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QUARTERLY

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

THE RIGHT TO SAFE DRINKING WATER AS A HUMAN RIGHT

By Romina Picolotti [1]

Introduction

During a research programme studying the dimensions of poverty, human rights and environment, an Argentinian NGO, CEDHA, identified the lack of access to safe drinking water in outlying poor neighbourhoods as a critical problem in the city of Córdoba, Argentina. This two-year research programme focused on specific geographical areas around Córdoba with high levels of poverty. It revealed that the lack of access to safe drinking water was a common and recurring problem in the poorest local communities.

The problem had four principal dimensions:

1. Lack of access to the local public water distribution network;
2. Contamination of water distributed by the existing local network, primarily due to a lack of State control over contracted cooperative providers who are charged with providing water to poor communities;
3. Contamination of groundwater, principally because of inadequate sanitation infrastructure and spill-over of contaminated water from homemade sanitation systems (domestic cesspools); and
4. Contamination of domestic water-storage tanks. This was caused by a number of factors, including: inadequate covers; poor maintenance and hygiene; a lack of regular checks; and atmospheric contamination due to the use of agro-pesticides and chemicals too close to areas of high population density, as well as the presence and/or use of pathogenic waste incinerators, crematories and other industrial pollution nearby.

Argentina's legal system guarantees a broad range of economic, social and cultural rights (ESC rights). The right to a healthy environment is guaranteed in the Constitution itself, while the rights to health, an adequate standard of living, and food have constitutional status because the international instruments providing for them have been incorporated into Argentina's Constitution.[2] In light of this legal framework and the pressing »

1 President and Founder of the Center for Human Rights and Environment (CEDHA), *http://www.cedha.org.ar, romina@cedha.org.ar*
2 The National Constitution incorporates 11 human rights instruments. These include the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, and the Convention on the Rights of the Child.

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EDITORIAL

This special, 'bumper' edition of the Quarterly opens with an article focusing on a case in Argentina involving the right to water. Romina Picolotti, President of the Center for Human Rights and Environment (CEDHA), provides an account of the case in which she discusses both the court ruling that the State was responsible for violating, *inter alia*, the right to water, and the ultimate outcome of the litigation. The next piece, by Padraic Kenna, a leading Irish housing rights expert, describes how the obligations imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms have been and may be employed in order to advance housing rights. Then Opiata Odindo analyses recent Kenyan court decisions involving slum-dwellers' housing rights in the context of State-ordered evictions. This is followed by a summary of a South African Constitutional Court ruling on the attachment and sale of homes to recover petty debts. Finally, there is a round-up of other judgments and admissibility decisions in ESC rights cases, as well as a note on a 'case to watch' in Botswana and information on forthcoming events.

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We hope you find the *Quarterly* useful. We welcome any comments, submissions of case notes and articles, as well as information on new cases and relevant events and publications. Please feel free to contact us at: *quarterly@cohre.org*

» need for the State to perceive the problem of access to safe drinking water as a human rights problem, CEDHA decided to begin to litigate cases addressing the various dimensions of the problem in the city of Córdoba.

Deciding to litigate

When selecting cases, CEDHA uses the following criteria: population density; the degree of poverty; existing lack of access to safe drinking water; proximity to the public water distribution network; social organisation of the affected community; and the judicial viability of the case.

The principal obstacles that CEDHA encountered when litigating were the lack of a tradition of judicial enforcement of ESC rights, and the limited capacity and willingness of the judicial sector to influence public policy decisions.[3] Other hurdles included the economic crisis being experienced by the country as a whole, as well as by the provincial and municipal governments.

Facts of the case

This article focuses on a case addressing the lack of access to safe drinking water in three poor neighbourhoods of the city of Córdoba, Argentina, which are not connected to the public water distribution network, and whose domestic groundwater wells are heavily contaminated with faecal matter, nitrates and nitrites.[4]

The affected neighbourhoods are *Chacras de la Merced, Villa la Merced* and *Cooperativa Unidos.* They have a combined population of around 4 500, approximately 43% of whom are minors under 17 years of age and nearly 5% of whom are older than 64. Approximately 30% of the neighbourhood's population is actively employed, while unemployment exceeds 23%. The average monthly income per household (in families with at least one employed member) is US$ 175. The level of illiteracy is nearly 3%.[5]

Towards the end of the 1960s, the city built a sewer-water treatment facility called the *EDAR Bajo Grande* (henceforth 'plant' or 'facility') on the banks of the Suquía River, two kilometres upstream from *Chacras de la Merced* community, whose existence predates construction of the facility by 30 years. *Chacras de la Merced* borders the *Villa la Merced* and *Cooperativa Unidos* communities. The *EDAR* facility was inaugurated in 1987, under municipal control, with the capacity to treat 120 000 cubic meters per hour (m^3/h) of sewer-water.

As the city of Córdoba kept on growing, the Municipality continued authorising new sewage connections, thereby progressively increasing the volume of sewer-water going into the plant.

