

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (ECHR) was established in 1959 by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). The Court enforces the obligations entered into by the Council of Europe's Contracting States. Any Contracting State or individual may lodge a complaint with the Court for violations of the Convention.

BURDEN V. THE UNITED KINGDOM

By a small margin of four votes to three, the Court held in *Burden* that Contracting States need not extend the protections given to civil partnerships to cohabiting relatives, connected by birth rather than choice.

Applicants J.M. and S.D. *Burden* are unmarried sisters who have lived together all their lives, and for the past 30 years, in a house built on land inherited from their parents. The sisters, both in their eighties, claimed that the 40 percent property tax they must pay if either dies and the property is sold, amounts to discrimination in violation of Article 14 of the Convention, in conjunction with Article 1 of Protocol I (protection of property), because U.K. law exempts survivors of a civil partnership from this tax. Under the 2004 Civil Partnership Act, exemption from the inheritance tax is extended to same-sex civil partnerships.

The Court held that the differential treatment did not amount to unlawful discrimination but, rather, a legitimate decision about how to allocate limited government benefits. The United Kingdom created the exemption for unmarried people in long-term relationships and people married or in civil partnerships in order to promote stable, committed heterosexual and homosexual relationships by providing a measure of financial security when one member of the couple dies. In the Court's opinion, this was a legitimate goal; the State could not be criticized for promoting marriage through its taxation system, be it for heterosexual or homosexual couples. And since the goal would not be furthered by extending the benefit to cohabiting relatives, the State did not act improperly when it excluded such individuals. In striking such a balance between pursuing social objectives

and raising revenue, the Court observed, the United Kingdom did not abuse its "margin of appreciation," which gives states discretion in questions of particular sensitivity.

The dissent by Judges Bonello and Garlicki asserted that had the United Kingdom only extended the inheritance tax exemption to traditionally married, heterosexual couples, it would have been justified in refusing to extend that benefit to cohabiting sisters. However, because the United Kingdom extended its tax protection to homosexuals forming permanent unions, it must be able to justify why the benefit extends to some non-traditional long-term relationships and not others. In the dissenters' opinion, there is a legitimate line to be drawn between heterosexual and homosexual couples, but not between civil partners and cohabiting relatives. The United Kingdom thus discriminated impermissibly against cohabiting relatives. The dissent also found that the legislature did not show a compelling reason to deny those benefits to the *Burden* sisters, when the nature of their relationship was so similar to those the government chose to protect.

SALAH SHEEKH V. THE NETHERLANDS

In *Sala Sheekh*, the Court continued to expand the protections of international human rights law to victims of abuse by non-state actors. The applicant, Salah Sheekh, is a Somali national who came to the Netherlands on a false passport and applied for asylum upon arrival. Sheekh is a member of the Ashraf minority and was forced to leave his home in Mogadishu and flee to a nearby village because of the 1991 civil war. The village was controlled by a clan, and, because they were minorities, Sheekh and his family had no protection. The clan's armed militia killed Sheekh's father, beat him and his brothers, and twice abducted and raped his sister. These were the reasons underlying his request for asylum.

Sheekh was refused asylum because he had made unreliable statements as to his date of birth and because the Minister for Immigration and Integration found that the reasons for his flight were insufficient to qualify for asylum under the country's Aliens Act

2000. That is, the persecution he experienced was not the result of systematic acts of discrimination but, instead, a consequence of the general unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people. In addition, the Dutch Minister found that denying asylum would not violate Article 3 of the Convention, which prohibits inhuman and degrading treatment of humans, because the applicant could resettle in one of the relatively safe of Somalia areas.

In contrast, the ECHR held that this denial of asylum *did* violate Sheekh's Article 3 rights. The Court reiterated its view that the existence of the obligation not to expel asylum-seekers is not dependent on whether a state is the direct or indirect source of the potential persecution faced by the applicant. The Court held that Article 3 may also apply in situations where the danger emanates from persons or groups that are not state officials. The material question in making these decisions, according to the Court, is whether there is a genuine risk of persecution and whether the government of the receiving State is able to provide adequate protection. In so holding, the Court strengthened one means of protecting individuals from human rights violations perpetrated by non-state actors.

