| CITATION | 1997 (4) SA 441 (C); 1997 (6) BCLR 789 (C) |
| COURT/BODY | High Court, Cape of Good Hope Provincial Division |
| SCOPE OF AUTHORITY | The Court, now known as the Western Cape High Court, Cape Town (commonly known as the Cape High Court), is a court of first instance, with general jurisdiction over the Western Cape province. Decisions may be appealed to the Supreme Court of Appeal or the Constitutional Court. |
| FACTS AND LAW | <p>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 were less than 500 per millilitre 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 centred on the whether the Applicants and other prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts were less than 500 per millilitre of blood were entitled to receive appropriate antiretroviral treatment at the Government's expense.</p> <p>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. Only prisoners with a CD4 count of less than 200 and more than 50 per millilitre of blood, and whose condition had developed into AIDS, received treatment. These policies were the result of significant budgetary constraints.</p> <p>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 among prisoners living with HIV. They also claimed that administering appropriate antiretroviral treatment at an earlier stage of the disease was more cost-effective.</p> |
| ISSUE(S) AND HOLDING | Are prisoners living with HIV who have reached the symptomatic stage of the disease and whose CD4 counts are less than 500 per millilitre of blood entitled to receive combination antiretroviral treatment at the Government's expense? Yes |

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 millilitre 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. With respect to 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. 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 noted 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 “[u]nlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment.” It further noted that prisoners living with HIV were unique because the Government is “keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside.” Therefore the Government is required to provide prisoners with medical treatment that is “better able to improve their immune systems than that which the State provides for HIV patients outside.” 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 millilitre of blood.

The Court thus held that combination antiretroviral treatment constituted “adequate medical treatment” to which prisoners living with HIV who had reached the symptomatic stage of the disease and whose CD4 counts were less than 500 per millilitre 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.

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| CASE NAME | <i>Bailey v. Director of Public Prosecutions</i> |
| YEAR | 1988 |
| COUNTRY | Australia |
| CITATION | (1988) 78 ALR 116 |
| COURT/BODY | High Court of Australia |
| SCOPE OF AUTHORITY | Highest court and final court of appeal in Australia. The Court decides cases of special federal significance, including challenges to the constitutional validity of laws, and hears appeals, by special leave, from federal, state and territory courts. Decisions are binding throughout the country. |
| FACTS AND LAW | <p>The Applicant was convicted of several criminal charges, including sexual intercourse without consent. He was sentenced to seven and a half years in prison, with a non-parole term of four and a half years. Shortly thereafter, he tested positive for HIV. He had been living with HIV at the time of his sentence, but he was virtually without symptoms.</p> <p>As a result of his HIV status, the Applicant was detained in a special unit, separate from the general prison population. This special detention was said to be more stressful by reason of its isolation. There was evidence at the time that stress had an adverse effect on the development of AIDS symptoms.</p> <p>The Applicant filed for leave to appeal his sentence on the ground that the sentence was inappropriate given his health condition. The lower court refused to grant leave to appeal the sentence and thus did not address the merits of the appeal.</p> |
| ISSUE(S) AND HOLDING | Did the Applicant make a sufficiently arguable case that the sentence imposed on him was inappropriate due to his HIV status? Yes. |
| DECISION AND REASONING | <p>The Court held that the lower court may rightly refuse leave to appeal rather than grant leave and dismiss the appeal. However, the grounds of refusal to grant leave should be stated. Moreover, where there is a “sufficiently arguable case,” the court should grant leave to appeal and address the merits of the argument before reaching a decision whether to allow or dismiss the appeal.</p> <p>The lower court therefore inappropriately “abstained from considering the relevance and weight to be attached in the sentencing to the applicant’s state of health and the effect of imprisonment thereon.” The Court held that the following principle should guide this determination:</p> <p>“Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender’s health.»</p> |

RIGHTS OF SEX WORKERS

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| CASE NAME | <i>Canada v. Bedford</i> |
| YEAR | 2012 |
| COUNTRY | Canada |
| CITATION | 2012 O.N.C.A. 186 (Ct. App. Ontario); 109 O.R. 3d 1 (Can. Ont. C.A.) |
| COURT/BODY | Court of Appeal for Ontario |
| SCOPE OF AUTHORITY | The Court hears civil and criminal appeals from decisions of Ontario's two trial courts: the Superior Court of Justice and the Ontario Court of Justice. Decisions may be appealed to the Supreme Court of Canada. |
| FACTS AND LAW | <p>Three women who were currently working or had in the past worked as sex workers, including the executive director of Sex Professionals of Canada, sought a declaration that certain provisions of the Criminal Code of Canada were unconstitutional.</p> <p>Sex work was legal in Canada, but Parliament indirectly restricted the practice by criminalizing certain related activities, including operating “common bawdy-houses,” “living on the avails of prostitution,” and “communicating in public for the purposes of engaging in prostitution or of obtaining the sexual services of a prostitute.”</p> <p>Section 7 of the Canadian Charter of Rights and Freedoms guarantees the right to life, liberty and security of the person, and “the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 2(b) protects freedom of expression.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none"> 1. Do criminal provisions prohibiting the operation of “common bawdy-houses” and “living on the avails of prostitution” violate the right to liberty and security of the person in the Canadian Charter of Rights and Freedoms? Yes. 2. Do criminal provisions prohibiting communication in public for the purposes of “engaging in prostitution or of obtaining the sexual services of a prostitute” violate the right to freedom of expression protected in the Canadian Charter of Rights and Freedoms? No. |
| DECISION AND REASONING | <ol style="list-style-type: none"> 1. The Court held that the statutory provision criminalizing the operation of bawdy-houses violated the Canadian Charter of Rights and Freedoms (the Charter). The declaration of invalidity was suspended for 12 months to give Parliament an opportunity to draft a provision that complied with the Charter, should it choose to do so. <p>The provision prohibiting “living on the avails of prostitution” was also held to violate the Charter. The Court therefore read in words of limitation to clarify that the prohibition against “living on the avails of prostitution” applied only to those who do so in “circumstances of exploitation.”</p> <p>The bawdy-house provision prohibited a sex worker from doing “in-call” work (engaging in commercial sex) from a fixed indoor location such as a commercial brothel. The prohibition against “living on the avails of prostitution” criminalized exploitive “pimping” but also prevented sex workers from paying bodyguards for protection. The Court held that these provisions increased the risk of physical violence to sex workers and thus infringed their constitutional right to security of the person. It further held that such a deprivation did not accord with “principles of fundamental justice.”</p> |

Canada v. Bedford (continued)

DECISION AND REASONING
(continued)

The Court explained that the practical effect of these provisions was that the only way to sell sex in Canada without risking criminal sanction was to engage in “out-call” work, which required sex workers to meet clients at outside locations, such as a hotel room or the client’s home.

2. The Court held that the criminal provision prohibiting communicating in public for purposes of “engaging in prostitution or of obtaining the sexual services of a prostitute” did not violate the right to freedom of expression in the Charter. The Court held that the prohibition was supported by a legitimate legislative objective in that street sex work was “associated with serious criminal conduct including drug possession, drug trafficking, public intoxication and organized crime.”

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| CASE NAME | <i>Tara v. State</i> |
| YEAR | 2012 |
| COUNTRY | India |
| CITATION | W.P. (CRL) 296/2012 |
| COURT/BODY | High Court of New Delhi |
| SCOPE OF AUTHORITY | Highest court and final court of appeal of the Union Territory of Delhi, including the Indian capital New Delhi. Decisions may be appealed to the Supreme Court of India. |
| FACTS AND LAW | <p>Police from the Indian state of Andhra Pradesh raided a premise in Delhi in order to “rescue” a number of sex workers. Seventy-two women were detained. Minor girls were processed according to the Juvenile Justice (Care and Protection of Children) Act, 2000. Forty-one adult women were released after a hearing before the Metropolitan Magistrate and the police were granted permission, pursuant to the Immoral Traffic (Prevention) Act, 1956, to transport 15 women back to Andhra Pradesh to face a magistrate there. The women opposed the transit order and stated that they wanted to remain in Delhi. The women were subsequently held in temporary detention, against their will, awaiting transport.</p> <p>The women petitioned the Court to quash the transport order. The Court issued an interim order suspending the execution of the order. It later issued notice to the National Commission for Women and the Delhi Commission for Women to “seek their assistance and explore the possibility of rehabilitation of the petitioners.”</p> <p>Counsel for the women argued that the police had “virtually uprooted the petitioners from the places where they lived in Delhi and subjected them to forcible transportation against their consent.” The Court noted that many of the women had children who were in school in Delhi. Counsel contended that this violated their rights under articles 14 (equality before the law) and 21 (protection of life and liberty) of the Constitution of India.</p> |
| ISSUE(S) AND HOLDING | Was the transit order directing the police to remove the women to Andhra Pradesh and the women’s subsequent detention lawful? No. |

Tara v. State (continued)

DECISION AND REASONING

The Court first held that the Magistrate had not acted in accordance with the Immoral Traffic (Prevention) Act of 1956 and thus did not have authority to exercise his power of transit remand.

The Court next held that the “coercive manner” in which the police dealt with the women infringed upon their rights under articles 14 and 21 of the Constitution. In reference to the women’s identity as sex workers, the Court held that the “mandate of these guarantees is constant and unaltered in content without any regard to the general or any of the other traditionally perceived differences that human beings see amongst themselves.” It further held that the “order to the extent it virtually ordered transportation, without consent, of petitioners amounts to treating them as less than human beings and belittling their dignity.”

The Court noted that the Supreme Court was at the same time hearing a case involving the rehabilitation of sex workers. The Court approved of schemes to provide sex workers access to rehabilitation services. However, it held that the continued detention of the women until such services were available was “both unfeasible and unpragmatic.” Ultimately, the Court held that the continued detention of the women was “contrary to law.”

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| CASE NAME | <i>Kylie v. Commission for Conciliation, Mediation and Arbitration</i> |
| YEAR | 2010 |
| COUNTRY | South Africa |
| CITATION | 2010 (4) SA 383 (LAC) |
| COURT/BODY | Labour Appeal Court |
| SCOPE OF AUTHORITY | The Court hears appeals from the Labour Court and has a status similar to that of the Supreme Court of Appeal. Decisions may only be appealed when a constitutional issue is involved to the Supreme Court of Appeal, and then the Constitutional Court. |
| FACTS AND LAW | <p>Kylie was a sex worker who was employed in a massage parlour. She was terminated from her employment and brought a challenge before the South African Commission for Conciliation, Mediation and Arbitration.</p> <p>Before the arbitration commenced, a Commissioner held that the Commission did not have jurisdiction to arbitrate Kylie’s claim of unfair dismissal because sex work was unlawful in South Africa. Kylie sought judicial review of this ruling in the Labour Court.</p> <p>The Labour Court held that because sex work was illegal, Kylie’s employment contract was void and thus unenforceable. The Court held that although section 23 of the Constitution of South Africa provides that “everyone has the right to fair labour practices,” it did not protect a person who engaged in illegal employment. In addition, the Court could not provide the remedy of reinstatement, as that would amount to ordering the employer to perform an illegal act.</p> <p>Kylie appealed the ruling to the Labour Appeals Court.</p> |

Kylie v. Commission for Conciliation, Mediation and Arbitration (continued)

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| ISSUE(S) AND HOLDING | Does section 23 of the Constitution of South Africa, which provides that everyone has the right to fair labour practices, afford protection to sex workers, even though sex work is prohibited by law? Yes. |
| DECISION AND REASONING | <p>The Court held that the constitutional right to fair labour practices vests in everyone, even if no formal contract of employment is involved, and even if the work is prohibited by law. The Commission for Conciliation, Mediation and Arbitration thus had jurisdiction to determine Kylie's dispute.</p> <p>The Court held that previous rulings support a generous approach to the range of beneficiaries protected by section 23. Prior rulings also support the right of sex workers to be treated with dignity, not only by their customers, but also by their employers. The Court noted that the Constitution's commitment to freedom, equality and dignity "reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule."</p> <p>The Court further held that while reinstatement may not be an appropriate remedy given the illegality of sex work, Kylie, if she prevails in the Labour Court, could be awarded monetary compensation for a procedurally unfair dismissal as a <i>solatium</i> for the loss of her right to a fair procedure.</p> <p>The Court declared that since sex workers are to be considered employees for the purposes of labour legislation and the Constitution, they could, conceivably, be entitled to form and join trade unions. However, it noted that collective agreements concluded between brothels and sex worker unions that amount to furtherance of the commission of a crime would not be enforceable.</p> |

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| CASE NAME | <i>The Sex Worker Education and Advocacy Task Force v. Minister of Safety and Security and Ors.</i> |
| YEAR | 2009 |
| COUNTRY | South Africa |
| CITATION | (2) SACR 417 WCC |
| COURT/BODY | Western Cape High Court, Cape Town |
| SCOPE OF AUTHORITY | The Court is a court of first instance, with general jurisdiction over the Western Cape province. Decisions may be appealed to the Supreme Court of Appeal or the Constitutional Court of South Africa. |
| FACTS AND LAW | The Applicant was a non-governmental organization that sought to promote the health and human rights of sex workers. It approached the Court for relief aimed at preventing the alleged continued unlawful and wrongful arrest of sex workers by members of the South African Police Service. The Applicant asserted that it was unlawful for members of the police to arrest and detain sex workers in circumstances where they know with a high degree of probability that no prosecution would result. The Respondents—the Minister of Safety and Security, the police and others—did not seriously dispute that the sex workers were arrested in circumstances where the arrestors knew with a high degree of probability that the arrestees would not be prosecuted. However, the Respondents claimed that this was the failure of the prosecuting authorities, not the police. |

FACTS AND LAW
(continued)

After reviewing the affidavits submitted by both the Applicant and the Respondents, the Court stated that a pattern had emerged: after their arrest, sex workers were detained overnight in police cells, they were then taken to the magistrate court cells the next morning, where they were released after being detained for a few hours, all charges having been withdrawn.

The Applicant alleged that sex workers were arrested in violation of the principle of legality and that members of the police arrested sex workers for the ulterior purpose of harassing them rather than the lawful purpose of having them prosecuted. The Applicant claimed that the arrest of sex workers for an ulterior purpose violated their rights to dignity and freedom in sections 10 and 12 of the Constitution. It sought declaratory relief declaring that the police were not entitled to arrest sex workers for an ulterior purpose and injunctive relief restraining the police from unlawfully arresting sex workers.

