

proffered by the plaintiff which showed that the vaccine and drug appeared to be effective. Much as the Court could not be the arbiter of claims better suited to an institution of immunology or science, the Court was impressed by the failure of the government to controvert the plaintiff's evidence. But, this is really as far as the legal issues could go. The case tells us little or nothing about the scientific truth or evidence behind the vaccine or drug, and instead demonstrates how the politics of HIV/AIDS played out among the various actors, including Dr. Abalaka as an innovator and the government as the regulator of vaccines and drugs. Obadare and Okeke ably discuss these politics in their article entitled "Biomedical loopholes, distrusted state, and the politics of HIV/AIDS 'cure' in Nigeria."<sup>97</sup>

Whether or not there was scientific truth to his vaccine or cure, Dr. Abalaka carried the day in Court because the government had banned his scientific research without any legal ground or rational justification.

***Dickson Tapela & 2 Others v. Attorney General & 2 Others***  
**[2014] MAHGB-000057-14**  
**Botswana, High Court**

### **COURT HOLDING**

The refusal to provide Highly Active Antiretroviral Therapy (HAART) to treat HIV in the applicants violates the applicants' rights under Sections 3, 4, 7, and 15 of the Botswana Constitution.

The refusal to provide HAART is a breach of respondents' duty to provide basic health care services for inmates in the respondents' care under the Prisons Act, Section 57(1).

### **Summary of Facts**

Three applicants brought this action against the Botswana Attorney General, Ministry of Health, and Ministry of Justice, Defence and Security. Two were Zimbabwean nationals seeking review of a prison's denial of non-citizen inmates' entry into HAART. HAART was made available to citizen inmates. The third applicant was a non-governmental organization advocating for the rights of people living with HIV/AIDS and other marginalised groups. The applicants alleged that the exclusion of non-citizens from the HAART program violated constitutional protections, national HIV/AIDS policy and the prison's duty to provide health care services to inmates.

### **Issue**

The issue put before the Court was the following:

Whether non-citizens' exclusion from the HAART program violated the constitutional protections of the right to life under section 4, the right not to be subjected to inhuman and degrading treatment under section 7, and the right to non-discrimination under section 3 and 15.

### **Court's Analysis**

The Court held that HAART is not only a medical necessity but a lifesaving therapy, the withholding of which will take away a constitutionally guaranteed right to life. HAART keeps HIV mutation in check

and drastically reduces the recurrence of opportunistic infections in HIV positive people. Withholding HAART would enable HIV to replicate and relegate the applicants to the terminal stage of AIDS, drastically increasing the likelihood of death.

The Court held that the exclusion of non-citizen inmates from HAART can only be justified under section 15 of the Constitution if it is reasonably justifiable in a democratic society and in the public interest. It referenced *Unity Dow v. The Attorney General 1992 BLR119*, where the Botswana Court of Appeal stated that Botswana must abide by international standards of conduct unless it is impossible. Therefore, the standards required by the articles of the African Charter on Human and People's Rights apply. Article 2 requires the signatories to take the necessary measures to protect the health of their people and to ensure they receive medical attention. These standards do not allow discrimination against non-citizen inmates.

The Prisons Act, Section 57(1) imposes a duty on a medical officer to take measures to restore the health of prisoners and to prevent the spread of disease. Denial of HAART to non-citizen inmates would likely create a cycle of infection of HIV/AIDS-positive non-citizen inmates by opportunistic infections that may in turn infect citizen inmates.

## **Conclusion**

The Court set aside the decision of the authorities not to provide HAART to non-citizen inmates, and ordered that the applicant inmates and all other non-citizen inmates in a similar predicament be enrolled in the HAART program.

## **Significance**

See Court of Appeal case below.

***Attorney General and Others v. Tapela and Others; In re: Attorney General and Others v. Mwale***  
**CACGB-096-14, CACGB-076-15 [2015] BWCA 1**  
**Botswana, Court of Appeal**

## **COURT HOLDING**

The decision by the authorities to withhold HIV/AIDS treatment from foreign inmates when citizen inmates are receiving free treatment is unlawful and contravenes the Prisons Act and Regulations.

The decision to withhold HIV/AIDS treatment from foreign inmates based on the fear that foreigners may use this as a way to access free antiretroviral treatment is not irrational.

## **Summary of Facts**

The Attorney General had filed an appeal in two cases. In the first case, the applicants brought an action before the High Court of Botswana against the Botswana Attorney General, Ministry of Health, and Ministry of Justice, Defence and Security. They sought review of a prison's denial of non-citizen

inmates' entry into Highly Active Antiretroviral Therapy (HAART) program for treating HIV/AIDS. The program was made available to citizen inmates only. Sechele J had decided in the applicant's favour and issued orders including that non-citizen inmates be enrolled in the prison's HAART program.

