

28TH AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION

UNIVERSITY OF BOTSWANA, 1-7 JULY 2019

HYPOTHETICAL CASE

before the African Court on Human and Peoples' Rights

in the case between

Leave Us Alone (LUA)

and

The Republic of Bentaria

- 1 Bentaria is a small landlocked country in Southern Africa with a fast-growing economy, which is envied by its neighbouring countries and their people. It is bordered on the east by the Republic of Zabalía and on the south-west by the Republic of Peradila. On the west side it is also bordered by Zeuta, a small enclave of Zabalía located inside Peradila. Bentaria has a per capita gross national income (GNI), using the World Bank Atlas method, of US \$12 000 in 2016, and an economic growth rate of 2,4 per cent per annum. It has thus been categorised as an upper middle-income developing country. Bentaria has a very well-developed health care system. It has rolled out a comprehensive prevention of mother-to-child-transmission treatment (PMTCT) programme, with close to 95 per cent of pregnant mothers receiving this treatment. Its anti-retroviral (ARV) treatment programme covers close to 80 per cent of those eligible for treatment. As a consequence the HIV infection rate among the population aged 15 years and older has reduced from 15 per cent in 2005 to 8 per cent in 2015. Its main sources of income are diamond mining, beef production and tourism. Bentaria is an active member of the United Nations (UN) and African Union (AU). Since his ascendance to the presidency, President Frederick Robaliano has made public statements, including at the United Nations in New York in November 2016, that his government is committed to the principles of international law enshrined in the UN Charter, particularly the protection of human rights.
- 2 Bentaria obtained its independence from Britain in 1966 and has had peaceful changes of government since then in accordance with the 1966 Republican Constitution. It has consistently prided itself as a county in which the rule of law prevails, and an effectively-functioning judiciary is in place. The Constitution of the Republic of Bentaria contains civil and political rights and, in that respect, mirrors the provisions of the European Convention on Human Rights. While the Constitution makes no reference to the position of international law in the country, the Court of Appeal has made it clear that Bentaria is a dualist state, holding that treaties that have been ratified by the state do not form part of domestic law unless specifically domesticated. The Court of Appeal further held that principles of customary international law form part of the domestic law to the extent that they are not incompatible with any provisions of domestic legislation. According to the Constitution, all constitutional law matters are to be initiated at the High Court of

Bentaria with the final say over such cases lying with the country's highest court, the Court of Appeal.

- 3 Bentaria has ratified the following international instruments: the International Covenant on Civil and Political Rights (ICCPR) (in 1993); the International Covenant on Economic, Social and Cultural Rights (ICESCR) (in 1993); the Convention on the Rights of the Child (CRC) (in 1997); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (in 1998); the African Charter on Human and Peoples' Rights (African Charter) (in 1986); the African Charter on the Rights and Welfare of the Child (African Children's Charter) (with a reservation to article 2) (in 2000); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) (in 2004); the AU Convention on Preventing and Combating Corruption (in 2004); the 1951 Refugee Convention and the 1967 Protocol thereto (in 1977); and the AU Charter on Democracy, Elections and Governance (in 2017). In 2001 Bentaria ratified the 1969 OAU Refugee Convention and immediately passed enabling legislation, in the form of the Refugee Act of 2001, containing the exact provisions of the OAU Refugee Convention. Bentaria ratified the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights in 2015, and its Parliament approved a declaration in terms of article 34(6) of this Protocol on 2 August 2017. The AU Commission recorded the deposit of this declaration on 30 July 2018. It did not sign or ratify any other potentially relevant instrument. Despite the array of international and regional human rights instruments ratified by Bentaria, its Criminal Code, inherited from the British colonial administration, still contains a provision on 'offences against the order of nature', which has been widely used as the basis to convict persons engaged in consensual same-sex relations. However, the last recorded conviction for such an offence dates back to 2000.
- 4 Bentaria has a population of two million people, made up of various ethnic groups. The main ethnic group is the Balo tribe, which has since independence dominated Bentarian politics. The Bentaria Democratic Party (BDP) has been in power since independence. All the former Presidents of Bentaria have been from the Balo tribe except for the current President, Frederick Robaliano, who comes from the Merando tribe. The main opposition party, the Bentaria Republican Party (BRP), never secured more than 30 per cent of the seats in Parliament. In addition to the BDP and the BRP, there are a few smaller political parties without much influence. The country has enjoyed a stable democratic political system characterised by regular free and fair elections and a free press. It has a vibrant civil society. One of the most prominent human rights organisations in the country is called Leave Us Alone (LUA). LUA, which advocates human rights in Bentaria and internationally, has observer status with the African Commission on Human and Peoples' Rights (African Commission), as well as the African Children's Committee, and has filed a number of complaints with the African Commission alleging human rights violations by certain member states of the AU. The political system is tolerant and accommodative of different political viewpoints. However, for the past two years the media has criticised the ruling party of President Frederick Robaliano, the BDP, of suppressing the press and engaging in corruption.