ISSUE(S) AND HOLDING

1. Is it unlawful for a police officer to arrest a sex worker if he knows with a high degree of probability that the sex worker will not be prosecuted? Yes.
2. Did the police violate the constitutional principle of legality in arresting sex workers on the basis of non-existent or inapplicable statutory provisions? The Court did not permit the Applicant to bring this cause of action due to a procedural flaw.
3. Was the Applicant entitled to relief under the Constitution for the unlawful arrest of sex workers by the police? Yes.

DECISION AND REASONING

1. The Court stated that given “the high premium placed upon a person’s right to freedom in terms of the Constitution, an arrest is prima facie wrongful and unlawful and it is for the arrestor to prove that the arrest was lawful.” The Court noted that section 12(1) of the Constitution “protects each person’s right to freedom, which includes the right not to be deprived of his or her freedom arbitrarily or without just cause.” It observed that section 35(2)(d) of the Constitution “provides that every detained person has the right to challenge the lawfulness of his or her detention before a court and, if the detention is unlawful, to be released.” The Court further declared that “the purpose or object of an arrest must be to bring the suspect before a court of law, there to face due prosecution.”

The Court thus held that the police did not arrest sex workers with the required object or purpose of having the sex workers prosecuted, because they knew with a high degree of probability the sex workers would not be prosecuted. The Court stated that even if an arresting officer wished to have a sex worker prosecuted, he knew with a high degree of probability that it would not happen. The Court thus held that an officer “who arrests a person, knowing with a high degree of probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest.”

2. The Court explained that the principle of legality is implicit in section 1(c) of the Constitution. The principle of legality requires that whenever public power is exercised it must have a source in law and be in compliance with the Constitution, which is the supreme law.

DECISION AND REASONING
(continued)

The Court stated that there had been occasions when sex workers were arrested “on the strength of non-existent or inapplicable statutory provisions.” However, it held that the Applicant had not identified this cause of action and set out the facts upon which it was based in its founding affidavit. The Applicant was therefore not entitled to bring this cause of action. However, the Court noted that the Applicant could argue that the fact that sex workers were arrested on the basis of non-existent or inapplicable statutory provisions demonstrated that the police did not expect the sex workers would be prosecuted.

3. The Court held that the declaratory and interdictory relief sought by the Applicant was generally appropriate under section 38 of the Constitution.

It held, however, that declaratory relief was inappropriate in this case because the declaration sought by the Applicant, that it was unlawful to arrest sex workers for an ulterior purpose, had already been decided by courts of competent jurisdiction. The Court would be “merely be restating the law” if it granted such relief.

As to interdictory relief, the Court held that the unlawful arrest of sex workers constitutes an infringement of their rights to dignity and liberty under sections 10 and 12 of the Constitution. It further held that unlawful arrest of sex workers would probably continue in the future. The Court also declared that sex workers were “a particularly vulnerable segment” of society and their arrest amounted to “a form of social control.” The Applicant was therefore entitled to interdictory relief.

The Court ordered the police to restrain from arresting sex workers other than for the purpose of bringing them before a court of law to face prosecution. In particular, the police were to restrain from arresting sex workers when they knew with a high degree of probability that no prosecution would follow the arrest.

RIGHTS OF TRANSGENDER PERSONS

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| CASE NAME | <i>Atkins v. Datacentrix (Pty) Ltd</i> |
| YEAR | 2010 |
| COUNTRY | South Africa |
| CITATION | [2009] ZALC 164; [2010] 4 BLLR 351 (LC); (2010) 31 ILJ 1130 (LC) |
| COURT/BODY | Labour Court of South Africa |
| SCOPE OF AUTHORITY | The Court handles disputes arising from the relationship between employer, employee and trade union. The Court has exclusive jurisdiction over cases arising from the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Unemployment Insurance Act. Decisions may be appealed to the Labour Appeal Court. |

Atkins v. Datacentrix (Pty) Ltd (continued)

FACTS AND LAW

The Applicant, Atkins, was an information technology technician with over 10 years of experience in the field. The Respondent offered the Applicant employment after a successful interview and the Applicant accepted the offer. The Applicant then informed the Respondent that he was in the process of undergoing sex reassignment surgery to transition from male to female. The Respondent terminated the Applicant's contract of employment because he failed to disclose his intention to undergo sex reassignment during his interview. The Respondent claimed that the Applicant's failure to disclose this information constituted a "serious case of misrepresentation" and was a repudiation of the employment contract.

The Applicant claimed his dismissal constituted an automatically unfair dismissal on the grounds of gender, sex and/or sexual orientation within the meaning of section 6(1) of the Employment Equity Act and section 187(1)(f) of the Labour Relations Act. The Applicant sought compensation and an order directing the Respondent to take steps to prevent the same or similar unfair discrimination from occurring in respect of other employees.

ISSUE(S) AND HOLDING

Was the Respondent's dismissal of the Applicant upon learning he was undergoing sex reassignment unlawful? Yes.

DECISION AND REASONING

The Court first reviewed the equality clause in section 9 of the Constitution, which prohibits discrimination on the grounds of, among other things, gender, sex and sexual orientation. It noted that section 9 applied not only to the State but also to employers. It explained that the Employment Equity Act and the Labour Relations Act were enacted in compliance with section 9 of the Constitution and both acts prohibit unfair discrimination on the basis of, among other things, gender, sex and sexual orientation.

The Court observed that it was clear from the facts that the Applicant was a "competent employee." The Court rejected the Respondent's contention that it would not have dismissed the Applicant if he had disclosed that he was undergoing sex reassignment during his interview. The Court held that the "only inference that one can draw from the facts" was that the Respondent "would not have employed the applicant in the first place had he disclosed his true intentions."

The Court further held that the Applicant had no legal duty to disclose his intentions to transition from male to female to the Respondent. The Court declared that it was "simply none of the respondent's business that he wanted to undergo the process." The Court observed that the Applicant was "after all working in the IT industry where the issue of his sex or gender [was] not important."

The Court thus held that the reason for the Applicant's dismissal was that the Respondent "was not happy that he was going to undergo a gender re-assignment process." The Applicant's claim was therefore founded both in terms of the Employment Equity Act for unfair discrimination dismissal and the Labour Relations Act for unfair discrimination.

The Court held that the discrimination in the case fit under the grounds of both gender and sex. It explained that the element of gender lay in the fact that the Respondent had a problem with the Applicant's desire to change his gender from male to female. The Court stated, however, that even after the Applicant undergoes sex reassignment he would remain an employee protected by the Constitution, the Employment Equity Act and the Labour Relations Act. The Court declared that the Applicant would "not become a less worthy human being" as a result of changing his gender or sex.

Atkins v. Datacentrix (Pty) Ltd (continued)

DECISION AND REASONING
(continued)

The Court next stated that it “must send out a message to employers who might still have some hang-ups about sex change operations that such conduct will not be tolerated at all.” The Court declared that “the best way to protect those employees who believe that they are trapped in a wrong gender and who are the most vulnerable employees is to award such compensation that will act as a deterrent to employers” from discriminating against them. The Court added that discrimination “is painful and is an attack on a person’s dignity as a human being.”

The Court ordered the Respondent to pay the Applicant 100,000 South African rand as compensation. It further ordered the Respondent to take steps to prevent the same or similar unfair discrimination against other employees, and to report to the Court within three months to demonstrate what steps it had taken. Last, the Court ordered the Respondent to apologize to the Applicant in writing.

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| CASE NAME | <i>Dr. Khaki v. Rawalpindi</i> |
| YEAR | 2009 |
| COUNTRY | Pakistan |
| CITATION | Human Rights Cases No. 63 of 2009 and Constitution Petition No. 43 of 2009 |
| COURT/BODY | Supreme Court |
| SCOPE OF AUTHORITY | Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters. |
| FACTS AND LAW | <p>A petition was filed on behalf of a group of transgender persons after police raided a wedding party they were attending. Police allegedly humiliated the individuals, took money from them and detained them.</p> <p>The petition claimed the rights of transgender persons were habitually infringed upon by society and government. It claimed their right to live with their parents was infringed upon because they were sent by their parents to live in a separate community with “gurus” at birth. It asserted that transgender persons’ right to dignity enshrined in the Quran and in article 14 of the Constitution of Pakistan was violated as they were often laughed at and humiliated in society. The petition claimed their “legal and Islamic” right to property and inheritance was violated because they did not receive inheritance from their parents. It asserted that their right to education was infringed upon because they were not provided education. It claimed transgender persons’ right to respect was violated because they were forced to dance and beg by the “gurus.” It asserted that their right to employment was violated because they were not reserved quotas as a class. Finally, the petition claimed transgender persons’ right to movement was restricted because they were enslaved by the “gurus.”</p> |
| ISSUE(S) AND HOLDING | Are the rights of transgender persons protected under the Constitution of Pakistan? Yes. |

DECISION AND REASONING

The Court issued several orders addressing the claims in the petition. It first ordered various provincial governments to conduct a census of transgender persons living in each province. It also directed these governments to take account of the “particulars” of any child handed over to the “gurus” in order to determine whether the child was handed over voluntarily or under compulsion and whether any offence had been committed.

The Court next held that transgender persons were “citizens” of the country and entitled to protection under article 4 of the Constitution, which guarantees the “inalienable right . . . [t]o enjoy the protection of law and to be treated in accordance with law,” and article 9 of the Constitution, which declares that “[n]o person shall be deprived of life or liberty save in accordance with law.” The Court directed the National Database and Registration Authority to add a third gender column on national identity cards for transgender people. The Court also warned the police not to engage in any “highhandedness” when dealing with transgender persons and required that a mechanism be established to protect transgender people from police harassment.

The Court also held that transgender persons’ “social life is to be respected” and that the federal and provincial governments are bound to protect transgender persons under the Constitution. It further ordered the federal and provincial governments to enable transgender persons to “get education and respectable jobs.” The Court directed police departments to provide protection to transgender persons and ensure law enforcement agents did not unnecessarily implicate them in criminal matters for the purpose of confiscating their money.

Finally, the Court ordered the federal and provincial governments to ensure protection of transgender persons’ inheritance and voting rights and to provide them with education and employment opportunities. Toward this end, it directed authorities to register transgender people in electoral rolls and to establish a mechanism to assist them with inheritance rights.

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| CASE NAME | <i>Sunil Babu Pant and Ors. v. Nepal Government and Ors.</i> |
| YEAR | 2008 |
| COUNTRY | Nepal |
| CITATION | [2008] 2 NJA L.J. 262 |
| COURT/BODY | Supreme Court |
| SCOPE OF AUTHORITY | Highest court in the country and final court of appeal for all criminal, civil and constitutional matters. |
| FACTS AND LAW | The Petitioners were leaders of organizations that represented lesbian, gay, bisexual, transsexual and intersex persons. They claimed that the Government of Nepal violated the rights of sexual minorities, including the rights to equality and freedom from discrimination, which are protected by the Constitution of Nepal and international human rights instruments. The Petitioners requested an order of mandamus allowing, among other things, the official recognition of their gender “on the basis of their gender feelings.” |

ISSUE(S) AND HOLDING

1. Did the Petitioners have standing to bring the suit? Yes.
2. Are the rights of sexual minorities, including gay, lesbian and transgender persons, protected under the Constitution of Nepal? Yes.

DECISION AND REASONING

1. The Court held that the Petitioners had standing to bring the suit as a public interest litigation under article 107(2) of the Constitution. It held that transgender persons in Nepal are citizens of the country and must be treated as such. The Court stated that the “issues raised in the writ petition such as gender identity, gender discrimination and obstacles faced due to it as well as the issue of gender recognition etc. are matters concerning social justice and social interest.”
2. The Court noted that the idea that gender identity is a function of both the physical condition and psychological feelings of a person was “being established gradually.” The Court held that it was unlawful to discriminate against individuals on the basis of their sexual orientation, including transgender persons. It held that the term “sex” in article 13 of the Constitution, which prohibits discrimination on a number of enumerated grounds, includes sexual minorities, including gay, lesbian and transgender persons.

The Court held that the right to privacy was a fundamental right and that it included sexual activity. It held that “[n]o one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural.” An individual’s right to privacy in sexual relations falls within the “ambit of the right to self-determination” and applies equally to individuals who engage in heterosexual sexual activities and same-sex sexual activities.

The Court declared that the Government had not made efforts to protect the rights of sexual minorities. The Court noted that rules concerning citizenship, passports, voter lists and security checks “have not only refused to accept the identity of the people of third gender but also declined to acknowledge their existence.” The Court stated that any existing legal provisions that restrict sexual minorities from enjoying fundamental and other human rights provided by part III of the Constitution and by international conventions “shall be considered arbitrary, unreasonable and discriminatory.” Moreover, state action that enforces such laws “shall also be considered as arbitrary, unreasonable and discriminatory.”

The Court held that it is the responsibility of the State to create an “appropriate environment” and make necessary legal provisions to ensure sexual minorities enjoy their fundamental rights, including the rights to life, dignity, equality and personal liberty. The Court declared that it appeared necessary to add a new provision to the Constitution guaranteeing non-discrimination on the grounds of gender identity and sexual orientation.

Finally, the Court held that it is “an inherent right of an adult to have marital relation with another adult with her/his free consent and according to her/his will.” The Court thus directed the Government to form a committee to “carry out a thorough study and analysis of international instruments relating to the human rights, the values recently developed in the world in this regard, the experience of the countries where same sex marriage has been recognized, and its impact on the society.”