UPDATE ON IMPLEMENTATION OF PROTOCOL 14

In early January, the ECHR's new President, Jean-Paul Costa of France, expressed his concern that the long-awaited Protocol 14 to the Convention was not in place at the beginning of 2007, as had been hoped. The Protocol has been ratified by 45 of the 46 states required for implementation. Only Russia has failed to do so. Protocol 14 was drafted and signed in 2004 in an effort to improve the efficiency of the Court's processing system in light of the increasing burden of applications. The Protocol's main streamlining techniques include new admissibility criteria that allow cases to be dismissed if they raise frivolous complaints or if the applicant has not suffered significant damage, and methods for the Court to hear cases with repetitive issues together. A provisional assessment estimates that implementation of Protocol 14 would enable the Court to

increase its productivity by 25%. Some Contracting Parties, however, question whether these reforms have struck the appropriate balance between an individual's Article 34 right to bring a matter before the Court and the Court's practical need to be able to reject some applications.

"The Court is universally known and respected but its future depends on its effectiveness," Mr. Costa told journalists. "If the Court becomes ineffective, it will lose its credibility ... If nothing is done about the influx of inadmissible and repetitive cases to the Court, our great European institution will be asphyxiated. Protocol 14 must enter into force and as quickly as possible."

INTER-AMERICAN SYSTEM

Nicaragua v. Costa Rica

On March 8, 2007, the Inter-American Commission dismissed a case filed in February 2006 by the State of Nicaragua against the State of Costa Rica, alleging discrimination against the Nicaraguan migrant population in Costa Rica. The Commission found that the State of Nicaragua failed to present sufficient evidence to prove violations of Articles 1(1) (the obligation to respect rights), 8 (the right to a fair trial), 24 (the right to equal protection), and 25 (the right to judicial protection) of the American Convention on Human Rights (Convention or American Convention). The Commission concluded that because readily available domestic remedies had not been exhausted, it was unnecessary to advance the case to the Court.

The alleged human rights violations occurred against Natividad Canda Mairena, who was brutally mauled by two Rottweiler dogs on November 10, 2005 at the entrance to the cemetery in Lima, Cartago, Costa Rica. The State of Nicaragua alleged that the incident "lasted approximately two hours," and was witnessed by Mr. Fernando Zúñiga Mora, the owner of the workshop and the two dogs; Luis Hernández, the security guard; Hugo Ceciliano Rodríguez, the head of the security company; and numerous armed policemen, firefighters, and curious onlookers. Nicaragua further alleged that the police officers passively observed the attack, when they could have easily rescued the victim by shooting the dogs.

Additionally, Nicaragua contends that José Ariel Urbina Silva, José Antonio

Martínez Urbina, Angulo García, Rito Antonio Obando, Elder Angulo García were verbally assaulted while at a bar, attacked with a knife when exiting the bar, and subsequently stoned by the crowd that surrounded them, without anyone coming to their defense or aid. Urbina Silva suffered fatal injuries and later died, while the rest were seriously injured. During a public hearing in Guatemala, the victims produced a video recording that verified their version of the story.

In both the *Mairena* and *Silva et. al.* cases, the Costa Rican trials were substantially delayed, and there were no due process guarantees. It took nearly 2 months for the forensics reports to be included in the case files along with the previously issued medical reports, which delayed adjudication of the merits.

Nicaragua argues that both these incidents are merely outward symptoms of a much deeper underlying situation "rooted in sentiments of xenophobia, intolerance, and rejection that reign in some sectors in Costa Rica," which Nicaragua concedes is not the norm in all areas of Costa Rica, but is indeed a problem that the Costa Rican government needs to address and control. Nicaragua points to the fact that Nicaraguan citizens in Costa Rica are discriminated against on a daily basis, particularly by way of limited employment opportunities and bad working conditions. Moreover, they are picked on for their darker skin and the dialect of Spanish they speak, and their children are neither eligible for scholarships nor do they generally receive the standard treatment in the realms of education and health care.

