

**22nd AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION**

**2 – 7 SEPTEMBER 2013**

**UNIVERSITY OF THE WESTERN CAPE**

**AND**

**CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA**

**HYPOTHETICAL CASE**

**The case between**

***The Government of Kalaharia and Children of Africa Now! (CAN!)***

- 1 Since its independence in 1965, Kalaharia has enjoyed relative economic development and peaceful democratic governance. According to the UNDP Human Development Index Report 2010, Kalaharia was among the 10 most improved economies in Africa. Foreign direct investment and official development assistance increased five-fold from US\$ 522 million in 2000 to around US\$ 2,5 billion in 2009. According to the Human Development Index, Kalaharia has experienced one of the most rapid rates of progress in its region, with a 23 per cent increase from 2000 to 2009.
- 2 The Republic of Kalaharia is administratively divided into three regions: the Bankaka region in the North, bordering the Republic of Natalia; the Mukony region in the West, bordering the Republic of Nyasi; and the region of Kanduri in the South, on the border with Malutania. The Republic of Kalaharia is inhabited by the Bankaka, the Mukony and the Kanduri tribes. According to the population census of 2001, the Bankaka, the Konduri and the Mokony constituted 49 per cent, 41 per cent and 10 per cent, respectively, of the total population of 53 million. The same report revealed that the Kanduri region is the region with the highest proportion of people living on less than one dollar a day and that between 1980 and 2000, poverty rates rose in absolute and relative terms. It still has inadequate resourced educational systems, and weak enrolment and completion rates in secondary schools and tertiary institutions. The region has a bulging youth population experiencing soaring unemployment; it has unacceptable gender gaps in access to education, health, employment and it also has restrictive labour conditions and cultural barriers to women participation in development. Many people in this region still face life-threatening water,

hygiene and sanitation conditions as well as food insecurity. In a policy response to this, the government of Kalaharia, in the last five years, has devoted enormous resources to addressing the wide income, gender and spatial inequalities among its citizens which is already leading to cause social tensions and threatening to unravel progress made in economic and social terms.

- 3 There are two major religions in Kalaharia: the Islamic religion, mainly practised by the inhabitants of the southern region, and Christianity, predominantly practised in the northern region of the country. The 2008 budget listed the following as the main sources of income: gold, uranium deposits, tax, direct foreign investment, agriculture and foreign aid.
- 4 The Constitution of the Republic of Kalaharia provides for a devolutionary system of government, separation of powers, and guarantees the independence of the judiciary and other oversight institutions. The Constitutional Court is the highest court in constitutional matters in Kalaharia. The Constitution, in section 2, provides for the Directive Principles of State Policy which incorporate the following: access to education, including free and compulsory 'basic education'; access to affordable health care; the right to the highest possible standard of dignified living for citizens; and access to social security. The Constitution ousts the jurisdiction of the courts to entertain matters relating to the implementation of the Directive Principles. Section 3 of the Constitution provides for a comprehensive bill of rights, enforceable before the ordinary courts of law. These rights include all the rights set out in the International Covenant on Civil and Political Rights. In addition, section 15 of the Constitution provides that 'all international and regional human rights instruments ratified by the Republic constitute an integral part of the Constitution and Bill of Rights'.
- 5 The Republic of Kalaharia is a member of the United Nations (UN) and the African Union (AU). It is a party to the following international and regional human rights instruments: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the UN Refugee Convention; the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; the African Charter on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child (African Children's Charter); and the Convention on the Rights of the Child (CRC), all ratified in 2000. The two protocols to the African Charter (on the rights of women and the African Court) and the two protocols to the CRC (on children in armed conflict, and on the sale of children, child prostitution and child pornography) were all ratified on 1 January 2011, as were the Convention on the Rights of Persons with Disabilities and the AU Convention for the Protection and Assistance of Internally-Displaced Persons. When Kalaharia ratified the CRC and the African

Children's Charter, it entered a similarly-worded reservation to article 23 of the CRC, and article 13 of the African Children's Charter, which reads: 'Kalaharia is, due to resource constraints, for the time being not able to ensure full realisation of this article; however, the reservation may in due course be reconsidered.' These reservations have not yet been withdrawn.

- 6 Unlike its southern neighbour, the Republic of Natalia is relatively poor and has been engaged in a brutal civil war along religious lines for over two decades. The war has destroyed livelihoods, and economic and social infrastructure. The brutalities of one of the rebel groups have forced many citizens of Natalia to flee their country. Among the victims of this war were Salif (10), his brother Mubarak (14), his father Hussein (35), his mother Alima (33), and his grandfather Sadig (61). Before the war, Salif and his family lived in a small village in the mountains of Natalia. Alima's highest educational level is 'secondary schooling'. She worked in the house, and tended to the family's domestic animals and small crops. Although Natalia is a predominantly Muslim nation, there are a significant number of Christian residents. Even though Salif and his family conducted their lives according to the precepts of Islam, they lived in the areas dominated by Christians.
- 7 Salif and Mubarak attended the local school until the civil war erupted more fiercely in the country. Many of the young men and most of the teachers soon left the village and Sadig (a former teacher) tried to keep up with the schooling of the children at home. On the night of 1 June 2011, Salif's family home was attacked by rebel fighters. The house was set alight, destroying everything owned by the family, and killing Salif's father. Mubarak was abducted to serve in the army of the local war lord, Ruthuru, as a child soldier. Salif escaped the same fate only by hiding with his mother and grandfather in an abandoned mine. A few days after the attack, Salif gradually started losing his sight. Salif's mother and grandfather suspected this was as a result of some of the weapons the rebels used in the attack. After the attack, Alima decided to flee the area and took Salif and Sadig with her. They made their way to the capital of Natalia, where they received shelter in a tented camp set up by the government. The camp was overcrowded and suffered from a shortage of food and water. Having waited for two days without receiving any proper food, Salif's mother decided to leave the camp and cross the border into neighbouring Malutania.
- 8 Fearing that they would be arrested and returned to Natalia by the authorities in Malutania (who sympathised with the rebels in Natalia due to its dominant Christian population), Salif's mother decided not to report to the immigration officials at the local reception centre established to deal with the sudden influx of Natalian citizens. Instead, Salif and his family found shelter in a one-room shack