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| CASE NAME | <i>Jayalakshmi v. State of Tamil Nadu</i> |
| YEAR | 2007 |
| COUNTRY | India |
| CITATION | W.A. No. 1130 of 2006 and W.P. No. 24160 of 2006 |
| COURT/BODY | High Court of Madras |
| SCOPE OF AUTHORITY | Highest court and final court of appeal of the state of Tamil Nadu and the Union Territory Puducherry. Decisions may be appealed to the Supreme Court of India. |
| FACTS AND LAW | <p>The Petitioner’s sibling, Pandian, was a transgender person. Pandian was detained and questioned multiple times by police in connection with an alleged theft. For several days, the police retrieved her from her home at 8 a.m. and detained her at the police station. She returned home at 11 p.m. each day. Pandian claimed she was tortured and sexually assaulted during her detention each day. Her mother inquired about these events at the police station and claimed she was «beaten up» by the police. Petitioner also addressed the police concerning her sister’s allegations and claimed she was abused and threatened. Pandian finally immolated herself at the police station. She was treated for severe burns and eventually died as a result of her injuries.</p> <p>The police denied torturing and sexually assaulting Pandian. They claimed that she had admitted to the theft and had only been granted bail on the condition that she appear every day at the police station.</p> |
| ISSUE(S) AND HOLDING | Did the police torture and sexually assault Pandian, a transgender person, in violation of her fundamental rights? Yes. |
| DECISION AND REASONING | <p>The Court held that it was «satisfied that excesses have been committed by the [police] and we have no doubt to arrive at the conclusion that the suicide committed by Pandian was only in consequence of the conduct of the [police].» It declared that there was «abundant circumstantial evidence» to prove the Petitioner’s claims. The Court further held that there was «abundant evidence» that the police «committed drastic inhuman violence on the body» of Pandian and that it amounted to a violation of her human rights. The Court stated that the police «deserved to be condemned and are liable for suitable action in the interest of maintaining decency, discipline and civilisation» in the police department. It also noted that the police had taken no remedial action in response to the Petitioner’s complaints.</p> <p>The Court held that a «constitutional remedy» exists that justifies the «award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers.» The Court thus ordered the Government to pay monetary compensation to the Petitioner. It further ordered the police to initiate disciplinary action against the officers responsible for the torture and abuse of Pandian.</p> |

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| CASE NAME | <i>Attorney-General v. Kevin and Jennifer</i> <i>See also, Kevin and Jennifer v. Attorney-General, [2001] FamCA 1074</i> |
| YEAR | 2003 |
| COUNTRY | Australia |
| CITATION | [2003] FamCA 94 |
| COURT/BODY | Full Court of the Family Court of Australia at Sydney |
| SCOPE OF AUTHORITY | The Court hears appeals from family law decisions made by federal magistrates (may be heard by a single Family Court judge or by the full Court) and from decisions of single judges in the Family Court. Decisions may be appealed to the High Court with grant of special leave from the High Court. |
| FACTS AND LAW | The Petitioner, Attorney-General, appealed a decision declaring the marriage valid between Kevin, a post-operative transgender person, and Jennifer. The Petitioner and the Respondents agreed that for a marriage to be valid it must be between a man and a woman. The trial court held that for the purpose of determining the validity of a marriage under Australian law, the question of whether a person is a man or a woman is to be determined at the time of the marriage. It held that the word “man” was to be given its “ordinary current meaning according to Australian usage.” The trial court concluded that Kevin was a man for the purpose of the law at the time of the marriage and thus the marriage between Kevin and Jennifer was valid. |
| ISSUE(S) AND HOLDING | Was the marriage between Kevin, a post-operative transgender person, and Jennifer valid under the law? Yes. |
| DECISION AND REASONING | <p>The Court first examined the historical context of marriage in Australian society. The Court declared that marriage is “an important and special social and legal institution, both for the individuals who enter into that commitment, and for the society in which they live.” The Court further held that it would be “potentially highly destructive to the institution of marriage for its definition to be frozen at any point in time.” Concluding its survey, it held that it was “plain that the social and legal institution of marriage . . . has undergone transformations that are referable to the environment and period in which the particular changes occurred.”</p> <p>The term “marriage” was thus to be given its “ordinary contemporary” meaning in the context of the Marriage Act (the Act). The Court held that the interpretation of the term “marriage” in the Constitution was to be understood broadly, given a “wider meaning” than the traditional Christian definition. As such, it was “within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition.”</p> <p>The Court agreed with the trial court that the terms “marriage” and “man” were “not technical terms and should be given their ordinary contemporary meaning” in the context of the Act. The Court further agreed with the trial court that the “contemporary, normal and everyday” definition of the term “man” was to include “the humane and practical trend to accept the reality of gender reassignment.” It noted that in all but three Australian states, legislation allows transgender persons to alter their record of birth to reflect their reassigned sex. Moreover, in all but one Australian state, anti-discrimination legislation prohibits discrimination on the basis that a person has a “transsexual history.”</p> |

Attorney-General v. Kevin and Jennifer (continued)

DECISION AND REASONING (continued)

The Court opined that marriage was a “secularised tradition” and it “reject[ed] the argument that one of the principal purposes of marriage is procreation.” The Court thus rejected the contention that because Kevin was unable to procreate, his marriage to Jennifer could not be a valid marriage.

The Court held that there was a “strong argument: first, that a child’s sex cannot be finally determined at birth; and secondly, that any determination at that stage is not and should not be immutable.” The Court agreed with the position that “transsexualism is a medical condition for which treatment is provided in order to afford relief and that the treatment requires a level of commitment and conviction to achieve it.” Accordingly, it concluded that the trial court did not err in finding “as a matter of probability that there was a biological basis for transsexualism.” However, it cautioned that this was “no reason to exclude the psyche as one of the relevant factors in determining sex and gender.” The Court noted that social and cultural factors were “clearly relevant to the issue of the meaning of ‘marriage’ and ‘man’ for the purpose of the marriage law.” As such, the Court held that “society’s perception of [a] person’s sex provides relevant evidence as to the ordinary, everyday meaning of the words ‘man’ and ‘woman.’”

Finally, the Court held that the medical evidence, evidence of social acceptance, weight of international legal developments, widespread statutory recognition of transgender persons for the purposes of social and criminal law, and laws permitting transgender persons to change their sex on their birth certificates all supported the finding that Kevin was a man at the time of his marriage. It added: “A contrary finding would, in our opinion, result in considerable injustice to transsexual people and their children, for no apparent purpose.”

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| CASE NAME | <i>Bellinger v. Bellinger</i> |
| YEAR | 2003 |
| COUNTRY | United Kingdom |
| CITATION | [2003] UKHL 21 |
| COURT/BODY | House of Lords |
| SCOPE OF AUTHORITY | Until 2009, the House of Lords was the court of last resort for most issues of law in the United Kingdom. |
| FACTS AND LAW | The Petitioner, Mrs. Elizabeth Bellinger, was a post-operative female transgender person who had married a man and sought a declaration that the marriage was valid. The Nullity of Marriage Act 1971, re-enacted in section 11(c) of the Matrimonial Causes Act 1973 (the Act), provided that a marriage was void unless it was between a man and a woman. The Petitioner also sought a declaration that section 11(c) of the Act was incompatible with article 8, the right to respect for private and family life, and article 12, the right to marry and found a family, of the European Convention on Human Rights. |

Bellinger v. Bellinger (continued)

FACTS AND LAW
(continued)

The Court established that the Petitioner “felt more inclined to be a female” for as long as she could remember. It noted that individuals experiencing such feelings are often recognized as suffering from a psychiatric disorder, known as gender dysphoria or gender identity disorder, which can result in “acute psychological distress.” Petitioner eventually began to dress and live as a woman, underwent hormone treatment and a sex reassignment surgery, and subsequently married a man.

ISSUE(S) AND HOLDING

1. Was the marriage between the Petitioner, a post-operative female transgender person, and a man valid under law? No.
2. Was section 11(c) of the Matrimonial Causes Act 1973, which made no provision for the recognition of gender reassignment, compatible with articles 8 and 12 of the European Convention on Human Rights? No.

DECISION AND REASONING

The Court discussed *Corbett v. Corbett*, 2 All E.R. 33 (P.D.A. 1970), which addressed the issue of how to determine the sex of a transgender person. *Corbett* held that the sex of an individual was fixed at birth and could not “be changed either by the natural development of organs of the opposite sex or by medical or surgical means.” The Court, however, noted that the decision in *Corbett* had received “much criticism, from the medical profession and elsewhere.” It also observed that the decision had not been universally followed internationally and that the international legal trend had instead been contrary to the *Corbett* holding.

The Court next considered the issue in the context of the European Convention on Human Rights (the Convention). The Court examined the European Court of Human Rights’ (the European Court) decision in *Goodwin v. United Kingdom*, Application No. 28957/95, and held that the “United Kingdom’s margin of appreciation no longer extends to declining to give legal recognition to all cases of gender reassignment.” In *Goodwin*, the European Court held that a “test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative” transgender persons. It further held that there was “no justification for barring the transsexual from enjoying the right to marry under any circumstances.”

The Court noted that, in response to the *Goodwin* decision, the United Kingdom had (1) convened an “interdepartmental working group” on transgender persons; (2) announced its intention to enact legislation that would “allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender;” and (3) accepted that parts of English law that “fail to give legal recognition to the acquired gender” of transgender persons are incompatible with articles 8 and 12 of the Convention.

With respect to the issue of whether the Petitioner’s marriage was legally valid, the Court found that recognition of the Petitioner as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would “necessitate giving the expressions ‘male’ and ‘female’ in that Act a novel, extended meaning.” The Court declared that this would represent a “major change in the law” and one that the courts were “ill-suited” to make. It held that questions “of social policy and administrative feasibility,” such as this one, are a matter for Parliament. The Court noted that this was particularly true since the Government had already announced its intention to introduce “comprehensive legislation . . . on this difficult and sensitive subject.”

Bellinger v. Bellinger (continued)

DECISION AND REASONING
(continued)

The Court noted three concerns underpinning its decision: (1) the uncertainty as to which gender reassignment should be recognized for the purpose of marriage, including whether surgical intervention was necessary; (2) the fact that the recognition of gender reassignment for the purposes of marriage was part of a larger issue, which should be addressed as a whole, rather than in a piecemeal fashion; and (3) the fact that, even in the context of marriage, there were larger concerns, such as the contention that the primary purpose of marriage is procreation.

With respect to the issue of whether the Matrimonial Causes Act 1973 was compatible with the European Convention on Human Rights, the Court held that that section 11(c) of the Act was incompatible with articles 8 and 12 of the Convention. It noted that the Act remained an obstacle to Mr. and Mrs. Bellinger's marriage. The Court rejected the contention that a declaration of incompatibility would not serve a useful purpose. It held that, even though the Government had already announced its intention to propose new legislation, the Court "should formally record that the present state of statute law is incompatible with the Convention."

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| CASE NAME | <i>Goodwin v. United Kingdom</i> |
| YEAR | 2002 |
| COUNTRY | United Kingdom |
| CITATION | Application no. 28957/95 |
| COURT/BODY | European Court of Human Rights |
| SCOPE OF AUTHORITY | The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case. |
| FACTS AND LAW | <p>The Applicant, Goodwin, was a post-operative male-to-female transgender person who filed a complaint regarding gender-based discrimination in several aspects of her life. The Applicant claimed she had experienced discrimination in the workplace, in relation to contributions to the National Insurance system, and in her ability to marry, as she was prevented from marrying a man because she was still legally male. She also claimed that the State was unwilling to formally recognize her new gender following her sex-reassignment.</p> <p>Article 8 of the European Convention on Human Rights (the Convention) provides that everyone has the right to respect for their private life, and there shall be no State interference with that right except as is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country.</p> |
| ISSUE(S) AND HOLDING | Did the State fail to meet its obligation to protect the right of the Applicant, a post-operative transgender person, to respect for her private life, in particular through its lack of recognition of her new gender? Yes. |

Goodwin v. United Kingdom (continued)

DECISION AND REASONING

The Court held that State respect for gender identity is a human right under the Convention, and such respect includes official State recognition of gender re-assignment.

The Court held that the very essence of the Convention is respect for human dignity and human freedom. It stated that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees set forth in article 8 of the Convention. This autonomy includes the right of all people “to establish details of their identity as individual human beings.” It further declared “In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy.”

The Court held that the United Kingdom had failed to respect Goodwin’s right to respect for her private life, in violation of article 8 of the Convention. It also held that Goodwin’s right to marry under article 12 had been violated.

The Court declined to award damages but directed the United Kingdom to implement such measures it considered appropriate to secure transgender persons’ right to marry and right to respect for private life.

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| CASE NAME | <i>Powell v. Schriver</i> |
| YEAR | 1999 |
| COUNTRY | United States |
| CITATION | 175 F.3d 107 (2d Cir. 1999) |
| COURT/BODY | United States Court of Appeals, Second Circuit |
| SCOPE OF AUTHORITY | The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in the following US states: Connecticut, New York and Vermont. Decisions may be appealed to the Supreme Court of the United States. |
| FACTS AND LAW | <p>The Plaintiff was a post-operative transgender person living with HIV who was imprisoned in a state correctional facility. A corrections officer told another officer, in the presence of other inmates and prison staff, that the Plaintiff “had had a sex-change operation and that she was HIV-positive.” As a result, the Plaintiff maintains that knowledge of her operation and her HIV status “became known throughout the prison” and she “became the target of harassment by guards and prisoners.”</p> <p>The Plaintiff claimed her constitutional right to privacy had been violated. She claimed deprivation of her constitutional rights to life, liberty, due process of law and equal protection under the Fourteenth Amendment to the Constitution. She also claimed she had been subject to cruel and unusual punishment in violation of the Eighth Amendment. She further alleged violations of statutory rights that prohibited degrading treatment of inmates and conferred the right to confidentiality in one’s HIV status.</p> |

Powell v. Schriver (continued)

**FACTS AND LAW
(continued)**

The trial court dismissed the statutory claims and held that the corrections officer was protected by the doctrine of qualified immunity from liability in the claim of cruel and unusual punishment. The jury awarded the Plaintiff damages for violation of her right to privacy, but the court set aside the verdict.

**ISSUE(S) AND
HOLDING**

1. Does the Constitution protect a prisoner's right to confidentiality in her HIV status and her status as a transgender person? Yes.
2. Was the corrections officer shielded from liability by the doctrine of qualified immunity for the claim that he subjected Plaintiff to cruel and unusual punishment? No.

**DECISION AND
REASONING**

1. The Court relied on its decision in *Doe v. City of New York* 15 F.3d 264 (2d Cir.1994), which held that "[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.» The decision established that few matters are as personal as the status of one's health and thus deserving of protection under the constitutional right to confidentiality.

The Court held that an individual who reveals that she is HIV-positive "potentially exposes herself not to understanding or compassion but to discrimination and intolerance . . . necessitating the extension of the right to confidentiality over such information." The Court reasoned that individuals suffering from gender identity disorder and those who have undergone hormone therapy or sex reassignment surgery face similar discrimination and intolerance. It thus held that "individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality."

The Court next considered whether the right to confidentiality exists in prisons. It held that, generally speaking, prisoners maintain those rights that are "not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system.» However, it concluded that "the gratuitous disclosure of an inmate's confidential medical information as humor or gossip—the apparent circumstance of the disclosure in this case—is not reasonably related to a legitimate penological interest, and it therefore violates the inmate's constitutional right to privacy." The Court held, however, that because this right was not clearly established at the time of the incident, the corrections officer was entitled to qualified immunity.

Finally, the Court held that it was difficult to imagine circumstances under which the disclosure of a prisoner's status as a transgender person would serve legitimate penological interests. Moreover, it stated that such disclosure might subject the prisoner to violence at the hands of other inmates, particularly given "the sexually charged atmosphere of most prison settings."

