Legal Brief:

Malawi: Ruling on a judicial review application to access safe abortion

Case citation: The State (On the Application by HM (Guardian) on behalf of CM (Minor) vs The Hospital Director of Queen Elizabeth Central Hospital & The Minister of Health: Judicial Review Cause Number 03 of 2021 (unreported) (High Court of Malawi, Zomba District Registry) Decision of 15 June 2021 (Google drive link)**.**

Court ruling

The High Court of Malawi (the Court) ruled that an application for judicial review against the Hospital Director of Queen Elizabeth Central Hospital (QECH) (1st Defendant) denying the Applicant access to safe abortion in terms of the exception provided for under Section 243 of the Penal Code would not be granted. This is because the Applicant had not demonstrated that there was a decision made by the 1st Defendant denying the Applicant access to lawful abortion under the said provision.

Summary of facts

The Applicant, a 15-year-old girl and student, got involved in a sexual relationship with an adult man. (According to Section 138 of the Penal Code, a person who has sexual intercourse with a girl of below 16 years of age, commits the offence of defilement). In December 2020, the Applicant realized that she was pregnant. The Applicant left her home to stay with the man who had impregnated her, but after a few days he took and left her at her home village. He did not provide any support to the Applicant.

The Applicant reported the matter to Police. The Police referred her to the One Stop Centre (OSC) (a facility established to provide comprehensive care to survivors of sexual abuse) at Queen Elizabeth Central Hospital (QECH). It is there that the Applicant expressed the wish to terminate her pregnancy. However, she was informed by the health providers that they do not perform such procedures because termination of pregnancy is illegal under Malawian law. According to the Applicant, she suffered the consequences of the trauma of having been abandoned after being sexually abused and becoming pregnant as a result. Her mental and physical health deteriorated, and she even contemplated committing suicide.

Being dissatisfied with the response from QECH, the Applicant and her family sought legal advice. They were advised that although termination of pregnancy is criminalized under Sections 149, 150 and 151 of the Penal Code, Section 243 of the same Penal Code makes exception by allowing the termination of a pregnancy if it is necessary to preserve the mother's life. They were further advised that the Applicant qualified for a legal termination of her pregnancy considering her circumstances.

The Applicant, therefore, decided to commence this application for judicial review, to challenge the decision of the health providers denying her access to lawful abortion when she was an eligible candidate under the law. The application was against the Director of QECH (1st Defendant) and the Minister of Health (2nd Defendant). She contended that the decision of the 1st Defendant refusing safe termination of her pregnancy was unlawful as it contravened section 243 of the Penal Code, and further that it was unreasonable in the *Wednesbury* sense. The Minister of Health was made a second defendant because the decision to refuse termination of pregnancy by the 1st Defendant is based on policies for which the Minister is responsible.

Issues before the Court

The main issue for determination by the Court was whether the Applicant should be granted permission to apply for judicial review of the decision of the Director of QECH (through his subordinates at the OSC) denying her safe termination of her pregnancy. Under Malawian law, one has to obtain the Court's permission to make a substantive application for judicial review. To resolve this issue, the Court was required to determine if the 1st Defendant had made a decision that was susceptible to judicial review.

Court's analysis

The Court started by pointing out that leave for judicial review hinged on whether the Applicant had demonstrated that there was in fact a decision by the 1st Defendant denying her access to lawful abortion. In her application, the Applicant had indicated that she had gone to QECH to seek termination of her pregnancy. However, in his defence, the 1st Defendant produced medical records of the Applicant which did not indicate at any point that the Applicant had made a request for legal abortion, and that such request was then denied by the 1st Defendant. This was a critical fact on which the Court based its refusal to grant permission for a judicial review. Failure to demonstrate the 1st Defendant's decision denying her safe abortion meant that, technically, there was no decision for the Court to review. This was significant because Order 19, Rule 20(1) of the Courts (High Court) (Civil Procedure) Rules, 2017, which provides the statutory basis for judicial review, states that judicial review covers, *inter alia,* "a decision, action or failure to act in relation to the exercise of a public function…" The Court interpreted this section as requiring that "there must be a decision, actually communicated to the applicant".