The State of Costa Rica did not present arguments on the events in connection with Mr. Natividad Canda Mairena, rather it stressed that the matter is being examined by the Judicial Branch in Costa Rica and that an investigation remains to be carried out. The State of Costa Rica underscored that "there are many day-to-day examples of harmonious and respectful coexistence between Costa Ricans and Nicaraguans. As far as human rights are concerned, the hospitals of Costa Rica do not inquire about nationality and provide, just as other institutions do, generous and humanitarian assistance." Furthermore, Costa Rica submits that "in none of the cases questioned by the State of Nicaragua has there been a delay of justice, violation of due process guarantees, or, much less, impunity, 'apparent' or otherwise ... and, furthermore,

should any doubt exist, in spite of the explanations provided, the parties concerned have recourse to the Constitutional Court." As such, Costa Rica alleges failure to exhaust domestic remedies in the instant case.

The Inter-American Commission is generally reticent to become involved in interstate struggles that it perceives can be remedied in local courts. Thus, even though Article 45 of the American Convention recognizes the Inter-American Commission's competence to admit and examine interstate conflicts, cases will not be heard until the Commission is confident that all domestic judicial remedies have been exhausted. In the cases of *Mairena* and *Silva et. al.*, it awaits to be seen whether the brutality suffered by the plaintiffs will indeed be remedied through Costa Rica's domestic judicial system.

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

GEARS OF JUSTICE GRIND TO A HALT IN CAMBODIA

The Extraordinary Chambers in the Courts of Cambodia (ECCC) may come to a close without a single person put on trial. That is not to say that no arguments were made. A year into operation — a third of the Court's allotted lifetime — Cambodian and international judges have brought the court to a near standstill over intense debate on the drafting of internal rules.

The ECCC, designed to hold accountable members of the Khmer Rouge for its genocidal four-year reign, currently have only one prospective defendant in custody. With prosecutors issuing only ten possible indictments to former Khmer Rouge members, most of who are frail and advancing in age, many are afraid of further delay. As of this writing, judges recently completed a ten-day period of negotiations, in which they had tentatively agreed to a draft of internal rules. There is still contention over a requirement that would make international lawyers participating in the trials join and pay a membership fee.

Tensions over the drafting of internal rules came to a boil earlier this year after the Open Society Justice Initiative (OSJI) called for an investigation following corruption allegations. OSJI claimed that Court personnel were allocated a percentage of their mandated wages to Cambodian government officials for favorable placement. In response to the allega-

continued on page 52

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS *(Continued)*

UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS *continued from page 50*

tions, UNDP began an audit of the human resources practices of the ECCC. The ECCC itself has denied these allegations and Sean Visoth, ECCC Director of Administration, cut all ties with OSJI. Since then the ECCC has resumed contacts with OSJI. This news arrived on the heels of the completion of an OSJI training session for court officials.

These fee disputes come at a time when the ECCC is particularly sensitive to criticism, especially because financial mismanagement was one of the alleged corruption charges. In a recently received letter, the international judges announced that in response to the lack of apparent progress made in resolving the fee dispute issue, they planned to boycott the April plenary meetings. International judges argue that as currently structured, the fees will limit the number of foreign lawyers

who may appear before the court. They also claim the fees will prevent victims access to pro bono counsel.

The judges will reevaluate the circumstances in the last week of April to see how discussions between the ECCC's Defense Support Section and the Cambodian Bar play out. If no progress has been made, they will reorganize the entire process without the help of the Cambodian bar, modeling it after processes used by other international and hybrid tribunals. Yet recognizing that these delays are crippling the Court, the judges have agreed to wait only this short period for the talks to work.

These birth pangs are nothing new to the Extraordinary Chambers. The tribunal came into existence in 2003, but only after six years

of difficult negotiations between Cambodia and the United Nations. Fortunately, this dispute over membership fees poses less of an obstacle than many of the other more substantial difficulties the Court has faced up until this point. The international community eagerly awaits the outcome of this latest round of discussions. **HRB**

Anna Cabot, a J.D. candidate at the Washington College of Law, covers the European Court of Human Rights for the Human Rights Brief.

Suzanne Shams, a J.D. candidate at the Washington College of Law, covers the Inter-American System for the Human Rights Brief.

Mihir Mankad, a J.D. candidate at the Washington College of Law, covers the Extraordinary Chambers in the Courts of Cambodia for the Human Rights Brief.