Powell v. Schriver (continued)

DECISION AND REASONING
(continued)

2. In order to overcome an assertion of qualified immunity, the Plaintiff must demonstrate that “at the time of the violation, the contours of the allegedly violated right were ‘sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.’” The Court held that it was clear that a prison official’s failure, as a result of deliberate indifference, to protect an inmate from violence perpetrated by other inmates could constitute a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. It further held that it was “obvious . . . that under certain circumstances the disclosure of an inmate’s HIV-positive status and—perhaps more so—her transsexualism could place that inmate in harm’s way.” The doctrine of qualified immunity thus did not protect the corrections officer from liability for violation of the Plaintiff’s Eighth Amendment right to be free from cruel and unusual punishment as a result of his unnecessary disclosure of her status as an HIV-positive, transgender person.

RIGHTS OF MEN WHO HAVE SEX WITH MEN

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| CASE NAME | <i>Kasha Jacqueline and Ors. v. Rolling Stone</i> |
| YEAR | 2010 |
| COUNTRY | Kenya |
| CITATION | Miscellaneous Cause No. 163 of 2010 |
| COURT/BODY | High Court of Uganda at Kampala, Civil Division |
| SCOPE OF AUTHORITY | The highest court and final court of appeal for matters of civil and criminal matters decided in first instances. |
| FACTS AND LAW | <p>The Respondent, Rolling Stone, was an investigative newspaper. It published a story titled “Hang Them: They Are After Our Kids!!!! Pictures of Uganda’s 100 Homos Leak.” Among other things, the article called for the Government to take “a bold step by hanging dozens of homosexuals” and alleged that “gays are after very young kids, who are easily brain washed towards bisexual orientation.” The Petitioners, Kasha Jacqueline and others, were mentioned by name in the story and the locations of their homes were given.</p> <p>The Petitioners claimed the story exposed them to possible violence, ridicule, hatred and mob justice in violation of their right to respect for human dignity and protection from inhuman treatment under article 24 of the Constitution. They claimed the call for homosexuals to be hanged, along with the threat of violence and mob justice, violated their right to life under article 22 of the Constitution. The Petitioners further claimed that the story infringed upon their right to liberty and their right to movement under articles 23 and 29(2) of the Constitution. Last, they claimed the story violated their right to privacy under article 27 of the Constitution. The Petitioners requested a permanent injunction restraining the Respondent from publishing injurious information about them and damages for pain and mental anguish.</p> |

Kasha Jacqueline and Ors. v. Rolling Stone (continued)

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| FACTS AND LAW <i>(continued)</i> | The Respondent argued that the Petitioners could not claim violation of their right to privacy because they had “already exposed themselves on the internet as homosexuals” and they had voluntarily appeared in public as “homosexual activists.” The Respondent asserted that the Petitioners had not proved that the story exposed them to death threats or violence. Last, the Respondent noted that homosexuality was a crime under the Penal Code Act, and therefore the Petitioners “had not come to court with clean hands.” |
| ISSUE(S) AND HOLDING | Did the Respondent’s publication of the Petitioners’ names and home addresses, identifying them as gays and lesbians, in an article titled “Hang Them: They Are After Our Kids!!!!” violate their rights to dignity, protection from inhuman treatment, and privacy? Yes. |
| DECISION AND REASONING | <p>The Court first noted that the case was not about homosexuality per se; rather, it was about whether the Respondent infringed or threatened to infringe the rights of the Petitioners through its publication.</p> <p>The Court held that it was not relevant that the Petitioners had not provided evidence of actual violence against their persons or intrusion upon the privacy of their homes. The Petitioners could obtain relief if they proved that the Respondent’s actions simply threatened to infringe their rights or freedoms. In this regard, the Court held that an objective test should be applied. The intentions of the Respondents in publishing the story was thus irrelevant to the determination of whether the story infringed or threatened to infringe the rights of the Petitioners.</p> <p>Applying this test, the Court stated that it could “easily conclude” that publishing the names and addresses of the Petitioners coupled with the explicit call to hang them because they were “after very young kids” threatened their right to dignity. The Court held that “[c]learly the call to hang gays in dozens tends to tremendously threaten their right to dignity.” It stated that “[i]f a person is only worthy of death, and arbitrarily, then that person’s dignity is placed at the lowest ebb” and it is “threatened to be abused or infringed.”</p> <p>The Court next held that, applying an objective test, there was “no doubt” that the Respondent’s exposure of the Petitioners’ identities and homes “for the purpose of fighting gayism” threatened their right to privacy of the person and home.</p> <p>The Court thus held that the Respondent’s publication threatened the Petitioners’ rights to respect for human dignity, protection from inhuman treatment, and privacy of the person and home. The Court issued a permanent injunction restraining the Respondent from publishing the identities and addresses of the Petitioners and all other homosexuals. The Court also awarded each Petitioner 1,500,000 Uganda shillings as compensation.</p> |

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| CASE NAME | <i>Naz Foundation v. Government of NCT of Delhi</i> |
| YEAR | 2009 |
| COUNTRY | India |
| CITATION | (2009) DLT 27 |

| <i>Naz Foundation v. Government of NCT of Delhi (continued)</i> | |
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| COURT/BODY | High Court of Delhi |
| SCOPE OF AUTHORITY | Highest court and final court of appeal of the Union Territory of Delhi, including the Indian capital New Delhi. Decisions may be appealed to the Supreme Court of India. |
| FACTS AND LAW | <p>This decision resulted from a public interest litigation brought by a non-governmental organization, challenging section 377 of the Indian Penal Code, which criminalized “unnatural offences” including certain consensual sexual acts between adults in private. Section 377 was introduced in British India in 1861. Britain repealed its laws punishing same-sex relations in 1967, but the law remained in force in India after independence.</p> <p>The High Court of Delhi initially dismissed the petition as an academic challenge to the constitutionality of the legislation. The Supreme Court overruled the dismissal and remitted the case for decision.</p> |
| ISSUE(S) AND HOLDING | Did section 377 of the Indian Penal Code infringe fundamental rights to life, liberty and privacy guaranteed under the Constitution of India? Yes, to the extent the statute outlaws consensual sexual acts between adults in private, it violates constitutional guarantees of liberty, equality, privacy and dignity. |
| DECISION AND REASONING | <p>The challenge was based on several articles of the Constitution. Article 21 protects the right to “personal liberty” and has been judicially interpreted to include a variety of related rights. Articles 14 and 15 guarantee the right to equality and non-discrimination. The Preamble to the Constitution protects the “dignity of the individual” and forms part of India’s “constitutional culture.” In addition, a right to privacy has been found by the courts to arise from other constitutional protections, including the right to life, freedom of speech and expression, and the right to freedom of movement.</p> <p>The Court referred extensively to foreign and international law in reaching its conclusion that section 377 infringed on the constitutional rights to privacy and liberty. The Court rejected the arguments of the Ministry of Home Affairs that the provision was supported by a legitimate governmental interest in public health or popular morality. Instead, it accepted the arguments of the National AIDS Control Organisation and the Ministry of Health and Family Welfare. Both entities asserted that the criminalization of consensual sex between men inhibits and impedes interventions to prevent and treat HIV in India.</p> <p>The Court further held that the term “sex” in article 15 of the Constitution, which prohibits discrimination based on sex, includes “sexual orientation.”</p> |

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| CASE NAME | <i>Victor Juliet Mukasa and Yvonne Oyo v. Attorney General</i> |
| YEAR | 2008 |
| COUNTRY | Uganda |
| CITATION | Miscellaneous Cause No. 247/06 |
| COURT/BODY | High Court of Uganda at Kampala, Civil Division |

Victor Juliet Mukasa and Yvonne Oyo v. Attorney General (continued)

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| SCOPE OF AUTHORITY | The highest court and final court of appeal for matters of civil and criminal matters decided in first instances. |
| FACTS AND LAW | <p>The Petitioners, two women, claimed they were harassed and unlawfully detained by a local authority referred to as the “LC1 Chairman» and later by the police. The second Petitioner, a university student, claimed she was forcibly removed from the home of the first Petitioner, where she was staying temporarily. During her removal, she alleged the Chairman and his agents pushed her to the floor and ransacked the home, taking a number of personal items belonging to the first Petitioner. She claimed she was then forced to walk to the Chairman’s office where she was detained for a significant period of time without access to a toilet. As a result, she urinated on herself and was only later taken to a toilet by a male guard. She was then taken to the local police station where she claimed she was forced to undress by the officer in charge in order to confirm her sex. She alleged the officer in charge fondled her breasts and other officers ridiculed her.</p> <p>The Respondent denied the Petitioners’ claims. The Respondent claimed that the Petitioners were picked up at a bar because they were seen kissing and local residents had threatened to lynch them. The Respondent asserted that the confiscated personal items were with the Petitioners at the bar and were not taken from the first Petitioner’s home. The Respondent also contended that the Chairman was not an agent of the state and therefore the Government could not be held liable for his actions.</p> <p>The Petitioners claimed their right to privacy of the person, home and property under article 27 of the Constitution had been violated. They also claimed their rights to personal liberty and protection from torture and cruel, inhuman or degrading treatment under articles 23(1) and 24 of the Constitution had been violated. The Petitioners requested damages as compensation.</p> |
| ISSUE(S) AND HOLDING | <ol style="list-style-type: none">1. Did the police violate the second Petitioner’s constitutional right to protection from torture and cruel, inhuman or degrading treatment? Yes.2. Did the police violate the first Petitioner’s constitutional right to property? Yes. |
| DECISION AND REASONING | <p>The Court declared that the case was “basically about human dignity, which should be protected.” It stated that when a citizen claims her rights have been infringed by the State, the burden of proof lies with the State to show that the alleged acts were carried out in the public interest.</p> <p>Although the Court accepted the Petitioners’ version of the facts, it held that the Chairman was not a government agent and that the Government was thus not liable for his actions.</p> <ol style="list-style-type: none">1. The Government was, however, liable for the actions of the police. The Court held that the officer in charge’s treatment of the second Petitioner amounted to humiliating and degrading treatment in violation of her constitutional right to protection from torture and cruel, inhuman or degrading treatment. The Court observed that the officer in charge’s actions also violated article 1 of the Universal Declaration on Human Rights, which provides that “all human beings are born free and equal in dignity and rights” and “should act towards one another in a spirit of brotherhood.” The Court also referenced the Convention on the Elimination of All Forms of Discrimination Against Women (the Convention). It highlighted the Convention’s protections in article 3 of women’s rights to liberty and security of the person, equal protection under the law, and to be free from torture or other cruel, inhuman or degrading treatment or punishment. |

Victor Juliet Mukasa and Yvonne Oyo v. Attorney General (continued)

DECISION AND REASONING
(continued)

The Court awarded the second Petitioner 10 million Ugandan shillings for the violation of her right to protection from torture and cruel, inhuman or degrading treatment under article 24 of the Constitution.

2. The Court held that the police violated the first Petitioner's right to property in article 27(2) of the Constitution because they did not handle her documents properly and kept them overnight without following proper procedures. The Court awarded the first Petitioner 3 million Ugandan shillings as compensation.

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| CASE NAME | <i>Secretary for Justice v. Yau Yuk Lung</i> |
| YEAR | 2007 |
| COUNTRY | Hong Kong |
| CITATION | [2006] 4 HKLRD 196 |
| COURT/BODY | Court of Final Appeal |
| SCOPE OF AUTHORITY | Court of last resort with the power of final adjudication of the law of Hong Kong and the power of final interpretation over local laws. This includes the power to strike down local ordinances on the grounds of inconsistency with the Basic Law. |
| FACTS AND LAW | <p>The Defendants were two men who engaged in a sex act in a private car parked beside a public road. They were charged with violation of the Crimes Ordinance provision that criminalized "homosexual buggery committed otherwise than in private." The provision stated that a man "who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years."</p> <p>The trial magistrate dismissed the charges, upholding Defendants' constitutional challenge. The Government appealed the ruling and the Court of Appeal affirmed the magistrate's ruling and dismissed the appeal. The Government then appealed to the Court of Final Appeal.</p> |
| ISSUE(S) AND HOLDING | Is the Crimes Ordinance provision that criminalized "homosexual buggery committed otherwise than in private" inconsistent with the Basic Law and the Hong Kong Bill of Rights? Yes. |
| DECISION AND REASONING | Article 25 of the Basic Law provides that "All Hong Kong residents shall be equal before the law." Article 22 of the Hong Kong Bill of Rights, which implements the International Covenant on Civil and Political Rights, provides for equality under the law and prohibits discrimination on grounds such as race, sex or other status. The Court held that sexual orientation falls within the phrase "other status." Therefore when differential treatment under the law is based on sexual orientation, the Court will scrutinize "with intensity whether the differential treatment is justified." |

Secretary for Justice v. Yau Yuk Lung (continued)

DECISION AND REASONING
(continued)

The Court noted that while all persons are subject to the common law offense of committing an act outraging public decency, only men who have sex with men were subject to the statutory offense of committing anal sex otherwise than in private. The Court further held that the Government failed to meet its burden of showing that this differential treatment was supported by a legitimate governmental purpose. The Court thus held that the challenged provision of the Crimes Ordinance was unconstitutional.