3 This is due to, *inter alia,* the fact that the judiciary is convinced that influencing public policy constitutes interference with the powers of the other branches of government. Under Argentinian law, such interference by a judge may result in his or her dismissal. Therefore, judges are extremely careful to avoid such behaviour.

4 MARCHISIO José Bautista y otros – AMPARO (Expte. N° 500003/36).

5 Statistics from *Perfil de la Pobreza en Córdoba* [Profile of Poverty in Córdoba], SEHAS.

As a result, the plant now has two extremely pressing problems. The first has to do with the lack of maintenance and supplies of basic products needed to treat the sewer-water. Due to these limitations, the plant is currently operating at 70% of its full capacity. The second problem relates to the quantity of sewer-water flowing into the plant. Even if the plant were functioning at 100% capacity, it could only treat 120 000 m^3/h. At present, the plant receives an average of 140 000 to 150 000 m^3/h. This data indicates that the plant is receiving between 20 000 and 30 000 m^3/h of sewage water that it could not treat even if it were operating at 100% capacity. The large disparity between the quantity of incoming sewage and the capacity of the facility to treat it results in daily spillage of untreated sewer-water directly into the Suquía River. In July of 2003, on CEDHA's invitation, a representative of the CEQUIMAP laboratory[6] arrived at *Chacras de la Merced* to take five water samples from the community. The faecal bacteria (*faecal coliform*) content of the river water collected downstream from the plant was 40 times higher than that of the sample taken upstream.

The samples taken from homes in the community also indicated severe contamination of water with faecal matter; the level of contamination increasing in direct proportion to the proximity of the home to the plant. Some of the samples showed up to 2000 *faecal coliforms* per 100 ml. The World Health Organisation (WHO) has stated that no *faecal coliforms* should be present in water destined for human consumption.

Legal strategy

The case was litigated by CEDHA's Human Rights and Environment Clinic. The legal strategy chosen in the case parallels CEDHA's general legal strategy, which is grounded in the objective of enforcing ESC rights. CEDHA is working with environmental and human rights law to create positive jurisprudence, which will enable continual progress towards the complete enforcement of all ESC rights. With the approval of the respective plaintiffs, the organisation distinguishes between all the rights that have been violated and a selection of these rights, which they choose to present to the courts for enforcement. Thus, in this case, while the contamination of the water source led to the violation of multiple human rights, CEDHA only sought judicial enforcement of certain rights. These included the right to safe drinking water, the right to a healthy environment, the right to health, and the right to an adequate standard of living.

With a view to expediting the process as much as possible, CEDHA chose to present an *'amparo'* petition based on two main criteria. The aims of the case were principally limited to securing safe drinking water for the affected parties and ensuring that contamination of the Suquía River immediately cease.

Actions were filed against the Provincial State and the Municipality of Córdoba. The action against the Provincial State was based on its obligation to ensure that the water of the Suquía River is suitable for human and industrial use, and on its duty to provide direct or indirect access to safe drinking water to the public, in conformity with previous jurisprudence and internal legislation. The action against the Municipality centred on the injurious and dangerous environmental degradation and its human consequences. This strategy enabled CEDHA to broaden the range of parties potentially responsible for violating rights, and to hold them accountable in differentiated but collective terms. The NGO argued that the State is the guarantor of human rights, irrespective of the internal organisational structure it might choose to adopt.

This approach enabled CEDHA to capitalise on existing and ongoing internal conflict between the Municipality and the Province. Rather than claiming innocence in the matter, the two parties proceeded to point the finger of responsibility at each other. However, although the duality and conflict between political levels operated in favour of the litigants at this stage of the case, it proved problematic later on when it came to execution of the court order, as the political differences created significant barriers to implementing the order.

As part of its strategy, CEDHA requested that members of affected communities be present at various stages of the process. This practice, which is quite unusual for the kind of legal action brought in this case, exerted strong political pressure on all the parties involved. The filing was jointly made by CEDHA and four community members, who had previously made their homes available for water sampling.[7] The strategy involved utilising the legal action as a political pressure mechanism. The objective was to confront the State with a 'Pandora's box' of »

6 A laboratory of the National University of Córdoba.

7 CEDHA carefully selected sites where they felt they could obtain solid evidence that the Suquía River and domestic water wells were heavily contaminated because of the plant. For example, they took samples from the river upstream and downstream of the plant, and from a school in one of the neighbourhoods which is attended by approximately 300 children who eat there and drink water from a local water well on a daily basis.

» thousands of potential subsequent cases to be brought by other affected community members, should the first action not result in a permanent solution to the problem of inadequate access to safe drinking water.

The following international human rights instruments were invoked in the case filing presented to the court: the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of the Child (CRC). The case was ultimately sustained by evidence coming primarily from the State's own reports on the functioning of the treatment facility and the levels of contamination of the Suquía River.