- 5 Bentaria and Peradila have maintained close and friendly relations, but have retained a closed border, with visas being required for nationals of each of the two countries to enter the other country. Peradila had a per capita GNI, using the World Bank Atlas method, of US \$1 200 in 2016, and has for the last few years experienced economic growth of around 0,5 per cent per annum. According to UNAIDS, the HIV infection rate in Peradila is 13 per cent of the population above the age of 15 years. Very limited HIV treatment is available, with about 50 per cent of pregnant mothers receiving treatment to prevent MTCT, and about 25 per cent of those eligible for ARVs actually receiving the treatment. Zabalía, a densely-populated and largely agrarian country, has maintained friendly relations with its two neighbours. Its GNI, measured according to the above-mentioned method, is around US \$600.
- 6 In the run-up to the 2017 general elections in Peradila, scheduled to take place on 1 August 2017, the leader of the main opposition party in Peradila, the Peradila Freedom Fighters (PFF), Dr Joseph Papaliano, accused the ruling party, Movement for Change (MFC), of using public funds and property for campaigning. The country has no system of political party funding and every political party has to fund its own campaign. According to opinion polls conducted by an independent think-tank, published on 1 July 2017, the MFC and PFF enjoyed almost equal support among likely voters. Dr Joseph Papaliano accused MFC of electoral malpractices including voter trafficking, providing evidence that people have been ferried to register in constituencies that are traditionally the stronghold of the opposition parties. As election day grew closer, the political parties intensified their campaigns. Accusations, counter-accusations, incidences of fighting and disturbances by members of different parties at political rallies were widely reported. Police were sent to quell the disturbances. A local newspaper reported that members of the opposition parties and people belonging to minority ethnic groups were beaten up by the police; and at least ten instances of 'disappearances' of well-known government critics were reported. A prominent opposition blog showed what appeared like 20 men being summarily executed and thrown into a mass grave. The Secretary-General of the MFC rejected these accusations as baseless. In the week just before the election, some members of the media were arrested for supposedly inciting violence and civil disobedience. The election ended in a resounding victory for the MFC. Although the PFF contested the election results as not reflecting the 'will of the people', as a result of strict security measures and a continuous high level of police presence, popular protests dissipated. However, Dr Joseph Papaliano promised not to 'rest until we have gained the power that is ours'. Sporadic and isolated guerilla-style attacks on the MFC headquarters and MFC offices throughout the country continue to this day, but other forms of violence have largely ceased. At least five journalists arrested just before the election remain in detention.
- 7 From the start of August 2017, thousands of people fled Peradila individually and *en masse* into neighbouring Bentaria. Upon arrival at the border between the two countries, they requested asylum. Some of those fleeing from Peradila entered Bentaria through Zeuta. In terms of a 'safe third country' agreement between Peradila and Zabalía, persons seeking refugee status must make their claim in the first country they arrive in, either Peradila or Zabalía, unless they qualify for an exception. There are two exceptions, namely, for 'unaccompanied minors' and 'in the public interest'.

Nationals of Peradila may enter Zabalia without a visa, and may remain legally in the country for up to 60 days. The Bentarian border authorities denied all those requesting asylum entry into the country. They put them on police trucks and took them back to Peradila, only for many of them to return illegally to the country through unofficial entry points. On 15 September 2017, the police arrested 1 350 undocumented Peradilians in Bentaria (all over the age of 18, a third of them women) and put them in police cells and detention centres, where they have remained up to the present. At a subsequent press conference, the Bentaria Minister of the Interior said that these arrests should 'send a signal to prospective so-called asylum seekers who abuse the process'. In response to questions, he indicated that there was no more space for asylum seekers in any of the three designated 'refugee camps' in the country.

- 8 A few weeks after the massive inflow of people from Peradila, the number of children living on the streets of the capital city of Bentaria rapidly increased. The children were unaccompanied and had no documents on them to show their nationality. As the numbers grew, especially in the affluent central business district, rumours began to spread all over the city that these children were thieves, and were causing insecurity in the city. These rumours further intensified when a group of children broke into a grocery store one evening, vandalised the store, and looted foodstuff. During this period, one of the most popular morning radio shows hosted a call-in session on the issue of thieves on the streets of the capital. Many Bentarian citizens called in to the show and generally voiced their dislike for the 'new street urchins', 'thieves' and 'prostitutes' from Peradila. The mayor of the city also called in and said that 'those street urchins are criminals. We shall deal with them accordingly, and clean our city.' The mayor also pointed out that the Bentaria Children's Act of 2007 mandated local authorities in Bentaria to take any children without parental care into state custody for their own care and protection.
- 9 The following morning the city authorities, accompanied by Bentarian police, rounded up all the children and a few adults from the streets and placed them in police trucks. They were taken to a holding facility, which had formerly served as military barracks. The mayor said that the holding facility was a temporary arrangement as they were searching for other facilities to accommodate the children, since they had neither anticipated their arrival in such large numbers, nor needed such facilities in the past. The barracks had one large and open dormitory where all the children and adults were accommodated. The management, however, put the boys and girls on opposite ends of the dormitory. The children were provided with sufficient food, hygiene facilities, access to a health dispensary, and a basic library where they could study. A few days into their stay at the facility, some of the girls complained of sexual harassment by the other residents of the facility, especially when they went to use the bathrooms. However, the manager of the facility dismissed the complaints, arguing that the children were poorly behaved and were just causing trouble. In any case, he said, the girls were of marriageable age according to the customs of Bentaria, and were free to get married and leave the facility. LUA visited the children in the