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| CASE NAME | <i>DW v. Secretary of State for the Home Department</i> |
| YEAR | 2005 |
| COUNTRY | United Kingdom |
| CITATION | [2005] UKAIT 00168 |
| COURT/BODY | Immigration Appeal Tribunal |
| SCOPE OF AUTHORITY | Established in 2005, the Tribunal had jurisdiction to hear immigration and asylum decisions, including appeals against decisions made by the Home Secretary and Home Department officials in immigration, asylum and nationality matters. The Tribunal was abolished in 2010 and replaced by the Asylum and Immigration Chamber of the First-tier Tribunal. |
| FACTS AND LAW | <p>The Appellant, DW, was a Jamaican citizen who sought asylum in the United Kingdom. He claimed to have been persecuted in Jamaica on the basis of his sexual orientation. He recounted two instances of being assaulted on the basis of being a homosexual. DW feared reporting these incidences to the Jamaican police because he believed that the police force in Jamaica was “corrupt and homophobic” and that the police would not protect him. He claimed homophobia was endemic to Jamaican society and that there was nowhere in the country he could safely be returned to.</p> <p>The Secretary of State for the Home Department (the Secretary) refused DW’s application for asylum. The Secretary claimed that DW’s statement of events was false and that he was not a homosexual. The Secretary argued that DW’s harassers did not “persecute” him and that any failure on the part of the police to apprehend the perpetrators did not prove complicity in or support for such attacks. The Secretary also argued that DW could be safely returned to other parts of Jamaica. The trial judge accepted the Secretary’s arguments. DW appealed.</p> |
| ISSUE(S) AND HOLDING | Did DW’s sexual orientation and fear of persecution in his home country constitute sufficient grounds to challenge his removal from the United Kingdom? Yes. |
| DECISION AND REASONING | The Court was presented with evidence that demonstrated that homosexuals in Jamaica were the subject of endemic discrimination and violence. There were also reports that health workers in Jamaica had refused medical treatment to men who had sex with men, made abusive comments toward them, and disclosed their sexual orientation to others, putting them at risk of homophobic violence. As a result, many men who had sex with men delayed or avoided seeking healthcare altogether, especially for health problems that might reveal their sexual orientation, such as sexually transmitted diseases including HIV. One report concluded that “[p]ervasive and virulent homophobia, coupled with fear of the disease, impedes access to HIV prevention information, condoms, and healthcare” in Jamaica. |

DW v. Secretary of State for the Home Department (continued)

DECISION AND REASONING
(continued)

The Court further held that DW's sexual orientation placed him in a particular social group, and that his membership in that group had led to his persecution. It held that his two previous assaults, together with a number of other incidents of harassment, amounted to persecution, and that the persecution had come about as a direct result of his homosexuality, or more importantly, the perception that he was a homosexual. The Court further determined that because Jamaica was a small country and homophobic attitudes were endemic throughout the country, DW could not be expected to relocate within Jamaica to avoid persecution. The Court also held that it was not reasonable to expect him to hide his sexual orientation to avoid persecution. The risk of persecution was to be assessed in light of the course of behaviour DW was most likely to adopt.

The Court thus held that unless there had been a material change in his circumstances, removing DW to Jamaica would put him at risk of persecution and infringe his right to life under article 3 of the European Convention on Human Rights.

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| CASE NAME | <i>Yasser Mohamed Salah et al. v. Egypt</i> |
| YEAR | 2002 |
| COUNTRY | Egypt |
| CITATION | Opinion No. 7/2002 (Egypt); E/CN.4/2003/8/Add.1 at 68 (2002) |
| COURT/BODY | Working Group on Arbitrary Detention |
| SCOPE OF AUTHORITY | United Nations body with a mandate, inter alia, to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned. Decisions of the group are not binding on States parties. |
| FACTS AND LAW | <p>At least 55 men were arrested in Cairo on grounds of their sexual orientation during a police raid of a discotheque. The raid occurred after undercover officers entered the bar and observed and filmed dancing. The police targeted men who appeared to be homosexuals or who were not accompanied by women. One man was slapped by officers and called a derogatory name when he refused to leave the club. The men were held in incommunicado detention at the police station and denied access to a lawyer. The men were charged with immoral behaviour and contempt of religion, both punishable as criminal offenses. They were later subject to an anal examination to determine whether they had engaged in sexual acts with other men.</p> <p>The Government of Egypt claimed that the men were not arrested on account of their sexual orientation. It stated that there were no laws in Egypt that provided for the prosecution of a person on account of his or her sexual orientation. It also claimed that the laws under which the men were charged did not take account of gender or sexual orientation, but were neutral in their proscription of particular conduct.</p> <p>The Working Group on Arbitrary Detention (the Working Group) learned from an independent source that all but two of the men were charged with "making homosexual practices a fundamental principle of their group in order to create social dissensions, and engaging in debauchery with men."</p> |

Yasser Mohamed Salah et al. v. Egypt (continued)

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| ISSUE(S) AND HOLDING | <ol style="list-style-type: none">1. Does the term “sex” in the prohibitions on discrimination in article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights include “sexual orientation or affiliation”? Yes.2. Did the detention of the men constitute an arbitrary deprivation of liberty in contravention of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights? Yes. |
| DECISION AND REASONING | <ol style="list-style-type: none">1. The Working Group examined the approach of UN human rights bodies in their interpretation of the term “sex” in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and concluded that the term includes “sexual orientation and affiliation.” In particular, the Working Group noted the Human Rights Committee’s decision in <i>Toonen v. Australia</i>; paragraph 18 of General Comment 14 of the Committee on Economic, Social and Cultural Rights; and the Office of the United Nations High Commissioner for Refugees’ ‘Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees.’2. The Working Group held:<p>“[T]he detention of the above-mentioned persons prosecuted on the grounds that, by their sexual orientation, they incited ‘social dissention’ constitutes an arbitrary deprivation of liberty, being in contravention of the provisions of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights.”</p>The Working Group requested the Government of Egypt to amend its legislation to bring it in line with the Universal Declaration of Human Rights and other relevant international instruments to which Egypt is a party. |

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| CASE NAME | <i>Smith and Grady v. United Kingdom</i> |
| YEAR | 1999 |
| COUNTRY | United Kingdom |
| CITATION | Applications nos. 33985/96 and 33986/96 |
| COURT/BODY | European Court of Human Rights |
| SCOPE OF AUTHORITY | The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case. |
| FACTS AND LAW | The Applicants were two former Royal Air Force personnel who claim they were discharged from the Royal Air Force solely on account of their sexual orientation. They argued that their discharges violated article 8 of the European Convention on Human Rights (the Convention), which recognizes the right to private and family life, and article 14, which provides that enjoyment of the rights and freedoms in European Convention “shall be secured without discrimination on any ground such as sex, race . . . or other status.” |

Smith and Grady v. United Kingdom (continued)

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| FACTS AND LAW <i>(continued)</i> | The Applicants also alleged that there was a policy in the Ministry of Defence against homosexuals in the armed forces. They claimed this policy violated article 3 (the prohibition against degrading treatment or punishment) and article 10 (the right to freedom of expression) of the Convention. |
| ISSUE(S) AND HOLDING | Does the European Convention on Human Rights prohibit termination of employment in the armed forces on the basis of sexual orientation? Yes. |
| DECISION AND REASONING | <p>The Court held that sexual orientation was not a valid ground under the Convention upon which to refuse men who have sex with men or women who have sex with women national service.</p> <p>The Court held that investigations by military police into the Applicants' private sexual lives, including detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with preparation of a final report to authorities on these matters, constituted a direct interference with their right to respect for their private lives in article 8 of the Convention. The Applicants' subsequent administrative discharge on the sole ground of their sexual orientation constituted a further violation of article 8.</p> <p>The Court found that both the investigations and the discharges were performed pursuant to a Ministry of Defence policy barring homosexuals from the armed forces. The Court rejected the Government's assertion that the policy, and the actions taken thereunder, were justified by the need to maintain morale in the armed forces so as to maximize fighting power and operational effectiveness. While a margin of appreciation is open to the State in matters of national security, particularly convincing and weighty reasons must be given to justify interference with an individual's right to respect for his or her private life. However, the Court held that the reasons proffered by the Government—the negative attitudes of heterosexual personnel toward homosexual personnel—were not sufficient justification for the intrusive investigations and discharges.</p> <p>The Court also found a violation of article 13 of the Convention, which guarantees the availability of a domestic remedy to enforce the substance of rights and freedoms under the Convention.</p> |

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| CASE NAME | <i>National Coalition for Gay and Lesbian Equality v. Minister of Justice</i> |
| YEAR | 1998 |
| COUNTRY | South Africa |
| CITATION | 1999 (1) SA 6 (CC) |
| COURT/BODY | Constitutional Court |
| SCOPE OF AUTHORITY | Highest court for matters of constitutional law. Judgments are binding throughout the country. |
| FACTS AND LAW | The Applicants were the South African Human Rights Commission and a coalition of 70 organizations representing lesbian, gay, bisexual, transsexual, transgender, transvestite and intersex people in South Africa. They brought a constitutional challenge to various statutory provisions in South Africa criminalizing homosexual acts. |

National Coalition for Gay and Lesbian Equality v. Minister of Justice (continued)

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| FACTS AND LAW <i>(continued)</i> | The Applicants claimed that the statutes in question violated sections 9, 10 and 14 of the Constitution of South Africa. Section 9 provides that every person has the right to equal protection and benefit of the law, and the Government may not unfairly discriminate against any person on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. Section 10 guarantees the right to human dignity. Section 14 guarantees the right to privacy. |
| ISSUE(S) AND HOLDING | Do statutes criminalizing homosexual acts in South Africa violate the Constitution? Yes. |
| DECISION AND REASONING | <p>The Court held that statutes criminalizing sodomy violate the constitutional right to protection from discrimination on the ground of sexual orientation, and the rights to human dignity and privacy. The Court further held that the criminal statutes bore no rational connection to any legitimate governmental purpose. The Court also held that the common-law offense of sodomy was unconstitutional.</p> <p>The Court stated that discrimination on the ground of sexual orientation was unfair and unjustifiable. It declared that, even if unenforced, the existence of a statute criminalizing consensual sexual behaviour between males “reinforces the misapprehension and general prejudice of the public” against male homosexuality. The Court further held that such statutes violate the right to dignity as they put gay men at risk of arrest and conviction “simply because they seek to engage in sexual conduct which is part of their experience of being human.”</p> <p>In a concurring opinion, Justice Albie Sachs declared:</p> <p>“Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.”</p> |

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| CASE NAME | <i>Toonen v. Australia</i> |
| YEAR | 1994 |
| COUNTRY | Australia |
| CITATION | Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) |
| COURT/BODY | United Nations Human Rights Committee |
| SCOPE OF AUTHORITY | A body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States parties by examining yearly country reports and individual petitions concerning 112 States parties to the Optional Protocol. Its decisions are not binding on States parties, but they represent authoritative interpretations of the rights in the Covenant. |

Toonen v. Australia (continued)

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| FACTS AND LAW | <p>Toonen lived in Tasmania, one of the six constitutive states of Australia. Tasmania criminalized same-sex sexual conduct among men under its criminal code; it was the only province in Australia to do so. Toonen brought a communication before the Human Rights Committee, claiming that the Tasmanian law violated articles 2, 17 and 26 of the International Covenant on Civil and Political Rights.</p> <p>Article 2, paragraph 1 of the International Covenant on Civil and Political Rights requires States parties to ensure to all individuals subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind on grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”</p> <p>Article 17 provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation; and everyone has the right to the protection of the law against such interference or attacks.”</p> <p>Article 26 provides that all persons are equal before the law and declares that the law should prohibit discrimination and positively guarantee freedom from discrimination on grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”</p> |
| ISSUE(S) AND HOLDING | Is sexual orientation a protected class or status under the International Covenant on Civil and Political Rights? Yes. |
| DECISION AND REASONING | <p>The United Nations Human Rights Committee (the Committee) held that sexual orientation is included in the definition of “sex” in articles 2 and 26 of the International Covenant on Civil and Political Rights and consensual sexual activity is an activity protected under the definition of privacy in article 17.</p> <p>The Committee thus held that the existence of laws criminalizing sexual conduct, regardless of promises by past or present officials to not enforce them, are violations of the human right of personal privacy. In light of this ruling, the Committee declined to decide the issue as to the violation of equality under article 26.</p> <p>The Committee explained that individuals have a right to a remedy under the International Covenant on Civil and Political Rights. It declared that in this case an “effective remedy would be the repeal” of the challenged laws. However, as it could not order such a repeal, it requested Australia to report back to the Committee on what remedy it provided to Toonen.</p> |

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| CASE NAME | <i>Dudgeon v. United Kingdom</i> |
| YEAR | 1981 |
| COUNTRY | United Kingdom |
| CITATION | Application no. 7525/76 |
| COURT/BODY | European Court of Human Rights |

Dudgeon v. United Kingdom (continued)

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| SCOPE OF AUTHORITY | The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case. |
| FACTS AND LAW | <p>During a police search of Applicant Dudgeon's home on suspicion of drug activity, personal property, including correspondences and diaries describing same-sex sexual activity, was seized. Dudgeon was subsequently taken to a police station and questioned extensively about his sexual life. The prosecutor considered but eventually declined to prosecute Dudgeon under a statute prohibiting "gross indecency" between males.</p> <p>Dudgeon, a citizen of Northern Ireland, sought a decision from the Court as to whether Northern Ireland's laws criminalizing sexual acts between consenting adult males violated article 8 of the European Convention on Human Rights (the Convention), which recognizes the right to private and family life, and article 14, which provides that enjoyment of the rights and freedoms in the Convention "shall be secured without discrimination on any ground such as sex, race . . . or other status."</p> |
| ISSUE(S) AND HOLDING | Do statutes criminalizing anal sex and "gross indecency" between consenting adult males violate the European Convention on Human Rights' protections of privacy and equality? Yes. |
| DECISION AND REASONING | <p>The Court held that the very existence of legislation criminalizing sexual conduct between consenting adult males constitutes an ongoing interference with the Applicant's right to respect for his private life, including his sexual life, in violation of article 8 of the Convention. The Court further held that the Government of the United Kingdom failed to meet its burden of demonstrating that the legislation was necessary to "protect morals" or to protect the rights and freedoms of others. The Court noted that in most European countries it was "no longer considered to be necessary or appropriate to treat homosexual practices . . . as in themselves a matter to which the sanctions of the criminal law should be applied."</p> <p>In light of this ruling, the Court did not reach the issue of discrimination under article 14.</p> |

See a short summary, for further reading:

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| CASE NAME | <i>Zimbabwe Human Rights NGO Forum v. Zimbabwe</i> |
| YEAR | 2006 |
| COUNTRY | Zimbabwe |
| CITATION | (2006) AHRLR 128 |
| COURT/BODY | African Court of Human and Peoples' Rights |
| BRIEF SUMMARY | This communication arose out of the alleged action by the Zanu PF party, led by incumbent President Robert Mugabe, against the opposition party following the Constitutional Referendum in Zimbabwe in 2000. The Zimbabwe Human Rights NGO Forum submitted a communication to the African Court on Human and Peoples' Rights, claiming that the alleged actions, including beatings, sexual violence and murder, were not only supported by the Zimbabwean Government but that government agents and supporters participated in the attacks and singled out victims on account of their political beliefs and affiliation. |

Zimbabwe Human Rights NGO Forum v. Zimbabwe (continued)

BRIEF SUMMARY
(continued)

The Court found that the Government of Zimbabwe was responsible for the attacks against Zanu PF's political opponents. It held that the Government's actions violated articles 1 and 7 of the African Charter on Human and Peoples' Rights. The Court called upon the Government of Zimbabwe to establish a commission of inquiry. In the course of the decision, the Court held that "the aim of this principle [of antidiscrimination in Article 2] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation" [emphasis added].