The ruling

The case was resolved in the first instance by the Civil and Commercial Court of the 8th Nomination. Having accepted the standing of the NGO (CEDHA) and the four affected community members, the judge ruled that the State was responsible for violating the rights to a healthy environment, to an adequate standard of living, to access to safe drinking water, and to health. The Court recognised the human right to safe drinking water, which is implied by the right to health. The judge explicitly cited the UDHR, the ICESCR, and General Comment No. 15 on the right to water of the Committee on Economic, Social and Cultural Rights.[8] The Court also recognised the immediacy with which the State must address the environmental situation, and that such immediacy implies the obligation to adopt urgent measures with a view to avoiding irreversible damage to the ecosystem and – consequently – to those individuals who inhabit the environment in question. The Court stated that:

[T]he environment is not only a collective good, but a requisite sine qua non for [the existence of people], [it] therefore is an individual patrimony and at the same time, a collective one, with implications for present and future generations, for which we must not only act in defence of present values, but in the name of future persons and environmental values.

With respect to the judicial enforcement of the rights at issue in this case, the Court declared that:

[W]hile it is good that in a State of rule of law ... a judicial entity [does] not conduct activities that are the responsibility of the Parliament or Presidency, the discretionary and privative competence of an organ of the State has limits, and ... the action of the Judicial power, in the face of the degeneration of those responsibilities, does not imply an invasion of one power over another, but rather the framing of public authority to uphold the Constitution and the law.

The Court ordered that:

[T]he Municipality of Córdoba adopt all of the measures necessary relative to the functioning of [the facility], in order to minimise the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the [plaintiffs] a provision of 200 daily litres of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94. [9]

Full costs were awarded to the plaintiffs.

Execution of the order

In the process, CEDHA succeeded in compelling the Municipality to present an 'integral sewage plan' under which US$ 1.75 million was to be invested for rehabilitation of the existing infrastructure, and US$ 6 million in order to increase plant capacity. CEDHA requested formal clarification of the ruling in order to ensure that the Judge would order precisely the measures necessary with regard to the functioning of the plant, in order to minimise its environmental impact until a permanent solution was reached, including specifying activities and their implementation timeframe.[10]

In December 2004, the Province of Córdoba commenced the public works required to provide fresh and safe water to the affected communities.[11] The Provincial State has since finished construction of the main section of the water system. The second phase of building – establishing connections to homes in the communities – is now due to begin. Work has also begun on the piping necessary to supply water to the neighbourhoods. This will eventually provide *Chacras de la Merced, Cooperatives Unidos* and *Villa la Merced* with permanent access to safe drinking water. The Municipality has undertaken to furnish the necessary pipes for home connections.[12] Construction work is expected to be completed by March 2005.

There have been several other developments as a result of the Court's ruling. The Municipal Executive ordered by decree that *"the Executive will not authorise new sewage connections until [the Municipality] improves the capacity of the sewage plant"*.[13] This has had one interesting result — the

8 *See* Committee on Economic, Social and Cultural Rights, General Comment No. 15, The right to water (29th session, 2003), U.N. Doc. E/C.12/2002/11 (2003), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6, p. 105 (2003).
9 Decree 529/94 is the internal legislation with which the provision of access to water must comply.
10 The judge is expected to respond to this request in March or April 2005.
11 The works include the digging of a new water well, the construction of new public water-storage facilities and the installation of a pneumatic pump.
12 CEDHA is still negotiating the quality of pipes to be used in construction.
13 Resol. D-79/04, 26 Oct. 2004.

coincidental alignment of the position of important economic actors such as the Construction Council and the Engineering, Architects and Real Estate Associations with that of CEDHA. As these actors cannot publicly call for new connections to be authorised, they are instead using economic arguments to exert pressure on the Executive to improve the plant as fast as possible. Their principal arguments are that as construction work has ceased because no new buildings can be connected to the sewage system, construction workers, architects and engineers, etc. are losing their jobs. In addition, real estate associations are losing money because nobody wishes to buy new apartments with no sewage connections.

In addition, the Municipal Congress recently passed a law dictating that, from now on, all revenue from sewage and sanitation taxes is to be invested exclusively in the sewage system. Annually, the Municipality collects around US$ 10 million in sewage taxes. Previously, this money was allocated at the Executive's discretion. As the facts that led up to this case reveal, they were obviously never invested in improving the sewage treatment system.

Conclusion

A request for the provision of permanent access to safe drinking water is not merely a simple request for the provision of a public service. Rather, it is founded on the desire to assure the full realisation of the human rights to health, food, an adequate standard of living, a healthy environment and of access to safe drinking water. The Court in this case established itself as the guarantor of the human rights of the residents of these neighbourhoods. This decision constitutes an important step towards the judicial enforcement of these rights.

USING THE ECHR TO ADVANCE HOUSING RIGHTS

By Dr Padraic Kenna [14]

Introduction

Housing rights advocates can point to many international instruments for support. Indeed, the United Nations' Universal Declaration of Human Rights as well as human rights covenants and conventions have increasingly led to an international monitoring and implementation process with respect to housing rights.[15] However, legally enforceable and justiciable housing rights at the national level are critical for effective implementation. While some States adopt a monist approach whereby international commitments become part of national law, others have a dualist system where the gap between rights rhetoric at an international level and their realisation at home can be a wide one. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) offers one means of transcending this problem.

