

LEGAL ASSISTANCE CENTRE
Constitutional and Human Rights Unit
Key Cases in 1999/2000

IMMIGRATION / CITIZENSHIP / REFUGEES – cases settled

Swart v Minister of Home Affairs: In this important judgement the High Court ordered the Minister of Home Affairs to grant the client citizenship on the basis of his long residence in Namibia. The effect is that all persons who were lawfully resident in Namibia on 1 April 1986 remain lawfully resident and need not apply for a residence or work permit. They are now also entitled to Namibian citizenship by naturalisation. The judgement affects a large number of persons, some of whom have been resident in Namibia for decades but nevertheless faced deportation.

Antonio v Minister of Home Affairs: An application was brought on behalf of the client, an Angolan asylum seeker whom the government intended deporting back to Angola. As a result the High Court directed the Minister of Home Affairs to consider his application for refugee status and interdicted the Minister from deporting the client pending his decision. This order is a recognition that the various refugee conventions to which Namibia is a party prohibits the government from deporting asylum seekers to their countries of origin without first deciding on their applications for asylum.

Deo Gahizi v Minister of Home Affairs: An application was brought on behalf of the client, a recognised Rwandan refugee, to compel the Minister of Home Affairs to grant his application for Namibian citizenship. He qualified for citizenship on the basis of marriage to a Namibian citizen, but the Ministry required him to renounce his refugee status first. The Minister did not oppose the application, recognising the correct legal position that the client would automatically cease to be a refugee on becoming a Namibian citizen, and a certificate of citizenship was granted.

Correia v Commanding Officer Windhoek Prison and Another: After the High Court ruled against his application for permanent residence, the client, an Angolan national married to a Namibian, was successful on appeal to the Supreme Court. The Supreme Court ruled that his detention by immigration officers was unlawful since at the time he was lawfully present in Namibia.

IMMIGRATION / CITIZENSHIP / REFUGEES – cases ongoing

Frank v Minister of Home Affairs: The client, a German national who has lived and worked in Namibia since independence in 1990, took her case to court after two applications for permanent residence had been rejected without reason. Her application was based on her professional qualifications, and her longstanding lesbian relationship with her Namibian partner. In her affidavit she pointed out that if she was involved in a heterosexual relationship with a Namibian citizen she would have been able to marry and thereby gain the constitutional right to reside in Namibia. Due to her sexual orientation this was not possible and she contended that the Ministry had violated her constitutional right to equality by not taking this factor into account. Ms Frank was successful in the High Court, which ordered the Minister of Home Affairs to issue her a permanent residence permit. The judge was highly critical of the Immigration Selection Board's failure to consider Ms Frank's impressive qualifications and contribution to Namibia, while taking into account irrelevant considerations. The government has indicated that it wishes to appeal against the ruling. It appears to be motivated more by political considerations than legal ones. (See CHRU page for an update on this case.)

Tihoro v Minister of Home Affairs: This case concerns the question of whether people wanting to become naturalised Namibian citizens need first renounce their existing citizenship. The LAC is arguing that the Constitution regulates the position and that the provisions of the Citizenship Act which purport to introduce such a requirement are not authorised by the Constitution. Not surprisingly, the government has opposed the application and the case is being argued in February 2000. (See CHRU page for an update on this case.)

OTHER CONSTITUTIONAL RIGHTS AND FREEDOMS – cases settled

M Muller v Minister of Home Affairs: The client applied to the High Court for an order authorising him to assume his wife's surname (Engelhard) without complying with any formalities. It is possible under Namibian law for a wife to change her surname to her husband's without formalities, but a man has to seek the permission of the Minister of Home Affairs, pay a fee to the Ministry and advertise his intention to change his name in a newspaper. The client therefore contended that he was being unfairly discriminated against on the basis of his sex, which is prohibited under the bill of rights. This was the first sex equality case to be heard by both the High Court and Supreme Court, both of which held that he had not been discriminated against. Mr Muller and his wife then made a communication to the Human Rights Committee under the International Covenant on Civil and Political Rights. The Committee will decide whether the Namibian law is contrary to the equality provision of the Covenant. This is the second communication submitted against Namibia.