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| CASE NAME | <i>Karner v. Austria</i> |
| YEAR | 2003 |
| COUNTRY | Austria |
| CITATION | Application No. 40016/98 |
| COURT/BODY | European Court of Human Rights |
| BRIEF SUMMARY | <p>The Applicant had shared a flat with his partner, the lease holder. The latter died after designating the Applicant as his heir for the tenancy. The landlord brought proceedings against the Applicant to terminate the tenancy. The District Court, then the Regional Court, dismissed the action, finding that the statutory right of family members to succeed to a tenancy also applied to persons in a homosexual relationship. The Supreme Court quashed the lower court's decision, finding that the legislature's intention, in 1974, had not been to include persons of the same sex. This appeal followed.</p> <p>The Court reiterated that differential treatment based on sexual orientation could only be justified by serious reasons. The Government had submitted that the aim of the statutory provision in issue was the protection of the traditional family unit. The Court accepted that this was, in principle, a weighty and legitimate reason that could justify a difference in treatment. However, the Court found that it was an abstract aim, and a broad variety of concrete measures could be used to realize it. Where the Contracting States' margin of appreciation was narrow, as in this case, the principle of proportionality between the means employed and the aim sought to be realized did not merely require the measure chosen to be suitable for realizing the aim; it also had to be shown that it was necessary to exclude same-sex couples from the scope of the legislation in order to achieve that aim. The Government had not advanced any arguments that would support such a conclusion and had therefore not advanced convincing and weighty reasons justifying the narrow interpretation of the provision in question.</p> |

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| CASE NAME | <i>Modinos v. Cyprus</i> |
| YEAR | 1993 |
| COUNTRY | Cyprus |
| CITATION | Application No. 15070/89 |
| COURT/BODY | European Court of Human Rights |
| BRIEF SUMMARY | <p>The Applicant, the president of the Liberation Movement of Homosexuals in Cyprus, was a homosexual man who was involved in a sexual relationship with another male adult. The Applicant asserted that Cyprus's laws criminalizing certain homosexual acts caused him great strain, apprehension and fear of prosecution. The Government argued that neither the Applicant nor any other person in his situation could be prosecuted under the relevant provisions of the Criminal Code because to the extent that these provisions concerned homosexual relations between consenting male adults, they were in conflict with the Constitution and the European Convention on Human Rights (the Convention), and were, therefore, not enforced.</p> <p>The Court first observed that male homosexual conduct in private between adults remained prohibited in law, even if the law was not enforced in fact. Moreover, in <i>Costa v. The Republic</i> 2 Cyprus Law Reports (1982), the Supreme Court of Cyprus found that the relevant provisions of the criminal code violated neither the Convention nor the Constitution. The Court stated that it could not fail to take into account such a statement from the highest court of the land on matters so pertinent to the issue before it. Moreover, the Court noted that the Attorney-General's policy of not bringing criminal proceedings in respect of private homosexual conduct provided no guarantee that action would not be taken by a future Attorney-General, particularly given that government ministers had suggested that the relevant provisions of the criminal code were still in force. Given these circumstances, the Court found that the existence of the prohibition continuously and directly affected the Applicant's private life and that there was, therefore, an interference. Accordingly, the Court held that there was a breach of article 8 the Convention. The Court awarded the Applicant damages covering costs and expenses.</p> |

2.6 ACCESS TO MEDICINES

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| CASE NAME | <i>Minister of Health v. Treatment Action Campaign</i> |
| YEAR | 2002 |
| COUNTRY | South Africa |
| CITATION | 2002 (5) SA 721 |
| COURT/BODY | Constitutional Court |
| SCOPE OF AUTHORITY | Highest court for matters of constitutional law. Judgments are binding throughout the country. |
| FACTS AND LAW | <p>The Government of South Africa developed a national public health programme to address mother-to-child transmission of HIV. The programme offered HIV-positive pregnant women, at no cost, nevirapine—a drug that prevents the transmission of HIV at birth. The programme was, however, limited in scope. It only offered nevirapine at certain pilot sites, none of which were public health institutions, and it did not establish a time-frame for national expansion of the programme. The Treatment Action Campaign (TAC) filed a complaint in the High Court challenging the Government’s programme, alleging that the restrictions in scope violated sections 27 and 28 of the Constitution of South Africa, which guarantee the right of access to public health care services and the right of children to be afforded special protection.</p> <p>The High Court found that the Government had not taken reasonable steps to address the need to reduce mother-to-child transmission of HIV and thereby violated the Constitution of South Africa. The High Court ordered the Government to develop a comprehensive countrywide programme and to make nevirapine available in public health facilities, if necessary. The Government appealed.</p> |
| ISSUE(S) AND HOLDING | Were limitations of the Government’s programme to address mother-to-child transmission of HIV, including only offering nevirapine at certain pilot sites and the lack of a time-frame for national expansion of the programme, in accordance with sections 27 and 28 of the Constitution? No. |
| DECISION AND REASONING | <p>The Court first examined whether socio-economic rights were enforceable under the Constitution of South Africa. Based on previous jurisprudence, it concluded that they were. The Court thus determined that the issue in this case was whether the Government was meeting its obligations with respect to those rights based on existing policies to provide access to health services for HIV-positive mothers and their newborn babies.</p> <p>The Court then addressed whether there was a “minimum core” of the rights in question that the Government must immediately provide. It declined to recognize a “minimum core.” Rather, it held that sections 27(1) and (2) must be read together. Under such a reading, the Government was constitutionally obliged only to take reasonable steps to progressively realize the rights.</p> <p>After these threshold determinations, the Court examined whether the High Court’s ruling must be upheld. It considered whether it was reasonable for the Government to exclude access to free nevirapine from public hospitals and clinics where testing and counselling services were available and where the administration of the drug was medically indicated. The Appellant raised four issues: whether the drugs were efficacious, whether there were resistance concerns, whether there were safety concerns, and whether there were administrative capacity concerns. The Court dismissed each issue as unwarranted or hypothetical.</p> |

Minister of Health v. Treatment Action Campaign (continued)

DECISION AND REASONING
(continued)

Regarding the reasonableness of restricting the Government programme to certain pilot sites, the Court indicated that it was reasonable for the Government to gather evidence regarding the scalability of the programme and to examine resistance and efficacy concerns associated with nevirapine. It was, however, not reasonable for the Government to wait until the best possible programme was developed before expanding it to the national level, denying women and children access to the drug in the meantime. Moreover, the safety and efficacy of nevirapine had been established and administration was relatively simple and within the available resources of the Government. Under such circumstances, the Court stated that the provision of a single dose of nevirapine to mother and child where medically indicated was a simple, cheap and potentially lifesaving medical intervention. The Court thus held that the Government must remove the restrictions that prevented nevirapine from being made available at public hospitals and clinics pursuant to section 27(2) and section 27(1)(a) of the Constitution.

The Court further held that the Government was obliged to ensure that children were accorded the protection contemplated by section 28 that arises when parental or family care was lacking. These cases involve children born in public hospitals and clinics to indigent mothers who are unable to gain access to private medical treatment. The Court noted that these mothers and children were dependent upon the Government for health services.

The Court stated that it was implicit in its holding that a policy of waiting for a protracted period before deciding whether to use nevirapine beyond the dedicated research and training sites was also not reasonable within the meaning of section 27(2) of the Constitution. The Court therefore ordered the Government to take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector.

Finally, the Court held that sections 27(1) and (2) of the Constitution required the Government to devise and implement, within its available resources, a comprehensive and coordinated programme to progressively realize the right of pregnant women and their newborn children to access health services to combat mother-to-child transmission of HIV. Such a programme must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and ensuring appropriate treatment was available to women for such purposes.

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| CASE NAME | <i>Luis Rolando Cuscul Pivaral et al. v. Guatemala</i> |
| YEAR | 2005 |
| COUNTRY | Guatemala |
| CITATION | Report No. 32/05, Petition 642/03; OEA/Ser.L./V/II.124, doc. 5 (2005) |
| COURT/BODY | Inter-American Commission on Human Rights |
| SCOPE OF AUTHORITY | The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States tasked with promoting and protecting human rights under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. |

FACTS AND LAW

The Petitioners, Luis Rolando Cuscul Pivaral and 38 others living with HIV, along with several non-governmental organizations, asked the Ministry of Health to provide a comprehensive health plan for persons living with HIV. They made their request pursuant to two laws: the General Law on the Fight Against HIV and AIDS and the Promotion, Protection, and Defense of Human Rights of Persons with HIV/AIDS, Decree 27-2000. The General Law provides: "Any person diagnosed as infected by HIV/AIDS shall receive immediate comprehensive care in conditions of equal opportunity with other persons, to which end that person's will, dignity, individuality and confidentiality shall be respected." The Ministry of Health did not respond to the Petitioners' request. However, it issued a public statement declaring that it lacked the financial resources to fulfil the legal mandate requiring it to provide health services to people living with HIV.

The Petitioners then sent a letter to the President of Guatemala requesting that he ensure "comprehensive and universal health care [was] made available to all persons in Guatemala requiring immediate medical attention." The President did not initially respond to the request.

The Petitioners filed an appeal for legal protection (*amparo*) before the Constitutional Court, requesting the restoration of "the constitutional right to health that is recognized for each and every one of us who lives with HIV/AIDS.» The President subsequently responded to the Petitioners' letter and promised to meet with them and to order an immediate special transfer of 500,000 quetzales to cover the cost of treating persons living with HIV through the last quarter of the year. The transfer was made, but medicines were only purchased for 71 persons receiving treatment at two hospitals, none of whom were the Petitioners.

The Constitutional Court subsequently rejected the Petitioners' appeal, holding that the President's order of a special budget transfer eliminated any grounds for a claim of ongoing injury. The Petitioners asserted, however, that the Court's ruling did not address the appeal's primary objective: to require the President to implement a universal health care policy that guaranteed the right to health care and the right to life of people living with HIV. This Complaint to the Inter-American Commission on Human Rights (the Commission) followed.

The Petitioners claimed the Government's failure to provide them with antiretroviral drugs violated the right to life and the right to physical integrity in the American Convention on Human Rights (the Convention). The Petitioners claimed the Government had a "heightened" obligation to take steps to protect "the life and health of vulnerable people like those diagnosed with HIV/AIDS." The Petitioners also alleged violations of the right to fair trial; the right to equal protection; the right to judicial protection; and the right to the progressive development of economic, social and cultural rights in the Convention. The Government argued that the Petitioners had access to antiretroviral drugs from private entities, including Doctors Without Borders, and that the Government lacked financial resources to provide antiretroviral drugs to all people living with HIV.

ISSUE(S) AND HOLDING

Were the Petitioners' claims concerning the Government's failure to provide antiretroviral drugs to people living with HIV admissible? The alleged violations of the right to judicial protection and the right to health were admissible.

DECISION AND REASONING

The Commission stated that it would consider whether the Government had a positive obligation to provide antiretroviral drugs to the Petitioners and, if so, whether the provision of such drugs by private entities relieved the Government of its obligation.

The Commission found that the alleged violation of the right to judicial protection was admissible; however, the alleged violation of the right to fair trial was not.

Luis Rolando Cuscul Pivaral et al. v. Guatemala (continued)

DECISION AND REASONING
(continued)

The Commission found that the alleged violation of the right to life was admissible. It stated that, under the circumstances of the case, the alleged violation of the right to physical integrity was subsumed in the alleged violation of the right to life.

With regard to the alleged violation of the right to the progressive development of economic, social and cultural rights, the Commission declared that, “since the present case involves the right to health, there is an obligation to provide the general population with a progressive fulfillment in both preventive and curative medical care.” It noted that two aspects of the right to health “demand immediate attention:” the principle of non-discrimination and situations involving “serious or imminent risk of death.” The Commission found that the Petitioners had not presented evidence proving they were subject to discrimination in access to health services. The alleged violation of the right to equal protection was thus inadmissible. The Commission also declared that the facts presented in the case tended to characterize a violation of the right to life, as understood in the context of a “serious or imminent risk of death.” The alleged violation of the right to the progressive development of economic, social and cultural rights was thus subsumed in the alleged violation of the right to life and was inadmissible.

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| CASE NAME | <i>Sahara House v. Union of India</i> |
| YEAR | 1998 to present |
| COUNTRY | India |
| CITATION | W.P. (Civil) No. (s) 535 of 1998; W.P. No. (C) 513 of 1999; W.P. No. (C) No. 311 of 2003; W.P. No. (C) 61/2003 (Unreported) |
| COURT/BODY | Supreme Court |
| SCOPE OF AUTHORITY | Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters. |
| FACTS AND LAW | <p>The Petitioner, Sahara House, was a centre for residential care and rehabilitation. The Petitioner filed a public interest suit in the Supreme Court under article 32 of the Constitution of India (original writ jurisdiction of the Supreme Court). The Petitioner sought a ruling establishing that the denial of treatment to persons living with HIV violated, inter alia, article 14 (right to equality), article 21 (right to life) and article 47 (duty of the state to improve public health) of the Constitution of India.</p> <p>A second petition, filed by Sankalp Rehabilitation Trust (Petitioner No. 2), also sought directions from the Court regarding discrimination against people living with HIV in health care settings. Other petitions were filed by Voluntary Health Association of Punjab and Common Cause. During the pendency of the petition, Petitioner No. 2 raised the issue of problems in the 2004 National Antiretroviral Rollout Programme (the Programme). The Court asked Petitioner No. 2 to file a request for the remedy they sought with respect to the Programme, along with justifications. In one of its applications, Petitioner No. 2 argued that the National AIDS Control Organization’s (NACO) criteria for restricting the provision of second-line antiretroviral treatment to certain categories of persons was unconstitutional. Petitioner No. 2 argued that antiretroviral treatment should be made available to everyone in need of the treatment, irrespective of other criteria.</p> |

Sahara House v. Union of India (continued)

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| ISSUE(S) AND HOLDING | Does the Government of India have a constitutional obligation to ensure access to second-line antiretroviral treatment for people living with HIV who needed such treatment? Yes. |
| DECISION AND REASONING | <p>The Court ordered, among other things, the upscaling of antiretroviral treatment centres, including provision and maintenance of adequate infrastructure and CD4 testing machines, provision of redress mechanisms for people living with HIV, free treatment of opportunistic infections, and non-discrimination of people living with HIV in health care settings.</p> <p>Taking note of the irrational prescription of treatment and medicines by private doctors, the Court ordered the Medical Council of India to ensure that all private sector health care facilities followed NACO protocol guidelines. It also ordered all health care providers to submit quarterly reports on the treatment provided to people living with HIV, in a format that could be made available by NACO on its website.</p> <p>Regarding the provision of second-line antiretroviral treatment, the Court held that second-line treatment should be universally available to people in need, without additional criteria. Taking into consideration capacity constraints, the Court held that such treatment should initially be made available in four centres. The Court clarified that persons from all over the country could be referred to these centres. The Court further held that the Government should study the pilot initiative for three months, during which time capacity would be increased and the number of people in need of treatment could be determined. The Court held that NACO should make second-line antiretroviral treatment universally available as quickly as possible.</p> |

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| CASE NAME | <i>Novartis AG v. Union of India</i> |
| YEAR | 2013 |
| COUNTRY | India |
| CITATION | Civil Appeal Nos. 2706-2716 of 2013 |
| COURT/BODY | Supreme Court |
| SCOPE OF AUTHORITY | Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters. |
| FACTS AND LAW | <p>In 1998, Novartis AG, a multinational pharmaceutical company based in Switzerland, filed a patent application in India for the beta-crystalline form of Imatinib Mesylate, a drug used to treat chronic myeloid leukaemia, a type of blood cancer. In 2005, the Chennai Patent office heard patent oppositions to this application, including one filed by the Cancer Patients Aid Association. The challenge was prompted by concern about the high price Novartis set for its version of the drug, marketed in India as 'Gleevec'. Novartis set the price at Rs 1,20,000 (approximately US\$ 2,400) per month, compared with generic versions that were available for Rs 8,000 to 12,000 (approximately US\$ 160 to 240) per month.</p> <p>In 2006, the Patent Office rejected Novartis's patent application on several grounds. In particular, it concluded that the application had not met the standard established in section 3(d) of the Indian Patent (Amendments) Act, 2005 (the Act). Section 3(d) states that the following are not considered "inventions" within the meaning of the Act and are thus not patentable:</p> |

FACTS AND LAW
(continued)

“[T]he mere discovery of a new form of a known substance which does not result in the *enhancement of the known efficacy* of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant” [emphasis added].

