

EXPERT REPORT OXPIL (B)

RELEVANCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Professor Sandra Fredman
Exeter College and Faculty of Law, Oxford

28 August 2003

Summary

1. The SA Constitution binds all organs of State (s 8). When interpreting any legislation, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights (s 39(2)). In addition, the State must respect, protect, promote and fulfil the rights in the bill of rights (s 7(2)). In interpreting human rights law, the court must apply international human rights law and take note of relevant comparative human rights law.
2. Evidence from the law of the European Court of Human Rights supports the argument that human rights obligations require the Commission to interpret 'excessive price to the detriment of consumers' in section 8 of the SA Competition Act to come to the conclusion that the companies that are the subject of this complaint have engaged in excessive pricing of ARVs to the detriment of consumers.
3. The excessive pricing of ARVs is directly responsible for premature, predictable and avoidable deaths of people living with HIV/AIDS, including both children and adults.
4. Thus the Commission should interpret section 8 consistently with its positive duty as a public body to protect the right to life of those living with HIV/AIDS, as well as their rights not to suffer cruel, inhuman or degrading treatment.
5. It also has a positive duty to protect the right to respect for home, family and private life, both in respect of the babies who contract the HIV virus from their mothers, in respect of individuals who contract the virus from their partners, and in respect of the many families whose family life is devastated by the death of family members

European Human Rights Case Law

6. Precedents from the ECHR support the argument that the State has a positive duty to intervene to protect individuals against others who threaten their basic human rights, and in particular their right to life, their right to protection against torture and inhuman treatment, and the right to respect for home, family and private life.
7. From these precedents it could be argued that the Competition Commission, as a public body, has a positive duty to interpret the Competition Act in such a way

as to protect the right to life of those living with HIV/AIDS from drug companies whose pricing policy makes access to relevant medication extremely difficult or impossible. Note, however, that this is not an absolute duty. Instead, there is a duty to take reasonable and appropriate measures to prevent others from interfering with right.

8. The precedents are drawn from recent case-law under Article 2 (right to life); Article 3 (protection against torture and inhuman treatment) and Article 8 (right to respect for home, family and private life.)

Article 2 (Right to Life)

9. The most relevant case law concerns Article 2 (right to life). The European Court of Human Rights has held that Article 2 does not merely restrain the State from taking life unlawfully. It also imposes an express obligation on the state, to 'secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'.¹
10. This also includes, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.² Notably, the duty is a proactive one: public authorities must do more than react after a breach of the right. They must scrutinise all their planning and policy to be sure that right to life is not infringed, including appropriate training, instructions and briefing.³
11. Although this case was decided in the context of protection of life against criminal actions, its principles are clearly also applicable to the deliberate actions of the pharmaceutical companies in setting prices at a level which makes it impossible for those living with HIV/AIDS to have access to life-saving treatment.
12. The conclusion is that the State must put in place appropriate structures to protect individuals against the deliberate interference of their right to life by other individuals.
13. It should be noted that the State is not under an absolute obligation to protect this right. Its function is to take reasonable and appropriate measures. In *Osman*,⁴ it was expressly stated that, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct, and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

¹ *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 Para 116

² *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245

³ *McCann v UK* [1995] 21 EHRR 97

⁴ *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245

14. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. The standard is whether the authorities did all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.
15. In this case, interpreting the Competition Act to prevent excessive pricing in this context is no more than a duty to take reasonable and appropriate measures. The State is not obliged to intervene in all pricing of drugs, or to intervene if the pricing is reasonable.

Article 3 (Freedom from Torture or Inhuman or Degrading Treatment)

16. The State also has a positive duty under the ECHR to protect individuals against other individuals who infringe the right, in Article 3, not to be subjected to torture or inhuman or degrading treatment.⁵
17. The Court has clearly held that to allow a person to die from HIV/AIDS without affording him the available treatment constituted a breach of the right not to be subjected to torture or inhuman or degrading treatment. This was so even if the obstacle to treatment was not the State itself, but another individual or another state.
18. Thus in *D v UK*,⁶ the European Court of Human Rights held that the UK's decision to remove a man who was in the advanced stages of HIV/AIDS to his home country, St Kitts, breached his right not to be subjected to torture or inhuman or degrading treatment. This was because there was no possibility that he would receive treatment for HIV/AIDS in St Kitts, whereas in the UK he had been given sophisticated treatment and medication under the NHS.
19. The Court stressed that because the UK had assumed responsibility for him for the past four years, it was under an obligation to continue to do so, even though the reason for his expulsion was because he had been found guilty of drugs offences. The logical conclusion of this case is that if the UK had decided not to continue to treat him in the UK itself, it would also have been in breach of this right.
20. This can be seen in the more recent Article 3 case of *Z v UK*⁷ which concerned the extent of the responsibility of the State to protect children against abuse by their parents. The Court emphasised that Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or

⁵ *Chahal v UK* (1996) (1996) 23 EHRR 413

⁶ *D V. The United Kingdom*, Judgment, 2 May 1997

⁷ (2002) 34 E.H.R.R. 3

ought to have had knowledge. Again, the State's obligation is only to take reasonable steps.

21. The conclusion in this context would be that the State must take reasonable steps to protect individuals living with AIDS from the degrading illness and subsequent death from AIDS which is a direct result of the drug companies' refusal to supply drugs at a reasonable price. Reasonable steps would clearly include the order of a compulsory licence.

Reasonable Fulfilment of a Positive Duty

22. The Court has also given more detail as to the standard of scrutiny to be applied in assessing whether the positive duty had been reasonably fulfilled. In *Hatton v United Kingdom*,⁸ concerning the right to respect of their home and family life, the Court held that the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.
23. However, in striking a fair balance between the competing interests of the individual and of the community as a whole, the Court insisted that mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others, particularly in the sensitive field of environmental protection.
24. Instead, a necessity standard was applied: States must seek to achieve their aims in the way that is least onerous as regards human rights. This requires a full and complete investigation of different solutions. Nor was the Court prepared simply to accept the solution proposed by the government. Instead, it looked closely at the research undertaken by the government and concluded that the impact on the national economy as a whole had never been assessed critically, whether by the Government directly or by independent research on their behalf.
25. It held therefore that in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it was not possible to agree that the Government had struck the right balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives.

⁸ (2002) 34 E.H.R.R. 1