holding facility and took note of their complaints. In January 2018 LUA instituted an urgent application at the High Court of Bentaria on behalf of the children, to contest their detention, as well as on the conditions of their detention. Their case, however, was dismissed, as the High Court determined that LUA had no standing to bring the case on behalf of the children. LUA appealed the decision of the High Court to the Bentaria Court of Appeal, which in June 2018 upheld the decision of the High Court.

- 10 Khali Bozozo is a successful dentist and (in)famous lesbian, gay, bisexual transgender and intersex (LGBTI) activist from Peradila who has been campaigning for the repeal of anti-sodomy laws and the enactment of specific laws against LGBTI discrimination in Peradila. In September 2017 Bozozo was on a business trip to Bentaria when upon arrival at the airport he read on the news that security forces in Peradila had raided his house in search of him on charges that he was contravening the laws of Peradila for his LGBTI activism 'which did not advance any African values'. Upon hearing this news, he immediately applied for refugee status at the airport in Bentaria. In his application he indicated that he had been specifically targeted by the Peradila officials for identifying as a gay man. In fact, he had earlier been quoted in a Peradila local newspaper as saying that he was 'born gay' and that he advocated the rights of gay people in Peradila.
- 11 Bozozo was sent to Camp Landi, the biggest of the three 'refugee camps' in the country, run by the United Nations High Commissioner for Refugees (UNHCR), in collaboration with the government of Bentaria. While at Camp Landi, Bozozo joined other LGBTI persons at the camp on a peaceful protest against the fact that many members of the LGBTI community at the camp had experienced violence by others in the camp against their person because of their real or perceived sexual orientation and gender identity, but nothing had been done to the perpetrators. When complaints about the violence were lodged, the local management of the UNHCR, working with the Bentaria government, provided segregated housing for members of the LGBTI community at the camp to limit their interaction with the general population, which exposed them to violence. However, occasional protests continued about the deplorable conditions of the segregated housing, which is inferior to the housing in the rest of Camp Landi.
- 12 After waiting for many months, Bozozo's application was rejected by the Bentarian Status Determination Committee (BSDC), which indicated that his grounds for requesting asylum or refugee status fell short of the requirements of the domestic legislation, namely, the Refugee Act of 2001. Bozozo subsequently instituted an appeal to the BSDC Appeals Body, which was also rejected. The Appeals Body gave Bozozo seven days to leave the country or to be forcibly removed by Bentarian immigration authorities, subject to the power of the Minister of Home Affairs to grant clemency in such cases. On 1 January 2019, Bozozo was returned to Peradila after a protracted process to secure clemency

had finally failed. Upon his return to Perdila, Bozozo went into hiding and has since refrained from engaging in any LGBTI activism.