The Court further reasoned that, to benefit from section 243 of the Penal Code, the pregnant person must "expressly" make a request to a medical officer for termination of her pregnancy and must state how the pregnancy affects her mental or physical health. In the words of the Court, "the medical practitioner cannot on his own motion apply the provision of Section 243 of the Penal Code against a patient." If the medical practitioner acts on his/her own, such conduct would not be "in good faith" as required under section 243 and would be unreasonable. Upon such a request, the medical practitioner evaluates the pregnancy for preservation of the life of the mother. On this, the Court found that the medical records

produced in evidence by the 1st Defendant did not show that the Applicant had made a request for termination of the pregnancy.

The Court also held that even if the Applicant had shown that the 1st Defendant had made an unlawful decision against her, leave for judicial review would have been denied because the Applicant had already pursued available alternative criminal and civil remedies against the man who made her pregnant; that is, she had lodged a complaint with the Police for sexual assault and sued the perpetrator for child maintenance. Therefore, the Court indicated that the Application would have failed on this ground.

The Court further expressed concern that the Applicant did not produce a medical report proving that the pregnancy had put her physiological wellbeing at a health risk.

Court's decision

Permission for judicial review was denied.

Significance

Although the Court did not grant the judicial review, this ruling is a milestone, as it marked the very first instance that the High Court of Malawi has acknowledged and discussed the position that abortion can be lawfully performed in Malawi. The ruling also reveals some challenges that Malawian girls and women face in accessing lawful termination of pregnancy, and that they are forced to keep pregnancies that are a result of sexual assault because the law is interpreted restrictively.

The Court's reasoning that, as a minimum, an applicant for leave for judicial review must demonstrate a decision by a public body/official that has to be reviewed, cannot be faulted. It reflects the current state of the law, both under statute and Common law. However, the application of that principle to the facts reveals some of the challenges that women who want safe abortion services face when interacting with medical and health practitioners. Their requests may not be recorded, and decisions refusing termination are communicated orally. The applicant likely made the request orally, and her request was also orally turned down. According to the Court, a woman must make a formal request and the decision of the health provider must be recorded. This would mean bureaucratic paperwork that would constitute a barrier to women.

It would be almost impossible for advocates to find a client that would make the ideal test case because girls and women who seek abortion are told verbally that it is not provided. The legal team knew about the potential deficiency, but advised the client to still try, hoping that the Court would not deny the client a judicial review just because decisions to deny women lawful abortion are not normally recorded by the health provider.

It should also be noted that in Malawi people use health passport books, which record one's medical history over time. Recording a request for termination of a pregnancy and official response thereto would be prejudicial to women. Any person who has access to the health passport (for instance, future medical or health practitioners) would learn that the woman previously requested abortion for a pregnancy. Very few women or girls would have the courage to have such requests officially recorded in their health passport books.

The Court's reasoning that the Applicant had pursued alternative remedies, and therefore could not pursue judicial review is misplaced. Criminal proceedings against the Applicant's defiler are instituted and prosecuted by the State, and not the applicant. She is merely a "complainant" and has no control over those proceedings. She cannot withdraw or stop the proceedings. She only participates as a witness and may be compelled to testify against the accused person. Those proceedings are not an alternative remedy to the judicial review proceedings, which are against a public body. Lawful termination of pregnancy where the life of the mother is in danger cannot be substituted with the criminal proceedings against sexual predators. It is ridiculous to suggest that victims of sexual violence must not report their ordeals to police as a precondition to access safe abortion services. Likewise, the fact that a woman is trying to hold a person responsible for her pregnancy cannot be treated as an alternative to lawful termination of a pregnancy which threatens the woman's life.