In the second case, the applicant, a Zimbabwean national serving a prison term, brought an action to enforce Sechele J's order, after he was denied enrollment in HAART. In his ruling, Dingake J had issued a directive compelling the relevant authorities to provide antiretroviral treatment to the applicant.

These were the two matters against which the Attorney General was appealing.

## Issues

The issues that the Court isolated for determination were:

1. Whether the decision of the authorities to withhold free HAART from foreign prisoners, while making it available to citizen prisoners, was unlawful for being *ultra vires* (exceeding the powers granted under) the Prisons Act, Cap. 21:03 (the "Prisons Act"); and
2. Whether the decision of the authorities was irrational.

## Court's Analysis

The Court's view was that the matter could be fully determined by interpreting and applying the Prisons Act and the Regulations made under it, so that there was no need to address constitutional questions, as the lower court purported to do.

The Court, in its reading of Sections 2, 56(1), 56(2), 57(1), and 65 of the Prisons Act, found that the Prisons Act did not discriminate amongst prisoners with regard to medical treatment. It further observed that Regulation 13, which described the duties of the prison Medical Officer, used all-encompassing language.

The Court also restated that under Common law, as under the Prisons Act and its Regulations, prisoners are entitled to be provided with basic health care, and this included the free health services being provided to citizen prisoners in Botswana. It confirmed that the Prisons Act and the Regulations did not distinguish between citizen and non-citizen prisoners.

According to the Court, administrative decisions in Botswana could be reviewed on the grounds of illegality, irrationality, and procedure impropriety. The Court was of the view that grounds of illegality or unlawfulness are part of the doctrine of *ultra vires*. The Court then held that the decision to deny foreign prisoners HAART, while it was given free of charge to citizen prisoners, discriminated against foreign prisoners in a manner not permitted by the Prisons Act and its Regulations, and was therefore *ultra vires*.

The Court however held that the decision was not irrational. It considered the fears raised by the respondents that persons might commit crimes in Botswana with the view to gaining access to free antiretroviral treatment in prisons as a genuine fear, and was of the opinion that a decision to give preferential treatment based on such fears would not be irrational.

## Conclusion

The appeal was dismissed. The orders of the lower courts were set aside, and replaced with an order setting aside the decision of the authorities to withhold free HIV/AIDS treatment from foreign prisoners, and an order compelling the authorities to comply with the Prisons Act and Regulations to provide the same HIV care to all prisoners.

## Significance

This is a celebrated case in prisoners' rights, and indeed it should be. However, the Court was asked to determine on the narrow issue of whether non-citizen prisoners should have access to HIV medicines. In fact, the Court of Appeal was of the view that the lower courts should not have spent a great deal of time examining constitutional provisions, and referencing international and regional treaties, because the matter could be resolved by interpreting pertinent legislation.

Over and beyond inmates' access to HIV/AIDS drugs in prison, conditions found in many prisons contribute toward exacerbation of the burden of HIV/AIDS and related diseases. Such conditions include overcrowding, poor nutrition, stress, and sexual violence. Though these issues were not raised in the court case, these unmentioned issues are critically important in ensuring that the rights of prisoners are respected.

*P.A.O. and 2 Others v. The Attorney General & Another*  
(2012), Petition No. 409 of 2009  
Kenya, High Court

## COURT HOLDING

Sections 2, 32, and 34 of the Anti-Counterfeit Act, relating to counterfeit medicines, threatened to violate the right to life of the petitioners as protected by Article 26 (1), the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health guaranteed under Article 43(1) of the Constitution of Kenya, 2010, and are accordingly unconstitutional.

## Summary of Facts

The petitioners were persons living with HIV/AIDS, who benefited from the passing of the Industrial Property Act, 2001 (Industrial Property Act), which allowed importation of generic medicines, and were therefore able to have a regular supply of affordable HIV/AIDS medicines. They filed their petition to challenge the passing of the Anti-Counterfeit Act, 2008 (the Act), especially the implementation of Sections 2, 32, and 34 of the Act, which would, in their view, threaten their access to low-cost and essential HIV/AIDS medicines.

The petitioners argued that Section 2 of the Act defines counterfeit medicines ambiguously and broadly to include legitimately manufactured and distributed generic medicines. Sections 32 and 34 of the Act vest enforcement authorities with powers to seize counterfeit goods, which would mean that they