The ECHR & housing rights

The ECHR was signed by Member States of the Council of Europe in 1950 and came into force in 1953.[16] It sets forth a number of fundamental rights and freedoms such as: the right to life, prohibition of torture, inhuman and degrading treatment; the right to liberty and security; the right to respect for private and family life; the right to an effective remedy; and the prohibition of discrimination. It was the first international human rights instrument to protect a broad range of civil and political rights by both presenting them in the form of a treaty legally binding on its ratifying States, and by establishing a system of supervision over the implementation of the rights at a domestic level. Its most revolutionary contribution lies in the provision under which a State may accept the supervision of the European Court of Human Rights (ECtHR) where an individual (rather than a State) initiates the process.[17] One measure of the Convention's success is the acceptance of this right of individual petition by all the ratifying States.[18]

The Convention does not contain an express right to housing or impose an obligation on Member »

14 Law Faculty, National University of Ireland, Galway, Ireland.
15 *See* Centre on Housing Rights and Evictions, *Legal Resources for Housing Rights* (Geneva: COHRE, 2000).
16 *See: http://conventions.coe.int/treaty/* (NB: the Council of Europe is not the same organisation as the European Union.)
17 ECHR, Article 34.
18 Council of Europe, *Short Guide to the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 1998), p. 6.

» States to guarantee housing. Many cases, however, have emerged under various articles that have implications for the enjoyment of housing rights.[19] The relevant articles and the duties imposed by them include:

- Article 3 – Prohibition of torture, inhuman and degrading treatment arising from a failure to provide adequate housing;
- Article 6 – The right to a fair hearing in civil matters including evictions and applications for housing;
- Article 8 – The right to respect for family and home life, which means that any evictions sanctioned by the State must be proportionate to the social objective required;
- Article 13 – The right to an effective domestic remedy for eviction; and
- Article 14 – No discrimination in relation to Convention rights.

The case-law

A State has positive obligations under Article 3 to take measures designed to ensure that individuals within their jurisdiction are not subjected to inhuman and degrading treatment. In the case of *Limbuela,*[20] the UK High Court and the Court of Appeal considered the State's duty to provide support for homeless asylum-seekers in order to meet its Article 3 obligations in relation to inhuman and degrading treatment. The applicant had slept in a park, had no money and no means of finding anywhere to provide him with food. The High Court found that where a person could establish that she or he would be reduced to sleeping on the streets, that there was no charitable support available to her or him, and that she or he had only irregular access to food and washing facilities, then State refusal of assistance would amount to degrading treatment under Article 3.

The judge pointed out that:

[The] question raised by the present appeals, in its starkest form, is to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the 'minimum level of severity' to amount to 'inhuman or degrading treatment' under Article 3 of the European Convention of Human Rights.[21]

This answer to this question could, indeed, also be interpreted as the core minimum obligation of European States in relation to homelessness.

A recent UK case established that a homeless person's application for State assistance invokes the applicant's civil rights, thus engaging Article 6 relating to fair procedures.[22]

Article 8, with its guarantee of respect for the home, is of particular significance in relation to housing. However, this protection can be limited:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[23]

In *Marzari* v. *Italy*[24] it was held that, while Article 8 does not offer a guarantee of having one's housing problems solved by the State, a refusal by the authorities to provide assistance to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8, because of the impact of such refusal on the private life of the individual.[25] A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the applicant's private life.

In a recent milestone case, violations of Article 8 resulted in damages of £10 000 being awarded against a London local authority with regard to a failure to act on the provision of adequate housing. In *R. (Bernard)* v. *Enfield L.B.C.*,[26] the High Court found that the authority had acted unlawfully and incompatibly with Article 8 by failing to provide suitable accommodation for a family for over two years. The mother was severely

19 Cases are heard at the European Court of Human Rights at Strasbourg in France. However, since the adoption of the Human Rights Act 1998 by the UK Government, incorporating the Convention into English law, there have been many important housing-related cases heard by UK courts.
20 *R (Limbuela)* v. *Secretary of State* [2004] EWHC (Admin), 4 Feb. 2004. The Court of Appeal upheld this decision despite knowing that there were over 600 similar cases pending. *See: R. (on the applications of Adam, Tesema, and Limbuela)* v. *Secretary of State for the Home Department* (2004), 2004 EWCA 540, All ER (D) 323.
21 *R. ex parte Adam and others* v. *Secretary of State for the Home Department* [2004] EWCA Civ. 540, para 84.
22 *Begum* v. *Tower Hamlets LBC* [2002] EWCA Civ. 239, *http://www.bailii.org/ew/cases/EWCA/Civ/2002/239.html*
23 Article 8(2) ECHR.
24 (1999) 28 EHRR CD 175.
25 Ibid. p. 179.
26 [2002] EWHC 2282 (Admin).

disabled and wheelchair bound. She was housed in temporary accommodation that was unsuitable for her needs, resulting in her being confined to the lounge room. The conduct of the authority not only engaged but breached the Article 8 obligations, since it condemned the claimants to living conditions which made it virtually impossible to have any meaningful private or family life in the sense of Article 8. The claim for breach of Article 3 in relation to inhuman and degrading treatment failed on the grounds that the authority's *"corporate neglect"* was not intended to deliberately inflict such suffering.

