

Minister of Health and Others vs. Treatment Action Campaign and Others 2002 (5) SA 721 (CC), 2002 10 BCLR 1033

Children's rights - basic health care services; Health rights - access to health care; Socio-economic rights - minimum core obligations; Women's rights - reproductive health.

Facts

This case related to a challenge brought by the Treatment Action Campaign, Dr Haroon Saloojee and the Children's Rights Centre, to the government's policy on the prevention of mother-to-child transmission of HIV. As part of efforts aimed at combating the disease, the government devised a programme for the prevention of mother to child transmission of HIV at birth using the antiretroviral drug, nevirapine. According to the programme, use of Nevirapine was permissible at limited number of pilot sites, two per province, with the result that only about 10% of all births in the public sector could benefit from the policy. Doctors in the public sector outside the pilot sites were precluded from prescribing the drug for their patients.

The Constitutional Court considered two key issues on appeal by the government against the decision of the High Court. The first was whether the government was justified in refusing to make Nevirapine available to pregnant women living with HIV and who give birth in public health facilities outside the research sites where it is medically indicated. The second issue was whether the government was legally obliged to implement and set out clear time frames for a national programme to prevent mother to child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding.

The Decision

1. According to the Constitutional Court, the pertinent question in the case was whether the applicants (TAC and its allies) had shown that "the measures adopted by the government to provide access to health care services for HIV-positive mothers and their new born babies fall short of its obligations under the Constitution." (para 25)
2. The Court approved its earlier decision in *Grootboom* that, at the very least, the state and all other entities and persons are enjoined to "desist from preventing or impairing the right of access to adequate housing". (para 46) This negative obligation was held equally applicable to the right of access to health care services, including reproductive health care. It was therefore held that the policy violated the negative obligation implicit in the right of access to health care services in so far as it confined the use of nevirapine to research and training sites.
3. The Court affirmed its earlier opinion in *Grootboom* and refused to endorse the arguments of the amici curiae in the case that sections 26 or 27 imposed minimum core obligations on the government to ensure essential basic services to vulnerable individuals. According to the Court, the rights recognised under both sections 26 and 27 do not oblige the state "to go beyond available resources or to realise these rights immediately". (para 32) The formulation of these rights, it was held, envisaged a much more focused and restrained role for the courts that centred on whether state duties met the constitutional standard of reasonableness. The issue of minimum core obligations standard was regarded as possibly relevant to the reasonableness test.

4. The Court endorsed the reasonableness test adopted by Grootboom and considered whether the policy on the prevention of mother-to-child transmission satisfied this test. The Court conceded that it was legitimate to research the efficacy, safety, and possible resistance to Nevirapine, as a prelude to a comprehensive programme for mother to child transmission of HIV. However, it took the view that these reasons could not justify the indefinite postponement of a national programme until conception of the best programme. It could also not justify delaying a comprehensive programme until completion of the research. The policy, it was further held, impacted seriously on a significant group of HIV-positive mothers and children who did not have access to the research sites. Because of their poverty, they were effectively denied access to "a simple, cheap and potentially life-saving medical intervention". (para 73) It was therefore held that the policy was unreasonable in that it was inflexible and failed to take into account the needs of a particularly vulnerable group.
5. Furthermore, the Court acknowledged that provision of a single dose of Nevirapine to a mother and her child to prevent transmission of HIV is essential as far as children are concerned. The needs of children, according to the Court, are "most urgent" and "their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled". (para 78) While conceding that "the primary obligation to provide basic health services no doubt rests on those parents who can afford to pay for such services", it emphasised that this holding does not mean that the state incurs no obligation in relation to children under the care of their parents or families. (para 77) Thus, the state is obliged to ensure that children are accorded the protection contemplated by section 28 "that arises when the implementation of the right to parental or family care is lacking." (para 79). According the Court, indigent mothers and their children are in the main dependent upon the state to make health care services available to them.
6. As regards remedial powers, the Court stated that where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both issuing of a mandamus and the exercise of supervisory jurisdiction.

In conclusion, the court made a declaration that the policy was unconstitutional in the manner summarised above. The Court did not follow the supervisory order made by the High Court, but issued a number of mandatory orders. Thus, the government was ordered "without delay" to remove the restrictions on, and permit and facilitate the use of Nevirapine where this is medically indicated. Furthermore, it was ordered to make provision for the training of counsellors in the public sector, and to take reasonable measures to extend testing and counselling facilities throughout the public health sector to facilitate and expedite the use of nevirapine for the purposes of reducing the risk of mother-to-child transmission of HIV.

However, no decision was made on the provision of formula milk as an alternative to breast-feeding for lack of sufficient evidence to support an order for its provision at state's expense.