



## FREQUENTLY ASKED QUESTIONS

### *Richard Banda and Others v the Attorney General and Others*

29 January 2019

#### WHAT ARE THE FACTS OF THE CASE?

Between August and September 2018, six inmates from Maula and Mzimba Prisons were diagnosed with multidrug-resistant tuberculosis (MDR-TB). The prisoners were receiving in-patient treatment but were due to be released from hospital. However, because all six were convicted inmates, their release from hospital would have meant a return to the prisons.

#### WHO BROUGHT THE CASE?

The case was filed by six prisoners who developed MDR-TB while in prison and the Centre for Human Rights Education Advice and Assistance (CHREAA).

#### WHO ARE THE DEFENDANTS?

The Attorney General, the District Health Officer of Bwaila General Hospital, the District Health Officer of Mzimba District Hospital, the Chief Commissioner of Prisons and the Ministry of Health are cited as defendants in the case.

#### WHAT IS THE CASE ABOUT?

The case concerns an outbreak of MDR-TB in two prisons. The case is about the obligations of the Malawi government with respect to the health and wellbeing of persons diagnosed with tuberculosis (TB) and at risk of contracting TB in detention.

#### WHAT DO THE CLAIMANTS WANT FROM THE COURT?

The six prisoners and CHREAA are seeking constitutional certification for a case in which they seek the following final orders from the Court:

1. A declaration that holding the inmates with MDR-TB in prison while undergoing treatment under the current conditions violates their constitutional rights and the rights of other prisoners and people working in or visiting the prisons.
2. A declaration that implementing the remainder of the six inmates' sentences under these conditions violates their human rights under the Malawi Constitution.
3. A declaration that chaining, cuffing and shackling the six inmates while undergoing treatment for MDR-TB violates their constitutional rights.
4. An order directing the six inmates to be released from detention on the grounds that their continued imprisonment is unconstitutional and a threat to public health.
5. An order directing the Ministry of Health to provide or enable adequate food for the six inmates while they are undergoing treatment in line with national policy.
6. An order directing the Ministry of Health to ensure that the six inmates have access to adequate transport and accommodation to ensure they are able to attend all their scheduled treatments and checkups while undergoing treatment for MDR-TB in line with national policy.
7. A declaration that the absence of a plan or its inadequate implementation to fully implement the government's 2018 National Tuberculosis Control Programme in the prisons is unconstitutional.
8. An order directing the Ministry of Health and the Commissioner of Prisons to develop a plan to comprehensively implement the 2018 National Tuberculosis Control Programme in the



- prisons, including to make provision for adequate screening and diagnosis, treatment, prevention, and access to adequate food and nutrition.
9. An order to ensure that new cases of persons diagnosed with drug-resistant TB in the prisons are referred to the courts to ensure that they are dealt with in a manner to ensure their adequate treatment and prevent transmission.
  10. A declaration that the state of overcrowding in the prisons is unconstitutional and a threat to public health.
  11. An order directing the Government of Malawi to develop a plan to reduce overcrowding in all prisons within periods specified by the Court.
  12. An order directing the Attorney General to file compliance status reports on the implementation of the plans to reduce overcrowding and implement the National TB Programme in the prisons.

While the constitutional case is pending, the claimants have approached the courts for certain interim orders. These orders were filed by the claimants to ensure that while the court process in the constitutional case is underway, that the lives and wellbeing of the six inmates and other persons detained or working in and visiting the prisons are protected and preserved. In these interim proceedings, the claimants sought the following orders from the court:

1. An order preventing the government of Malawi from returning the six inmates with MDR-TB to prison after their discharge from hospital and discharging them to their respective homes to continue their treatment in the care of their families until the constitutional case is determined.
2. An order to stop the prison authorities from using restraints such as chains, shackles or handcuffs on the six inmates while they are undergoing treatment in hospital.
3. An order to compel the Ministry of Health to provide adequate food for the six inmates while in hospital and after their discharge.

#### **WHAT ORDERS HAVE ALREADY BEEN GRANTED?**

On **11 October 2018**, the Zomba High Court granted the claimants an urgent interim order on an *ex parte* basis preventing the inmates from being released from the hospital to the prisons and prohibiting the use of shackles and chains on the men while they remain in hospital, a practice amounting to torture, cruel, inhuman and degrading treatment in their condition.

On **30 January 2019**, the Zomba High Court will hear argument from both sides whether to confirm or alter its order made in October 2018.

#### **WHAT IS THE DIFFERENCE BETWEEN THE INTERLOCUTORY PROCEEDINGS AND THE CONSTITUTIONAL CASE?**

The constitutional case is the main case in which the claimants are seeking final orders from the court. This case is brought to enforce and protect a number of constitutional rights, including the rights to life, human dignity, freedom from torture, cruel, inhuman and degrading treatment and the right to be detained under conditions consistent with human dignity.

In addition, the claimants have filed interim or interlocutory proceedings, in which the courts are asked to make certain temporary orders while the parties wait for the court to consider and determine the main (constitutional) case. Because the claimants believed that the inmates' return to the prisons would pose an immediate and urgent threat to their lives and wellbeing and those of others in the



prison system, the claimants made the urgent application at the same time as filing the constitutional case to prevent them from being returned to prison. While they are undergoing treatment, the claimants are also concerned that the inadequate food they are provided with and the practice of shackling and chaining the inmates in hospital violates their human rights and threatens their recovery. The claimants are therefore also seeking that the court makes orders to ensure they receive adequate nutrition and prevent them from being shackled and chained. These orders are only sought on a temporary basis to preserve and protect the claimant's rights until the court makes final orders in the constitutional case.