The ECtHR case of *Connors* v. *UK*[27] involved the eviction of gypsies from a halting site by a local authority.[28] The plaintiff challenged an order for possession as being unnecessary and disproportionate, since he had no means of challenging allegations made against him as part of the eviction process. The summary procedure for obtaining a possession order required only that the local authority show that it had withdrawn permission to occupy the land and issued a notice to quit.

The ECtHR held that an interference with the home in the context of Article 8 will be considered *"necessary in a democratic society"* for a legitimate aim if it answers a *"pressing social need"* and, in particular, if it is proportionate to the legitimate aim pursued.[29] In this regard there is a *"margin of appreciation"* left to the national authorities who are better placed than an international court to evaluate local needs and conditions:

This margin will vary considerably according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim persuaded by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights ... [Article 8] concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.[30]

The serious interference with the applicant's rights under Article 8 requires, in the ECtHR's opinion, particularly weighty reasons of public interest by way of justification, and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed.[31] The procedural safeguards available to the individual will be especially important in determining whether a State has remained within its margin of appreciation.[32]

The ECtHR held that the mere fact that anti-social behaviour occurs on local authority gypsy sites cannot, in itself, justify a summary power of eviction.[33] The existence of procedural safeguards is a crucial consideration in the Court's assessment of the proportionality of the interference.[34]

Finding a violation of Article 8, the ECtHR held that the eviction of the applicant was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights.[35] Consequently, it could not be regarded as justified by *"pressing social need"* or proportionate to the legitimate aim being pursued. In relation to Article 6, the ECtHR also found that *"[t]here was no equality of arms and he was denied any effective access to court against the very serious interference with his home and family"*.[36]

While this is only a single case, the issue of providing accommodation for homeless nomadic gypsies/travellers has been a source of conflict in most European countries for many years. In the UK, a 1968 Act placed a duty on local authorities to provide adequate accommodation for gypsies residing in or resorting to their area. In 1994 this system was discontinued and gypsies/travellers who were camped on unauthorised sites were subject to criminal sanction. Many purchased sites in 'green belt' areas and sought to obtain planning permission for their homes. »

27 European Court of Human Rights, 27 May 2004. Application No. 66746/01. Decision available from: *http://www.echr.coe.int/Eng/Judgments.htm*

28 While the term 'gypsy' has often been used and experienced as a derogatory term, the Editorial Board wishes to make clear that that is not the intention here. In the UK, in the context of planning and local authority law, the term 'gypsy' has the specific meaning of anyone – regardless of race or origin – who is of a nomadic habit of life and travels around for economic reasons. Indeed, the term 'gypsy' is used by the European Court in this specific case. Additionally, in the UK, several nomadic people's rights groups use the term self-descriptively, including the Gypsy Council for Education, Culture, Welfare and Civil Rights and the Gypsy and Traveller Law Reform Coalition.

29 ECtHR (n. 27 above), para. 81. *See also: Spadea and Scalabrino* v. *Italy* (1995) 21 EHRR 482.

30 Ibid. para. 82.

31 Ibid. para. 86.

32 Ibid. para 83.

33 Ibid. para. 89.

34 Ibid. para. 92.

35 Ibid. para. 95.

36 Ibid. para. 102.

» These attempts were largely unsuccessful and local authorities sought to evict them from the sites for breach of planning. Some appealed to the ECtHR, but most did not succeed.[37]

In 2004, however, the English Court of Appeal ruled that pursuing enforcement proceedings for breach of planning by gypsies in a rural area violated the gypsies' rights under Article 8. The eviction of gypsies from their homes (admittedly in breach of planning laws) would not be proportionate or justified.[38]

Conclusion

Clearly, there is much scope for using the ECHR to advance housing rights by means of the positive obligations it places on the State to provide a minimum level of services for people to enjoy a meaningful private and family life, and home. The legitimacy of legal measures that result in people being made homeless can also be evaluated in terms of the proportionality and fairness of the process. Truly, housing rights are emerging in the most unexpected places.

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37 *See: Buckley* v. *UK* (1996) 23 EHRR 101; *Chapman* v. *UK (2001)* 33 EHRR 413; *Beard* v. *UK* (2001) 33 EHRR 442.
38 *Secretary of State* v. *Chichester D.C.* [2004] EWCA Civ. 1248, *http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2004/1248.html&query=chichester&method=all*

HESITANT STEPS TOWARDS A HOUSING RIGHTS JURISPRUDENCE: RECENT DECISIONS FROM KENYA

By Opiata Odindo[39]

Recently, a number of cases have been brought in Kenya requesting the courts to ensure respect for the housing rights of slum-dwellers in the context of State-ordered evictions.

On 29 January 2004, the Kenya Railways Corporation (a State corporation) issued a general notice to all the people staying on lands within 100 feet of either side of the railway line, railway station reserves, railway quarries and points, level crossings, inland port areas and all other railway premises used for administration and control of services. The notice ordered them to vacate the premises within thirty days, failing which they would be forcibly evicted.