Novartis challenged the constitutional validity of section 3(d) before the Madras High Court. It argued that the term “efficacy” in section 3(d) was “vague,” not in compliance with India’s obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and in violation of the right to equal protection of the law under article 14 of the Constitution of India. In 2007, the Madras High Court dismissed the suit and held that the word “efficacy” had a definite meaning in the pharmaceutical field, namely “therapeutic efficacy.”

In 2009, the Intellectual Property Appellate Board rejected Novartis’s appeal of the Patent Office’s rejection of its patent application, again on the ground that it did not satisfy section 3(d) of the Act. Novartis appealed to the Supreme Court, requesting a liberal interpretation of section 3(d) that would allow it to obtain a patent for Gleevec.

ISSUE(S) AND HOLDING

Did Novartis’s beta-crystalline form of Imatinib Mesylate, a drug used to treat chronic myeloid leukaemia, meet the standards of “patentability” under the Indian Patent (Amendments) Act, 2005? No.

DECISION AND REASONING

The Court first examined the intent of the Patent (Amendments) Act, 2005, including the standard of enhanced efficacy established in section 3(d). The Court noted the concern that patent protection of pharmaceutical and agricultural chemical products “might have the effect of putting life-saving medicines beyond the reach of a very large section of people.” It examined the legislative history of the Indian Patents Act, including the impact of the TRIPS agreement and the subsequent Doha Declaration.

The Court noted that after patents for pharmaceutical and chemical substances were barred in India, India’s pharmaceutical industry grew dramatically and became “the major supplier of drugs at cheap prices to a number of developing and under-developed countries.” The Court therefore noted that the reintroduction of product patents in India, including for pharmaceutical and chemical substances, was a cause of great alarm for those concerned with ensuring continued access to affordable medicine in India and abroad. To this end, the Court reproduced, in full, letters from the World Health Organization and the Joint United Nations Programme on HIV/AIDS (UNAIDS) expressing concern about the potential impact that India’s forthcoming modifications to its patent system could have on access to affordable medicines throughout the world, particularly for HIV treatment.

The Court concluded that:

“[T]he Indian legislature attempted to address [these concerns] and, while harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries).”

After examining the parliamentary debates surrounding the enactment of the Act, the Court held that section 3(d) was undoubtedly meant to address chemical substances, and pharmaceutical products in particular, and that it clearly established a “second tier of qualifying standards” for pharmaceutical products meant to “leave the door open for true and genuine inventions but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds.”

Novartis AG v. Union of India (continued)

DECISION AND REASONING
(continued)

The Court next held that Imatinib Mesylate was a “known substance” because it had previously been patented and sold in the United States and thus did not qualify as an “invention” in terms of clauses (j) and (ja) of section 2(1) of the Act. The Court then considered arguments on both sides as to whether the beta-crystalline form of Imatinib Mesylate enhanced the “known efficacy” of a “known substance” pursuant to section 3(d) of the Act. Novartis argued that the physiochemical properties of new forms of old medicines should be considered in determining whether efficacy has been enhanced pursuant to section 3(d) of the Act. In particular, it contended that the physiochemical properties of its polymorph form of the Imatinib molecule, including better flow properties, better thermodynamic stability and lower hygroscopicity, resulted in improved efficacy. It argued that these properties made the product “new” because it “stores better” and is “easier to process.” The Court rejected this contention and held that, for medicines, efficacy means “therapeutic efficacy.” The Court declared that this standard must be interpreted “strictly and narrowly” and that while improvements in physicochemical properties may be beneficial to some patient, they do not meet the standard for “therapeutic efficacy” under section 3(d).

Novartis also argued that increased bioavailability—the degree and rate at which a drug is absorbed into a living system or is made available at the site of physiological activity—constituted enhanced efficacy under section 3(d). The Court held that “increased bioavailability alone may not necessarily lead to an enhancement of therapeutic efficacy.” Rather, whether an increase in bioavailability leads to an enhancement of therapeutic efficacy “must be specifically claimed and established by research data;” a “bald assertion” of increased bioavailability alone does not meet the standard under section 3(d). The Court held that there was “absolutely nothing,” save the submissions of counsel, to show that Novartis had enhanced the efficacy of its product through increased bioavailability.

The Court further held that patent applicants must prove the increased therapeutic efficacy required under section 3(d) based on research data in vivo in animals.

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| CASE NAME | <i>Cipla v. Aventis</i> |
| YEAR | 2012 |
| COUNTRY | South Africa |
| CITATION | Case No: 139/2012 and Case No: 138/2012; [2012] ZASCA 108 |
| COURT/BODY | Supreme Court of Appeal |
| SCOPE OF AUTHORITY | Highest court of appeal in South Africa except for constitutional matters, over which the Constitutional Court exercises final jurisdiction. |
| FACTS AND LAW | Aventis, a pharmaceutical company, applied for a preliminary injunction against infringement of its patent on its cancer drug Taxotere in order to restrain Cipla, an Indian pharmaceutical company, from importing, manufacturing or selling Cipla’s generic equivalent of the drug. Prior to this, Cipla had applied for revocation of Aventis’ amended patent on a number of grounds. The Commissioner of Patents dismissed both applications. This appeal followed. |

Cipla v. Aventis (continued)

FACTS AND LAW
(continued)

The Treatment Action Campaign (TAC), a non-governmental organization, was admitted to the appeal as amicus curiae. TAC objected to the preliminary injunction on two grounds, both founded upon section 27(1) of the Constitution, which guarantees the right to have access to health care services, including the right of access to affordable medicines. TAC argued that the Patents Act should be construed “through the prism of the Constitution” in a way that “appropriately balances the rights of a patentee against the constitutional rights of others.” TAC further contended that that Act “must be interpreted and applied to ensure the public interest in patent protection is in fact served and ensuring other rights are not unreasonably limited thereby.”

ISSUE(S) AND HOLDING

Was Aventis in the right to be granted a preliminary injunction against the importation and sale of Cipla’s generic version of its cancer drug Taxotere? Yes.

DECISION AND REASONING

The Court first held that it was “clear” that Cipla’s generic drug was to be imported and sold with “the specific and sole intention” that it would be used in a manner that would infringe Aventis’ patent. Its conduct in doing so would thus be unlawful. The Court next held that, except for the question of “obviousness,” no grounds had been established for revocation of the patent. It stated that the question of obviousness, however, would be determined in another venue. The Court held that the material before it established, prima facie, that Aventis’ patent was valid, and that Cipla was “intent upon inciting, aiding and abetting its infringement.” The Court noted that there was “some mention” in Cipla’s affidavits of the prejudice cancer patients were likely to suffer if an injunction were granted; however, it stated that it was “perfectly plain that in reality Cipla’s resistance to an [injunction was] founded upon its commercial interests.”

The Court next considered the objections raised by TAC to the granting of a preliminary injunction to Aventis to restrain Cipla from importing and selling its generic version of Taxotere. As to TAC’s first contention, that the Patents Act was to be construed “through the prism of the Constitution,” the Court noted that section 39(2) of the Constitution already calls upon the courts to “promote the spirit, purport and objects of the Bill of Rights” when interpreting legislation. The Court noted that this does not grant courts the authority to change the meaning of a statute, but only to strike down legislation that conflicts with the Bill of Rights. In this case, however, the constitutional validity of the Patents Act (the Act) had not been challenged and there was no suggestion that the meaning of the relevant provisions was unclear. The dispute instead involved the application of the Act to the facts of the case. The Court thus declined to pursue this contention.

The Court held that TAC was “on stronger ground” with its contention that “the broader public interest, and not only the interests of the litigating parties, must be placed in the scales when weighing where the balance of convenience lies.” Aventis also accepted that “public-interest factors” ought to be taken into account in the Court’s decision whether to grant the injunction. In weighing the public interest, the Court noted that Aventis had registered its own generic version of Taxotere in order to compete with generic manufacturers when its patent expires. The Court noted that there was no suggestion that Aventis was not able to meet the market demand for Taxotere, nor that Cipla’s generic version offered “superior medicinal benefits.” Finally, the Court considered the relative cost of the three versions of the drug and declared that Taxotere was “considerably more accessible” than Cipla’s generic version to patients who were “dependent upon public health care.” It concluded that the only health-related consequence of granting the injunction was that patients receiving private health care who were unable to recover the cost of treatment from a private medical fund, would pay 10 percent more for treatment with Taxotere than if Cipla’s generic drug was available to them.

Cipla v. Aventis (continued)

DECISION AND REASONING
(continued)

Last, the Court held that the commercial prejudice likely to be suffered by Cipla if the injunction was granted was equivalent to the commercial prejudice to Aventis if the injunction was not granted: the loss of the advantage of having the first generic on the market. The Court held that under these circumstances the fact that the doubt as to the validity of the patent was “slight” became decisive. There was thus no proper ground upon which to deny the preliminary injunction.

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| CASE NAME | <i>Patricia Asero Ochieng and Ors. v. Attorney General</i> |
| YEAR | 2012 |
| COUNTRY | Kenya |
| CITATION | Petition No. 409 of 2009 |
| COURT/BODY | High Court of Kenya at Nairobi |
| SCOPE OF AUTHORITY | Court of first instance for the Nairobi District, with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals, then to the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights. |
| FACTS AND LAW | <p>The Petitioners were citizens of Kenya living with HIV. They claimed that provisions of the Anti-Counterfeiting Act, 2008 (the Act) severely restricted access to affordable, essential medicines, including generic medicines for HIV-related diseases, in violation of their fundamental rights to life, dignity and health protected under articles 26(1), 28 and 43 of the Constitution of Kenya.</p> <p>The Petitioners and others unable to afford branded medicines began receiving regular supplies of medicines for HIV-related diseases free of charge following the passage of the Industrial Property Act in 2001, which allowed for the importation of affordable, generic drugs into the country. The HIV and AIDS Prevention and Control Act, 2006 established the Government’s obligation to ensure the availability of resources to guarantee access to medicines to treat HIV. The Petitioners submitted that 90 percent of people living with HIV in Kenya used generic medicines imported by the Government or donors.</p> <p>The Petitioners argued that the Government failed to specifically exempt generic medicines from the definition of “counterfeiting” in section 2 of the Act. They argued that the definition of counterfeit goods in the Act was unclear and could be interpreted to include generic medicines. This would effectively prohibit the importation of generic medicines into Kenya and allow generic medicines to be seized at any time by authorities. This in turn would severely reduce access to affordable, life-saving medicines, including for HIV-related diseases.</p> <p>The Petitioners further contended that the Government failed to consider how the Act would affect the rights and obligations accrued under the HIV and AIDS Prevention and Control Act, 2006 and the application of the Industrial Property Act.</p> <p>The Petitioners also claimed that the definition of ‘counterfeit’ in the Act went beyond the internationally accepted meaning of the term, as established in article 51 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization, which limits the use of the term to counterfeit trademark goods.</p> |

Patricia Asero Ochieng and Ors. v. Attorney General (continued)

**FACTS AND LAW
(continued)**

The Petitioners also noted that generic HIV medicines in transit to developing countries had in fact already been seized in the Netherlands and Germany pursuant to laws similar to the Act.

The Court also considered arguments submitted in an amicus brief from the United Nations Special Rapporteur on the Right to Health. The Special Rapporteur contended that the definition of counterfeiting in the Act effectively conflated generic medicines with medicines produced in violation of private intellectual property rights. He asserted that this would have a “serious adverse impact on the availability, affordability and accessibility of low-cost, high-quality medicines.”

Respondent Attorney General argued that the term “generic drugs” was not synonymous with “counterfeit drugs.” It was the Government’s responsibility to protect people from the latter, which may lead to harm or even death. Respondent contended that the definition of counterfeit in the Act was sufficiently precise and did not encompass generic medicines. She argued that the Act provided “sufficient safeguards for users of antiretroviral drugs against those who market counterfeit goods but also ensures that they access antiretroviral drugs.”

**ISSUE(S) AND
HOLDING**

Did the Anti-Counterfeiting Act, 2008 infringe upon the fundamental rights to life, dignity and health protected under the Constitution of Kenya? Yes.

**DECISION AND
REASONING**

The Court first noted the socio-economic context in which the petition arose. It held that there “can be no dispute that HIV AIDS constitutes a serious threat to the health and life of the petitioners,” as well as the general public, particularly women and children. It noted that HIV continued to be a major challenge to Kenya’s socio-economic development.

The Court stated that the availability of affordable antiretroviral drugs in Kenya under the Industrial Property Act had greatly enhanced the life and health of people living with HIV. The Court stated that the Act should be considered within this context.