- 13 A general election in Bentaria was scheduled to take place on 30 October 2018. This date is the last date on which the election could be held, according to constitutional prescriptions. Ferana Ditori is a well-known journalist working for a Bentarian private newspaper, *The Sun*, which has been covering the security situation in Bentaria in the run-up to the general election. On 10 October 2018 *The Sun* carried an article, authored by Ferana Ditori, with the title 'Bentaria on fire: The police wreak havoc at opposition campaign rallies'. The Minister of Information, Colonel Sergio, issued a statement aired on Bentaria National Television (BNTV), a state-owned television station, denouncing *The Sun's* report, and Ferana Ditori, the journalist who wrote the story. In his statement Colonel Sergio further accused *The Sun* and its editors of inciting the public into violence and giving terrorists the platform to commit acts of terrorism against his country under the pretext that they are campaigning for elections. He indicated that the government would sternly address the situation and force those responsible to comply with the law.
- 14 Ferana Ditoria was invited to participate in a conference on freedom of expression in Razavia, a state in North America, and to speak at a few universities in Rezavia on the situation in Bentaria. She also planned to visit the offices of the Razavian newspaper, *The Schweritz*, to which she had over the years been a regular contributor, reporting on events in Bentaria. Ferana Ditoria has a well-known flying phobia and therefore booked a trip on a ship, the North Star, which departs on the 17th day of each month from the main harbour in neighbouring Peradila for the 10-day journey to Razavia, with the return trip on the fifth day of the following month. The North Star is registered in Bentaria. To secure a good deal, Ditori booked her trip directly through the company that owns the ship, Sergio Travels, a company owned by the brother of the Bentarian Minister of Information. She booked a ticket for departure on 17 October 2018, with the return trip on 5 November 2018. There are 100 passengers on the North Star which, apart from carrying paying passengers from Peradila to Razavia, also carries provisions to the isolated island of Luf where it briefly stops on 23 October. Ditori reserved a single cabin and mainly kept to herself during the journey. However, several times a day she provided updates on social media where she reflected on the political situation in Bentaria. Her last social media post was on 25 October at 16:00 Bentaria time (11:00 at the position the North Star was at this time, in international waters, two days before its arrival in Razavia). When Ditori did not arrive at the conference as scheduled on 28 October, the organisers contacted the editor of *The Sun* who expressed his surprise as he knew how much she had looked forward to her trip to Razavia to campaign for improvement in the situation of human rights in Bentaria.
- 15 On 29 October *The Sun* published an article about the matter in which it blamed the government of Bentaria for the disappearance of Ferana Ditori. The article in

The Sun was followed by countrywide demonstrations in Bentaria and worldwide condemnation. Countries that condemned Ferana's disappearance included Razavia which issued a public statement on the matter and effectively said that the blame lay squarely at the door of the Bentarian government and called on Bentaria to thoroughly investigate her disappearance. On 1 November *The Schweritz* published a photo allegedly taken by one of the passengers on the North Star on 25 October. The photo had been taken in the dark and was grainy. The photo appeared to have been cropped to focus on the three figures in it. Two of the persons were wearing what seemed to be Bentarian army uniforms. The third person was a woman who resembled Ferana Ditori. In the photo the three persons appeared to be engaged in a heated discussion. Bentaria refused to launch an investigation saying that they thought Ferana Ditori did arrive in Razavia and that, in any event, it was not their duty to investigate what happened on a ship that was on its way from Peradila to Razavia. They referred to the *Toxic* case where the Court of Appeal of Bentaria in 2010 held that it did not have jurisdiction in a case dealing with the dumping of hazardous waste on the high seas by the North Star.

- 16 Bentarian media reported that the police had arrested several persons during demonstrations following the disappearance of Ferana Ditori. One of the persons arrested was Weino Pi, the Secretary-General of the LUA. LUA's call for the unconditional release of Weino Pi failed to secure his release from police custody. When asked by the international media about the state of affairs in his country, President Frederick Robaliano said that 'everyone reaps what they sow'. LUA, however, has vowed to ensure that Weino Pi is released from police custody.
- 17 Meanwhile, on 23 October 2018 the government announced that it had indefinitely suspended the general elections, citing country-wide disturbances and demonstrations. It stated that the political climate was not favourable for the conduct of a free and fair election. The government also blamed political opposition members for hijacking the electoral process. A new date for the election has subsequently been set for 30 November 2019.
- 18 LUA engaged in a vigorous advocacy campaign protesting the detention of its Secretary-General and the disappearance and possible killing of Ferana Ditori by the government. The government vehemently denied all the allegations levelled against it. However, a few days later Weino Pi was released. As a result of the media coverage, asylum seekers in Bentaria approached LUA to file an application at the High Court of Bentaria for their release from police cells and detention centres, and to argue that their detention was contrary to international law and obligations of Bentaria contained in international human rights instruments. This application was submitted on 30 November 2018. In a separate application, submitted on 1 December 2018, LUA applied to the High Court for an order for Bentaria to release information on the whereabouts of Ferana Ditori and other people arrested during the demonstrations. Bentaria filed documents in

opposition to the applications. However, to date no dates have been set for the hearing of the applications in Bentaria.

- 19 On 10 May 2019 LUA submitted the following matters to the African Court on Human and Peoples' Rights, requesting it to make the following findings:
- (i) Bentaria violated the African Charter and other international human rights norms by 'disappearing' Ferana Ditori.
 - (ii) Bentaria violated the provisions of the African Charter and other relevant human rights instruments in its treatment of people who fled from Peradila to Bentaria.
 - (iii) Bentaria violated the provisions of the African Charter and other relevant international human rights law in its treatment of the children found on the streets.
 - (iv) Bentaria violated the African Charter and other relevant international human rights law by its treatment of Khali Bozozo.

The case has been set, on the basis of urgency, for hearing in July 2019. Prepare memorials on behalf of LUA and the Republic of Bentaria. In each instance, deal with jurisdiction, admissibility, the merits and the appropriate remedial order.