S Gabriel v President of the Republic of Namibia: An application was brought on behalf of the client, who was detained as a President's Patient. People are detained as such if they are unfit to stand trial because being mentally ill they are unable to understand the court proceedings, and/or if they commit a crime while mentally ill. They are detained indefinitely until they are certified as no longer mentally ill. In this case the client was deemed mentally unfit to stand trial, and could thus not be tried for possessing a very small quantity of cannabis (the normal sentence being a fine). He was confined in prison for an indefinite period, despite his release not being a threat to society since he was not a danger to himself nor to others. He had already been detained for a year when the Unit applied to the High Court for his release and to declare unconstitutional the provision under which he was detained. After the application was brought, the Attorney-General conceded that the legislation was indeed unconstitutional and requested the Unit to draft amendments. The Unit will be drafting amendments to sections 77-79 of the Criminal Procedure Act, No. 51 of 1977; section 29 of the Mental Health Act, No. 18 of 1973; and other legislation as necessary to give effect to these amendments.

Chief Kapika v President of the Republic of Namibia: This important case concerned the right to assemble without first obtaining police permission. Since 1994 the LAC has been advising Chief Kapika and his Ovahimba community regarding their legal rights in respect of government's plan to build a hydropower scheme at the Epupa Falls on the Kunene River in the far north of Namibia, which would inundate numerous villages inhabited by the Ovahimba. (See Land, Environment and Development Project and the booklet titled *The Epupa Debate*.) A 1997 meeting between LAC lawyers and the Ovahimba clients was broken up by heavily armed members of the Namibian Police. The police had interpreted a consultation between a lawyer and his/her clients as being a public gathering, for which prior police consent is required. This view followed a statement by the Namibian President that prior police permission for holding public meetings would be required in future. The LAC launched an urgent application in the High Court, which handed down a final order against the government and police, confirming several important human rights principles. The Court ruled that the Ovahimba were entitled to meet with their lawyers without interference or harassment. Of more general application, the Court ruled that prior police permission is not required for holding public meetings. The government agreed not to enforce the legislation on which the police were relying, recognised that it unconstitutionally restricted the rights to freedom of assembly and speech as

enshrined in the bill of rights, and undertook to amend the offending legislation to bring it in line with the Constitution.

L Byhl v A Thompson: This case illustrates the tendency to treat farm workers inhumanely. The client was shot by the farmer for whom he worked following a minor disagreement between them. He was then left in the sun for two hours before receiving medical treatment. The case ended successfully when the farmer agreed at the doors of court to pay N\$10 000 in settlement.

Julius v Commanding Officer Windhoek Prison and Another; Nel v Commanding Officer Windhoek Prison and Another: In this case brought on behalf of two clients who were detained in the Windhoek Prison for lengthy periods for debts, civil imprisonment of debtors was declared unconstitutional.

OTHER CONSTITUTIONAL RIGHTS AND FREEDOMS – cases ongoing

T Namunjepo v Commanding Officer Windhoek Prison: The client and four other prisoners were placed in leg irons or chains by prison officials at the Windhoek Prison, for escaping or attempting to escape. They were held in this fashion for about four months. They were released as a result of an application brought by the Unit on their behalf, on the grounds of their contention that their placement in irons or chains was inhumane and degrading treatment in violation of the bill of rights. The case was reported to the UN Special Rapporteur on Torture in Geneva before the hearing in the High Court. The Special Rapporteur's view as conveyed to the Ministry of Foreign Affairs was that the placing of prisoners in leg irons or chains contravenes international law and is degrading treatment or punishment. Despite this, the High Court ruled against the clients, but on appeal the Supreme Court ruled that chaining prisoners in leg irons or chains is unconstitutional. The Ministry of Prisons and Correctional Services will therefore have to stop chaining prisoners. The Unit has also instituted civil claims against the Minister of Prisons and Correctional Services on behalf of 16 other prisoners held in leg irons or chains, the claims amounting to N\$2 875 000. The Supreme Court ruling means that only the amount of damages can be disputed, not whether the Minister is liable. (See CHRU page for an update on this case.)

State v Sheehama: The client is a renowned Namibian reggae musician and an adherent of the Rastafarian faith. He was prosecuted for possessing a very small quantity of cannabis. He admitted possession, but argued that his conviction would violate his right to freedom of religion and belief, because cannabis use is integral to the religious observances of Rastafarians. He was nevertheless convicted, but the case is presently before the High Court on appeal.