This notice was one of many that were being issued by various Government departments, including the Ministry of Public Works and Roads, the Kenya Power and Lighting Corporation and the Ministry of Local Government. Ostensibly this was being done pursuant to the new Government's policy of repossessing all public land. Whatever the reason, it was obvious that if this policy was to be implemented then hundreds of thousands of persons, particularly in poor urban and rural areas, would be affected. Predictably, there was immediate outcry against the Government action, which became more vocal when a slum village (ironically named after Raila, the Minister of Public Works and Roads and the local Member of Parliament) was razed to make way for a planned by-pass road.

One of the communities that was to be massively affected was Kibera, one of the largest and most densely populated slums in Africa. As time ran out, the Kibera residents became increasingly desperate. As a last-ditch effort they decided to file suit through Kituo cha Sheria[40] a day before the expiry of the notice.[41] The suit was brought by those operating kiosks next to the railway line and was largely based on the administrative law principles of natural justice — namely, the right to be heard and the right to be given adequate notice.

39 Legal Officer, Kituo cha Sheria, Kenya.
40 A national legal and human rights NGO.
41 *Maina Ngare Njeru and 87 Ors.* v. *Kenya Railways Corporation* (High Court of Kenya, Nairobi) HCCC No. 189 of 2004.

Reference was also made to the rights of the child under the Convention on the Rights of the Child, which has been incorporated into domestic law in Kenya. In addition, the plaintiffs referred to the obligation to comply with the international standards governing evictions, including the right of the affected people to be genuinely consulted and to participate in the entire process, the provision of alternative appropriate settlement sites, adequate notice, and the availability of effective remedies through the judicial system.

When the plaintiffs approached the Court under a certificate of urgency for an order of temporary injunction, what transpired can only be described as a judicial farce. First, the presiding judge clearly avoided addressing any of the substantive legal issues raised in the application. Instead, he took the approach often adopted by judges when faced with the slum-dwellers' right to housing. That is, to shift the burden of proof by declaring the slum-dwellers to be squatters, who have no *locus standi* to challenge the rights of a registered owner. It did not appear to matter to the Court that human rights standards impose certain non-derogable obligations on registered owners of land vis-à-vis illegal occupants. Despite finding that the residents had no *prima facie* case, the judge proceeded to grant the sought injunction 'in the interest of justice'. In doing so, the Court seemed to be swayed by what the judge in the Ghanaian case of *Issah Idi Abass*[42] contemptuously referred to as *"argumentum ad misericordium"*; in other words, one appealing to pity or mercy or forgiveness, instead of pure legality.

In the short term, this was a significant victory for the residents as it provided them with a legal edict preventing the Government from evicting them. In the meantime, two days after the order was granted, the Government itself suspended the evictions. This action reduced the court order to being more or less of academic interest, and eventually the matter before the Court was resolved through negotiations so that no jurisprudence of any significance emerged. This result was both bad and good: bad in the sense that it denied the litigants an opportunity to test how far the Kenyan judiciary is willing to become involved in the challenging task of adjudicating economic and social rights, good in that it averted what might have shaped up to be a potentially explosive confrontation between the Government and the urban poor.

Some hundreds of kilometres from Nairobi in a town named Kitale, some of the affected people decided to use the pleadings in the Kibera case to file another case.[43] The arguments in this case were similar to those made in Kibera and – even though the defendants did not defend the application – the Court nonetheless proceeded to give a reasoned ruling, which is probably the most progressive jurisprudence on evictions in Kenya to date.

In granting the injunction, the Court relied mainly on administrative law principles, declaring that:

It is always a well understood principle of law that the executive government or its corporations or any of its officers should not possess arbitrary power over the interest of the individual. Every action of the executive government must be informed with reasons and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.

The Court held further that:

It is clear from the submissions of learned counsel for the plaintiffs and the material placed before me that Respondent did not also give the plaintiffs a right of hearing. The Respondent did not also give the plaintiffs reasons for its decision. The plaintiffs are likely to establish that the notice was issued unprocedurally and unlawfully. They are also likely to establish at the hearing of suit that the notice was arbitrary and unreasonably inadequate.

Although the Court did not specifically direct its opinion to the relevant international law instruments, the ruling has certainly opened a window of hope for economic and social rights litigation in the area of evictions. This opening is due to the Court's recognition of the rights of slum-dwellers to procedural safeguards in the context of threatened evictions. It is hoped that the Kenyan courts will be prepared to adopt a more expansive attitude towards international human rights instruments in future cases pending before them.[44]

42 *Issa Iddi Abass & Ors.* v. *The Accra Metropolitan Assembly & Anor.*, Superior Court of Judicature, Accra. Misc. Case No. 1203 of 2002.
43 *John Samoei Kirwa & 9 Ors.* v. *Kenya Railways Corporation* (High Court of Kenya, Bungom) HCCC No. 65 of 2004.
44 For instance, in the case of *Ibrahim Muhumed Danage & Ors.* v. *The Attorney General* (High Court of Kenya, Nairobi) HCCC No. 887 of 2004. This case was filed by Kituo cha Sheria in conjunction with COHRE and will, for the first time, call upon the judiciary to make an authoritative pronouncement on the jurisprudential position of the international human rights instruments in Kenya's domestic legal system. The case not only challenges the practice of forced eviction but also brings in children rights, the right to water, and freedom from cruel and degrading treatment and non-discrimination. The matter has yet to be set down for hearing and the Attorney General has yet to respond, even though the matter was filed in Oct. 2004.