#### **WHAT IS MDR-TB?**

MDR-TB is a contagious form of TB infection caused by bacteria that are resistant to treatment with at least two of the most powerful first-line anti-TB drugs. MDR-TB is spread through coughing and is highly contagious. Treatment for MDR-TB is longer, and requires more expensive and more toxic drugs. MDR-TB drugs have many more side effects than first-line anti-TB drugs. MDR-TB treatment generally takes 18–24 months. The latest data reported to the [World Health Organisation](#) show a treatment success rate for MDR-TB of only 55% globally. A significant proportion of people who become infected with MDR-TB will therefore die, even if receiving treatment.

#### **WHY ARE THE INMATES AND CHREAA RESISTING THEIR RETURN TO PRISON?**

The claimants in the case understand that once the sick inmates have been stabilised in hospital, they will need to be discharged. In the ordinary course, patients with MDR-TB would continue their treatment in the community. However, because they are convicted prisoners and in the absence of parole proceedings permitting their release on medical grounds, the inmates will be returned to the prisons.

The claimants are concerned that returning to the prisons will be a threat to their recovery as the poor conditions in prisons are not appropriate for prolonged treatment of highly contagious illnesses. Not only are some more likely to experience treatment failure because of these conditions, but some of the best treatments for MDR-TB are currently not offered in the prisons.

The claimants are also concerned that returning the inmates to prison poses a significant risk of infection to all other persons in the prisons, including staff and visitors. They argue that TB is spread even more readily in prisons than in outpatient settings because of the longer duration of potential exposure, crowded environment, poor ventilation, and limited access to health care services. Late diagnosis, inadequate treatment, overcrowding, poor ventilation and repeated prison transfers encourage the transmission of TB infection.

The claimants argue further that keeping the inmates in hospital for the entire duration of their treatment (up to 2 years) will pose an undue burden on the hospital, pose a greater risk for transmission in the hospital, and be inhumane as the inmates will effectively undergo prolonged confinement in isolation.

As all six inmates have served significant portions of their sentences, the claimants argue that it is appropriate for them to be released to complete their treatment at home.

#### **HOW DO CONDITIONS IN THE PRISONS RELATE TO TB AND MDR-TB?**

The claimants argue that severe overcrowding and poor ventilation in the prisons, combined with the lack of adequate food and the absence of isolation facilities to accommodate the inmates while



infectious and undergoing lengthy and toxic treatment, are a breeding ground for the spread of this drug-resistant strain of TB. These conditions not only exacerbate the likelihood of TB spreading, but also increase the likelihood of the manifestation of TB disease and of persons with TB not recovering from their illness even if treatment is provided.

The [World Health Organisation](#) says that worldwide, the level of TB in prisons has been reported to be up to 100 times higher than that of the civilian population. Cases of TB in prisons may account for up to 25% of a country's burden of TB. The claimants therefore consider that the state of TB in Malawi's prisons is important to Malawi's overall TB burden and to public health as a whole.

#### WHY ARE THE CLAIMANTS SEEKING STRUCTURAL REFORMS IN THE PRISONS?

As noted above, the claimants seek a number of orders in addition to the release of the six inmates. These include prayers asking that the court order government to come up with comprehensive plans to reduce overcrowding in the prisons and to implement appropriate TB prevention, treatment and screening in the prisons in line with national policy. The claimants have also asked the court to monitor the government's enforcement of these plans over regular intervals.

It is the inmates' and CHREAA's case that these orders are necessary considering the recalcitrance and failure of the defendants to comply with the orders in *Gable Masangano v The Attorney General Constitutional Case No 15 of 2007* for almost a decade and the significant public health crisis and grave threats to life that have manifested in the result. The claimants argue that in this urgent situation, it is appropriate to ask the court to exercise its broad remedial powers under the Constitution to grant the orders they seek.

#### WHAT IS CHREAA'S INTEREST IN THE CASE?

[CHREAA](#) is a registered non-governmental organisation dedicated to the promotion and protection of human rights. Inspired by Malawi's past history of oppression and human rights abuses, CHREAA is committed to combating ignorance of rights and to making justice accessible to marginalised communities. CHREAA is well aware that the daily struggles of ordinary people are often overlooked. In joining this application as a party, CHREAA seeks to ensure that the rights of all prisoners are advanced in the determination of the case as well as the rights of its paralegal officers who are working in the prisons on daily basis and are likely to be exposed to infection.

#### WHAT IS SALC'S INTEREST IN THE CASE?

SALC is a regional human rights organisation that works to promote and advance human rights, democratic governance, rule of law and access to justice in the Southern Africa region through advocacy, capacity strengthening and strategic litigation support. SALC's Health Rights Programme works, amongst others, to advance human rights-based approaches to HIV and TB and advance the social and environmental determinants of health, particularly for key populations such as prisoners. SALC is supporting CHREAA in this case.