Further, the Court was wrong to suggest that medical practitioners cannot proceed under section 243 of the Penal Code unless the woman expressly requests termination and demonstrates that the pregnancy threatens her life. The Section actually reads:

Section 243 of the Malawi Penal Code
A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

Such a suggestion is contrary to the true purpose and intent of the section. Technically, the section is not permissive of lawful termination of pregnancy, but rather it supplies a defense to a person accused of terminating a pregnancy under section 149 of the Penal Code. The person escapes liability by showing that s/he performed a surgical operation on a woman (a) in good faith; (b) with reasonable care and skill; (c) for the preservation of the mother's life; (d) and that the operation was reasonable having regard to the woman's state at the time, and to all circumstances of the case. Such a procedure can be performed to preserve a mother's life even where the woman is unable to consent or incapable of giving consent. To interpret the section as requiring that the woman must herself make the request and also demonstrate how the pregnancy threatens her life is a gross misreading of the provision. Moreover, most girls and women may not have the medical expertise to know how the pregnancy threatens their life.

In the ruling, the Court uses language that suggests that it recognizes that preservation of the life of the women entails preserving her mental and physical health. This is progressive on the part of Court and a pointer to an interpretation that conforms with the consensus in the human rights discourse that the rights to health and life are closely related.

Malawi adopted its abortion provisions from old English legislation that existed before 1930. Just as it was in England before 1937, the meaning of the abortion provisions in Malawi's Penal Code 1930, as read with the exception under Section 243, has been interpreted differently by health providers. Most health providers interpret the provisions restrictively to automatically exclude pregnant children, although their physiological and psychological immaturity puts them at an increased risk to health and life. Girls and women who have unwanted pregnancies because of rape or sexual assault, such as the Applicant in this case, have also been automatically excluded from accessing legal abortion.

However, the Court's ruling also contains specks of light that there is still room for further litigation on the interpretation of the law for sexually assaulted or defiled women or girls who fall into a grey area. Advocates should advise women who believe they are eligible to access safe abortion to make the request and to require the health provider to record the decision in writing, not necessarily in their health passport, which could then provide a stronger basis for a judicial review.

It is fortunate that the Court did comment briefly on the abortion law even though the issue it had to deal with was whether or not to grant permission for the judicial review. Advocates are now able to discuss something about the abortion law in Malawi through the perspective of a court's opinion. However, since the Court made those comments beyond the issue that it determined, that is, the judicial review question, the Court's comments on the abortion law are not legally binding on lower courts, because these were the Court's opinion aside from the permission to grant judicial review. This, however, does not mean the Court's opinion is worthless, because these pronouncements were made by an authoritative body and might influence how other courts and tribunals would approach interpretation of the abortion law if a similar case came before them.

The Malawi Law Commission, following its review of the colonial abortion law [1], proposed liberal changes which, if implemented, would expand access to safe abortion. However, the urgent step that the Ministry of Health ought to take is to clarify the current abortion law, whether through judicial review, guidance for healthcare staff, or any other means, and not to wait for a new law to materialise in the indeterminate future.[2]

Indeed, in 2020, Malawi's Ministry of Health issued ***Standards and Guidelines for Post Abortion Care*** [3] that interpret the law on abortion in Malawi for health providers. However, a reading of these guidelines, especially section 1.2, shows that it still is not clear whether a girl or women who becomes pregnant because of sexual violence can access safe termination legally. The Ministry of Health ought to indicate clearly that any girl or women who is pregnant because of sexual violation should have an option to terminate the pregnancy

to preserve her life and health, without being subjected to burdensome requirements such as proving severe depression or suicidal ideation.

Meanwhile, we also recognize the limitations of the current law which, even if would be interpreted liberally, would still be restrictive because the law was never based on Malawi's international obligations to respect the full sexual and reproductive rights of women. Health advocates, therefore do well to champion the reform of the law, including to challenge the constitutionality of the current abortion provisions in court.

RELATED RESOURCES:

[1] Malawi Law Commission. Report of the Law Commission on the review of the law on abortion (Penal Code CAP.7:01 of the Laws of Malawi). Lilongwe: Malawi Law Commission; 2015. Report online.

[2] See also: Godfrey Dalitso Kangaude and Chisale Mhango, "The Duty to make abortion law transparent: A Malawi case study" *International Journal of Gynecology and Obstetrics* 143.3 (Dec. 2018): 409–413, Published Version at IJGO . Submitted text online at SSRN.

[3] Ministry of Health, Malawi, Standards and Guidelines for Post Abortion Care 2020. 43-page document.2020 edition online.

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