SUMMARY OF A RECENT ESC RIGHTS CASE IN SOUTH AFRICA

Jaftha & Anor.* v. *Van Rooyen & Anor. [45]

Constitutional Court of South Africa

Housing rights – obligation to respect

Facts

The plaintiffs alleged that legislation which allowed for debtors' homes to be attached and sold in order to recover petty debts – even where this might result in homelessness – violated, *inter alia*, the negative aspect of the constitutional right to have access to adequate housing (e.g. the obligation to respect) set out in Section 26 of the South African Constitution. The plaintiffs were former owners of subsidised houses, which were attached and sold in accordance with the legislation.

Decision

When deliberating on what constitutes 'adequate housing', the Court considered international law, specifically the International Covenant on Economic, Social and Cultural Rights and jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR). It noted the CESCR's statement that security of tenure takes many forms, not just ownership, but that *"all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."*[46] The Court emphasised that the need for the protection of security of tenure in Section 26 of the Constitution must be viewed in light of past forced removals from land and evictions. The Court stated that Section 26 must be read as a whole and is aimed at creating a new dispensation in which every person has adequate housing and in which the State may not interfere with such access unless it would be justifiable to do so.

The Court found that any measure which permits a person to be deprived of existing access to adequate housing limits the constitutional right to housing. The Court proceeded to consider whether such a measure is *"reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors"*.[47] Acknowledging that the purpose of the legislation – debt recovery – was important, the Court stated that when the focus is on the trifling nature of the debt, the importance of the purpose is diminished. While not every sale in execution to satisfy a trifling debt will necessarily be unreasonable and unjustifiable, the Court pointed out that there will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor.

The Court held the legislation to be too broad and unconstitutional to the extent that it allowed execution against the homes of indigent debtors where they lose their security of tenure. The legislation was unjustifiable to the extent that it allowed for such executions where there were no countervailing considerations in favour of the creditor which would operate to justify the sales in execution.

The Court held that the existence of a permissive measure which could be invoked by the debtor in order to prevent the sale of her/his home in execution did not change the potentially unjustified executions that might occur when the process envisaged by the impugned legislation was initiated by creditors. (For instance, in cases such as this where the appellants' indigence and lack of knowledge are likely to prevent them from being aware of, or taking advantage of, the protection afforded by such a measure).

The Court ordered, *inter alia*, that judicial oversight be provided over the execution process, enabling a court to determine whether an execution order against immovable property is justifiable in the circumstances of a particular case.

Prepared by Aoife Nolan

45 Case No. CCT74/03, 8 Oct. 2004, *http://www.concourt.gov.za/files/7403/7403.pdf*
46 General Comment No. 4 on the right to adequate housing, 13 Dec. 1991, E/1992/23, para. 8.
47 That is, whether such a measure is justifiable in terms of Sect. 36 of the Constitution.

ROUND-UP OF RECENT DECISIONS IN ESC RIGHTS CASES

Admissibility decision

Housing rights/Roma/discrimination - The European Committee of Social Rights has declared admissible a complaint brought against Italy by the European Roma Rights Centre (ERRC).[48] The ERRC alleges that the housing situation of Roma in Italy amounts to a violation of Italy's obligations in relation to ensuring the effective exercise of the right to housing, set out in Article 31 of the Revised European Social Charter. In addition, it claims that policies and practices in the field of housing constitute racial discrimination and racial segregation, both contrary to Article 31 read alone or in conjunction with Article E (the principle of non-discrimination in the enjoyment of Charter rights).[49]

Judgments

Women's rights /children's rights /inheritance rights/customary law - In *Bhe* v. *Magistrate, Khayelitsha & Ors.,*[50] decided by the Constitutional Court of South Africa, the plaintiffs brought a constitutional challenge against, *inter alia,* the customary law rule of male primogeniture, which precluded: widows from inheriting as the intestate heirs of their late husbands; daughters from inheriting from their parents; younger sons from inheriting from their parents; and extra-marital children from inheriting from their fathers. The plaintiffs alleged that such exclusions constituted unfair discrimination on the basis of gender and birth. The Constitutional Court agreed, holding that the rule as applied to inheritance in customary law was inconsistent with the Constitution's equality provisions, the right to human dignity and the rights of children under Section 28 of the Constitution.