The Court declared that the rights to life, dignity and health are “inextricably bound” and that without health, the right to life would be in jeopardy. It held that if a law had the effect of limiting the accessibility and availability of HIV medicines, it would “ipso facto threaten the lives and health” of people living with HIV “in violation of their rights under the Constitution.”

The Court examined the scope of the right to health under the Constitution in light of the right to health in international agreements, including article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, and article 24(1) of the Convention on the Rights of the Child. The Court noted that General Comment 14 of the Committee on Economic, Social and Cultural Rights, which interprets and elaborates the right to health in ICESCR, states that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.” The Court interpreted this to mean that the State must ensure people have access to the medicines they require to be healthy. The Court also noted that the right to access medicine has been recognized as an essential component of the right to health in other jurisdictions, including South Africa.

DECISION AND REASONING
(continued)

The Court held:

“The state’s obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines. Any legislation that would render the cost of essential drugs unaffordable to citizens would thus be in violation of the state’s obligations under the Constitution.”

The Court examined the definition of “counterfeiting” in section 2 of the Act and compared it with the World Health Organization’s (WHO) definitions of counterfeit medicines and generic medicines. It noted the overlap between the definition of “counterfeit” in the Act and the WHO’s definition of generic medicine and concluded that section 2 of the Act was “likely to be read as including generic medication.” The Court declared that the danger that generic medicines could be seized under the Act was thus “manifest.”

Finally, the Court noted that the tenor and object of the Act was to protect intellectual property rights, as evinced by the authority granted to the Commissioner appointed under section 13(1) of the Kenya Revenue Authority Act to “seize suspected goods upon the complaint of a patent holder.” The Court found that the Act’s purpose was not to safeguard consumers from counterfeit medicine. Had this been the Act’s intention, it would have placed greater emphasis on standards and quality of medicines.

The Court held that sections 2, 32 and 34 of the Act threatened to violate the rights to life, dignity and health and must be reconsidered in light of the Government’s constitutional obligation to protect the fundamental right to health, which encompasses access to affordable medicines, including generic medicines. The Court declared: “There can be no room for ambiguity where the right to health and life of the petitioners and the many other Kenyans who are affected by HIV/AIDS are at stake.”

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| CASE NAME | <i>AIDS Access Foundation et al. v. Bristol Myers-Squibb and Department of Intellectual Property</i> |
| YEAR | 2002 |
| COUNTRY | Thailand |
| CITATION | Black Case No. Tor Por 34/2544, Red Case No. 92/2545 (2002) |
| COURT/BODY | Central Intellectual Property and International Trade Court |
| SCOPE OF AUTHORITY | The Court has exclusive jurisdiction in both civil and criminal matters involving the enforcement of intellectual property rights and international trade. |
| FACTS AND LAW | The Plaintiffs were the AIDS Access Foundation, a non-governmental organization committed to protecting the rights and welfare of people living with HIV, and two persons living with HIV. The Defendant, Bristol Myers-Squibb, is a multinational pharmaceutical company based in the United States. The Court also summoned the Department of Intellectual Property as co-defendant. |

FACTS AND LAW
(continued)

Defendant Bristol Myers-Squibb applied for a patent for didanosine, a reverse transcriptase inhibitor effective against HIV and used in combination with other antiretroviral drug therapy. The patent claim stated that it was a “better formula for oral use” and stipulated the dosage “from about 5 to 100 mg per dose.” Defendant later amended the patent claim to delete the dosage stipulation.

The Plaintiffs claimed the amendment to the patent was unlawful and requested the Court to amend the patent to include the dosage stipulation. They contended that without the stipulation Defendant’s patent protection would be so broad as to severely restrict access to HIV medicines in Thailand by reducing access to affordable drugs, in violation of the rights of people living with HIV. They noted that didanosine was unaffordable for many people living with HIV and could not be replaced by other medicines. The Plaintiffs claimed that the Thai Pharmaceutical Authority (the Authority) had attempted to manufacture didanosine tablets of more than 100 mg per dose to market at an affordable price. However, the Authority decided not to manufacture the drug because the Defendant’s representative claimed the scope of its patent prohibited them from doing so.

The Defendant claimed the Plaintiffs did not have standing to challenge its patent, as they were not manufacturers or sellers of the medicine protected by the patent. The Co-defendant Department of Intellectual Property argued that the Plaintiffs were not injured or interested parties and were not entitled under the Patent Act to assert the invalidity or request the revocation of the patent. The Co-defendant also contended that the patent amendment was not a material amendment and that the Defendant was not permitted to manufacture any dosage of the patented drug simply because the dosage stipulation had been removed. Rather, according to the Patent Act, the “scope of invention shall be determined by the Patent claim, taking into account the nature of invention from the details of the invention.”

ISSUE(S) AND HOLDING

1. Were the Plaintiffs interested parties entitled to assert their claim? Yes.
2. Was the deletion of the dosage stipulation from the patent claim unlawful and must the claim be amended to include the stipulation as requested by the Plaintiffs? Yes.

DECISION AND REASONING

1. The Court held that injured parties were not limited to the manufacturers or sellers of the medicine protected by the patent. Rather, patients and those in need of the medicine, as well as organizations that help people living with HIV to access the medicine, were also interested parties entitled to bring suit.

The Court stated that medicines were fundamental to the well-being of human beings and were thus distinct from other patented inventions that people may or may not choose for consumption. It stressed that treatment for the life and health of human beings was “[more] important than other property.” It noted that the Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health, adopted by the World Trade Organization in 2001, declared that the TRIPS Agreement was to be interpreted and implemented so as to promote the rights of Member States to protect public health, particularly in regard to access to medicines.

AIDS Access Foundation et al. v. Bristol Myers-Squibb and Department of Intellectual Property (continued)

DECISION AND REASONING
(continued)

2. The Court held that deletion of the phrase “from about 5 to 100 mg per dose” from the patent claim was a material amendment that granted the Defendant protection for all dosage amounts of the medicine. The Court held that the phrase “material to the invention” includes both details of the invention and the patent claim itself. The Defendant’s amended patent claim went beyond the scope stipulated in the original claim and the scope of invention was thus extended beyond what was disclosed in the details of the invention.

The Court held that the Defendant must register the amendment of the patent, to reintroduce the dosage stipulation, or the Department of Intellectual Property would amend the claim pursuant to the Court’s ruling.

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| CASE NAME | <i>Mangani v. Register Trustees of Malamulo Hospital</i> |
| YEAR | 1991 |
| COUNTRY | Malawi |
| CITATION | Unavailable |
| COURT/BODY | High Court of Malawi |
| SCOPE OF AUTHORITY | The Court is an intermediate court of appeal with general, commercial and constitutional divisions. It hears appeals from subordinate courts, including Magistrate Courts and the Industrial Relations court. Decisions may be appealed to the Supreme Court of Appeal. |
| FACTS AND LAW | <p>The Plaintiff, Mangani, was admitted to the Defendant hospital suffering from a number of symptoms. One morning during her stay, the Plaintiff began bleeding from her nose and became dizzy. She tried to summon help from the medical assistant on duty, but she was unable to wake him from his sleep. The Plaintiff fainted and fell. The Plaintiff complained of an injury in her right ankle resulting from her fall, but the doctor told her the pain would cease over time. She was discharged from the hospital but told to return to obtain her blood test results.</p> <p>When she returned to the hospital, the Plaintiff again complained of the injury to her right ankle. The doctor performed an x-ray and told the Plaintiff she had not suffered a fracture, but that she was badly injured. However, he only prescribed two weeks bed rest with no treatment. The Plaintiff was also given a sealed envelope and told to take the envelope to another doctor from whom she wished to receive treatment.</p> <p>The Plaintiff visited another hospital and a doctor determined that the injury to her ankle involved a rupture ligament and was permanent as a result of the failure to treat it immediately.</p> |
| ISSUE(S) AND HOLDING | Was the Defendant liable for negligence as a result of its failure to properly care for the Plaintiff? Yes. |

Mangani v. Register Trustees of Malamulo Hospital (continued)

DECISION AND REASONING

The Court held that the Defendant was vicariously responsible for the negligence of the medical assistant on duty when the Plaintiff fell and sustained an injury to her ankle. It held that the negligence of the medical assistant was the cause of the Plaintiff's fall and resulting injury. The Court also held that the Defendant was liable for negligence for failing to provide treatment and care to the Plaintiff after it was clear that she had sustained an injury under its care.

The Court further held that it was "an inescapable conclusion" that the doctor treating the Plaintiff at the Defendant hospital believed the Plaintiff to be suffering from HIV and took the view that "it would be a waste of medicine and time to give medicine to such patient who is fated to die in any event." The Court stated that the doctor's view was deplorable, unprofessional and unethical. It declared that doctors have a moral duty not only to save but also to prolong the lives of people living with HIV.

Short summary for further reading:

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| CASE NAME | <i>Sankalp Rehabilitation Trust v. Roche</i> |
| YEAR | 2009 |
| COUNTRY | India |
| CITATION | OA/8/2009/PT/CH |
| COURT/BODY | Intellectual Property Appellate Board |
| BRIEF SUMMARY | <p>A generic drug manufacturer and a non-profit organization "working for the benefit of drug users" filed two post-grant patent oppositions on a hepatitis-C medication. After the Indian Patent Opposition Board rejected both of these oppositions, the non-profit organization appealed, claiming that the invention was obvious in light of the prior art.</p> <p>The Board considered two issues:</p> <ol style="list-style-type: none">1. Did the non-profit organization demonstrate the requisite standing?2. Was the invention obvious in light of the prior art? <p>The Board held that the non-profit organization had standing to bring the patent opposition and that the invention was obvious and, therefore, the patent was invalid. The Board stated: «We must take a common sense approach to construe the interest that the opponent has in opposing the grant of a patent. In the present case, the appellant claims that it is a society which works for the community of [hepatitis-C] and HIV sufferers. This is not challenged. The invention is admittedly for the use in the case of hepatitis-C. The continuance or removal of the patent will definitely affect the interest of the community for whom the appellant claims to work.»</p> |

III. RESOURCES AND FURTHER READING

Resources on HIV, Human Rights and the Law

Below is a non-exhaustive list of documents that can help readers deepen their knowledge and strengthening their understanding of the area of HIV, human rights and the law.

Global Commission on HIV and the Law, (2012), *Risks, Rights and Health*, July 2012. Available at: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

Global Commission on HIV and the Law, (2011), *Various working papers*. Available at: <http://www.hivlawcommission.org/index.php/working-papers?start=10>.

IDLO, UNAIDS and UNDP, (2009), *Toolkit: Scaling up HIV-related legal services*. Available at: http://data.unaids.org/pub/Manual/2010/20100308revisedhivrelatedlegalservicetoolkitwebversion_en.pdf.

International Commission of Jurists, (2009), *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*. Available at: <http://www.icj.org/sogi-casebook-introduction/>.

Lines, Rick, (2007), *International Human Rights Jurisprudence on Issues Relating to Drug Use and Harm Reduction*, Open Society Institute. Available at: <http://www.opensocietyfoundations.org/reports/international-human-rights-jurisprudence-issues-relating-drug-use-and-harm-reduction>.

Office of the United Nations High Commissioner for Human Rights, (2006), UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, Available at: <http://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf>.

Open Society Institute, Equitas, (2009), *Health and Human Rights, A Resource Guide*, Fourth Edition, March 2009. Available at: <http://equalpartners.info/PDFDocuments/EngCompleteResourceGuide.pdf>.

Open Society Foundations, (2013), *Bringing Justice to Health, The impact of legal empowerment projects on public health*, OSF, New York, Available at: http://www.opensocietyfoundations.org/sites/default/files/bringing-justice-health-20130923_0.pdf.

Southern Africa Litigation Centre (SALC), (2012), *Equal Rights For All: Litigating Cases of HIV-related Discrimination*, SALC Litigation Manual Series. Available at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/10/HIV-and-Discrimination-Manual-pdf.pdf>.

SALC, (2012), *Protecting Rights: Litigating Cases of HIV Testing and Confidentiality of Status*, SALC Litigation Manual Series. Available at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Litigating-Cases-of-HIV-Testing-and-Confidentiality-of-Status-Final.pdf>.

UNAIDS, (2009), *HIV in Africa in the 21st Century, Brief for the Judiciary*, Meeting of Eminent African Jurists on HIV in the 21st Century, 10–12 December 2009, Johannesburg, South Africa. Available at: http://data.unaids.org/pub/manual/2009/jc1803_hiv_and_the_law_en.pdf.

UNAIDS, Canadian HIV/AIDS Legal Network, (2006), *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*, UNAIDS Best Practice Collection. Available at: http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2006/jc1189-courtingrights_en.pdf.

UNDP, Pretoria University Law Press, (2008), *Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa*. Available at: <http://www.undp.org/content/dam/aplaws/publication/en/publications/hiv-aids/compendium-of-key-documents-re-human-rights-hiv-in-eastern-and-southern-africa/203.pdf>.

World Bank, (2007), *Legal Aspects of HIV/AIDS: A Guide for Policy and Law Reform*. Available at: <https://openknowledge.worldbank.org/handle/10986/6754>.

Relevant Websites

Additional information about the work of UNDP and KELIN, as well as the legal dimensions of HIV, is available at the websites listed below. This list also includes relevant global, national and regional databases of judgments.

AIDSLEX: www.aidslex.org

Canadian Legal Information Institute: www.canlii.org/canlii-dynamic/en/

European Court of Human Rights: www.echr.coe.int/echr/en/hudoc

Global Commission on HIV and the Law: www.hivlawcommission.org

Global Health and Human Rights Database: www.globalhealthrights.org

Hong Kong Judgment and Legal Reference: www.judiciary.gov.hk/en/legal_ref/judgments.htm

Indian Kanoon: www.indiankanoon.org/about.html

Inter-American Commission on Human Rights: www.oas.org/en/iachr/decisions/cases.asp

International Commission of Jurists: www.icj.org

International Network for Economic, Social and Cultural Rights: www.escr-net.org/

Joint United Nations Programme on HIV/AIDS: www.unaids.org

Kenya Legal and Ethical Issues Network on HIV and AIDS: <http://kelinkenya.org/>

Lawyers Collective: www.lawyerscollective.org/

NAM, AIDSmap: www.aidsmap.com

Section 27: www.section27.org.za/

Southern African Legal Information Institute: www.saflii.org/

The Center for HIV Law and Policy: www.hivlawandpolicy.org/

United Nations Development Programme: www.undp.org



UNITED NATIONS DEVELOPMENT PROGRAMME

Bureau for Development Policy, HIV, Health & Development Group

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