Discrimination/people living with disabilities - In *Catholic Education Office* v. *Clarke*,[51] the Full Federal Court of Australia upheld the decision of a single judge of the Federal Court that the appellant educational authorities had indirectly discriminated against a deaf student in respect of the terms and conditions upon which they were prepared to admit him as a high school student to Mackillop Catholic College. The school insisted on the student accepting a 'model of learning support' that did not include the provision of Australian Sign Language (Auslan) interpreting services, without which the plaintiff could not meaningfully receive classroom education. The Court held that this constituted discrimination in violation of Section 6 of the Disability Discrimination Act 1992 as it required the plaintiff to comply with a requirement (to participate in and receive classroom instruction without an interpreter) with which a substantially higher proportion of persons without the disability were able to comply. The requirement was not reasonable having regard to the circumstances of the case, and was one with which the plaintiff, by reason of his dependence on Auslan, was not able to comply.

Discrimination/inheritance rights - In *Merger & Cros* v. *France*,[52] the first applicant was born of a relationship between her mother (the second applicant) and a married man who already had children. The applicants complained about the restriction of the first applicant's right to inherit her father's property on the basis of her status as a child born out of wedlock. They also complained about their lack of legal capacity to receive gifts from the deceased. Dealing with the first claim, the European Court of Human Rights (ECtHR) noted that the first applicant had been penalised in the division of the assets of her father's estate on account of her status as an adulterine child. The Court, therefore, held unanimously that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 1 of Protocol No. 1 (protection of property). With regard to the second claim, the Court found that there had been a violation of Articles 14 and 8 (right to respect for family life) taken together. It held that, in light of her parents' cohabitation prior to and at the time of the first applicant's birth, she and her parents formed a 'family' for the purposes of Article 8. The Court reiterated that family life did not include only social, moral or cultural relations but also interests of a material kind, as was demonstrated, *inter alia*, by the obligations in respect of maintenance, and the position occupied by the institution of the reserved portion of an estate in the domestic legal systems of the majority of the Contracting States. The Court could find no ground in this case to justify the discrimination in the legal capacity of the applicants to receive gifts from the deceased based on the birth out of wedlock of the first applicant. It accordingly held that, in respect of both applicants, there had been a violation of Articles 8 and 14 taken together.[53]

48 *European Roma Rights Centre* v. *Italy*, Complaint No. 27/2004, 7 Dec. 2004, *http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/RC27_admiss.asp*

49 Ibid.

50 2005 (1) BCLR 1 (CC), 15 Oct. 2004, *http://www.concourt.gov.za/files/4903/bhe.pdf*

51 [2004] FCAFC 197, 6 Aug. 2004, *http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/197.html*

52 Case no. 68864/01, 22 Dec. 2004. Decision available from: *http://www.echr.coe.int/Eng/Judgments.htm*

53 This case note is paraphrased from a press release issued by the Registrar of the ECtHR, 22 Dec. 2004, *http://www.echr.coe.int/Eng/Press/2004/Dec/ChamberjudgmentMergerandCrosvFrance22122004.htm*

CASE TO WATCH

The case filed against the Government of Botswana by the San Bushmen community of the Kalahari in early 2002, *Roy Sesana* v. *Government of Botswana*, continues in the Botswanan High Court. In January 2002, the Government terminated water, food and health services in San areas in the Central Kalahari Game Reserve in Botswana. The Government argued that it was costly to provide services to these remote areas, and that the San should be brought into the 'mainland' to seize the opportunities of modern development. The service cuts were followed by massive demolition of houses and relocations to adjacent areas. Access to the reserve was utterly restricted; the San could no longer enter the land they had occupied since time immemorial nor could they continue with their hunter-gatherer lifestyle. Botswana is a party to the International Convention on the Elimination of All Forms of Racial Discrimination as well as the African Charter on Human and People's Rights. These and the Constitution of Botswana raise questions with regard to possible violations of the ESC rights of the San people in the eviction-relocation process. The Court will have to determine whether the Government's decision to end provision of essential services to the residents was unlawful and whether it is obliged to restore such services.[54] The Court will also have to decide if the residents were in possession of their land and were deprived of it forcibly. In addition, it will have to consider whether the Government's refusal to issue game licenses to the residents and allow them to enter the Reserve is unconstitutional.[55] The outcome of the case will almost certainly influence the content and direction of the land and housing rights of minorities in Southern Africa.

Prepared by Moses Metileni

54 'Botswana: Court case on San rights resumes', *http://www.irinnews.org/report.asp?ReportID=45136&SelectRegion=Southern_Africa&SelectCountry=BOTSWANA*

55 Ibid.

EVENTS

- The Committee on Economic, Social and Cultural Rights will hold its 34th Session from 25 April to 13 May 2005 in Geneva. The Committee will consider the State Reports of Zambia, China with Hong Kong and Macau, Serbia and Montenegro, and Norway.
- The Committee Against Torture will hold its 34th Session from 2 to 21 May 2005 in Geneva. The Committee will consider the State Reports of Albania, Bahrain, Canada, Finland, Switzerland, Togo and Uganda
- The Committee on the Rights of the Child will hold its 39th Session from 16 May to 3 June 2005 in Geneva. The Committee will consider the State Reports of Ecuador, Bosnia Herzegovina, Nepal, Philippines, Norway, Nicaragua, Mongolia, Yemen, Saint Lucia and Costa Rica.

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