in the city, where Salif's mother soon found temporary work as a domestic worker, while Salif and his grandfather tended to cooking and chores around their own shack. After four months in the city, Salif's mother had saved enough money for the family to travel to the border between Malutania and Kalaharia and to pay a guide to take them into the latter state. Salif and his family crossed the border illegally just after midnight on 1 November 2011.

- 9 Salif and his family crossed the border into Kalaharia in search for employment. They believed that, since the country was economically developed and politically peaceful, they might find something to do that could generate income to enable them to provide for the basic needs of the family. By this time, Salif had become completely blind, and the family hoped that in the more affluent Kalaharia, his needs would be better attended to. However, matters did not turn out that way. On 2 December 2011, Salif, his mother and grandfather were arrested as illegal foreigners and detained at a local police station. Two days later, they were transferred to an immigration detention centre. On arriving at the detention centre, Salif and his family members immediately applied for asylum. In terms of the Refugee Act of Kalaharia, an illegal foreigner may be detained for 30 days at a time, renewable by an order of a lower court, until he or she is either released as a refugee or deported to his or her country of origin. They were placed together as a family in a cell normally designed to house four persons. A number of these larger cells had been converted into 'family suites' by the detention authorities. Each of these cells contained two bunk beds, a basin and a toilet. Communal meals were outsourced to a catering company. However, the detention centre did not have educational or recreational facilities.
- 10 Just before the start of the new school year in January 2012, Salif was removed from the detention centre and placed in a place of safety, normally used to house abandoned or severely abused children. He was provided with a standard school uniform and enrolled at a local school. This clothing consisted of the standard issue: a short-sleeved shirt, and short trousers. His request to be provided with long-sleeved shirts and trousers covering his knees, in compliance with his religious code, was not attended to. He was also not provided with the space and the necessary materials (including a prayer mat) to conduct his prayers, and was not allowed to pray on two of the four specific times of the day that he requested to pray, because these times fell in class time. He joined a class of 34 children, all from the local area. Teaching took place in English. Despite having some difficulties, Salif managed to follow the classes. He was the only blind child in the class. In fact, he was the only blind child in the whole school. However, the school did not have any special arrangements to support blind students. As a result, Salif was not provided with textbooks in Braille and other relevant facilities, including a teacher competent to teach him Braille. Salif felt isolated. He was

initially allowed to phone his mother once a week, and repeatedly asked his mother whether he could not return to the detention centre to be with his mother and grandfather. After a few weeks, he was told by the staff at the place of safety that his mother could no longer be reached, as the phone line had been vandalised during a riot in the detention centre.

- 11 While on an inoculation drive, the non-governmental organisation (NGO) Children of Africa Now! (or CAN!) visited the school and met Salif. After Salif told them his story, CAN! ascertained that his mother and grandfather were still detained in the immigration detention centre. CAN! also established that their case had been heard by a lower court once, on 3 January 2012. This court renewed their detention pending further investigation, without stipulating a date for a further hearing. In July 2012, CAN! brought an urgent application in the High Court for an order declaring the placement of Salif in the place of safety unlawful and a violation of his basic rights. CAN! also challenged the extended detention of Salif's mother and grandfather on the ground that it violated their right to liberty, and further applied for an order declaring that Salif should be allowed to wear his preferred religiously-compliant dress at school and that he should be provided with all text books and learning aids in Braille. The state opposed the case and argued that Salif's mother and grandfather had no right to be released pending the outcome of their asylum applications and that, in the circumstances, the placement of Salif in a place of safety was the only way in which his right to education and other basic needs and rights could be met. As far as the accommodation of Salif's special educational needs was concerned, the state argued that the place of safety and the school did not have the funds available to procure the relevant text books in Braille to blind learners, or to appoint a teacher competent to teach Braille. The area of the city in which the school is situated is cosmopolitan and the majority of the people in the community live a secular lifestyle. The school's governing body took a democratic decision to ban the wearing of all religious symbols, clothing and markings. The Education Act of Kalaharia provides that 'all decisions about discipline at school, including the dress code of learners, shall be determined by the School Governing Board by majority decision'. As a result, the state argued that it could not interfere with the dress code established by the Board.
- 12 In February 2012, the High Court found in favour of the state on the issue of the ongoing detention of Salif's mother and grandfather. However, given the inability of the place of safety and the school to cater for Salif's religious and educational needs, the Court ordered that Salif be reunited with his family in the detention centre and that his grandfather be supplied with basic teaching materials which would enable him to provide schooling to Salif in his own mother tongue and in a culturally-appropriate manner. The High Court ruled that its order did not

mandate the provision of Braille text books to Salif or the wearing of his religiously-compliant dress in school.

- 13 The state appealed against the order of the High Court to the Constitutional Court on the basis that the Court should have rejected the application in its entirety. At the same time, CAN! instituted a cross-appeal against the order of the High Court on the basis that the Court should have ordered the release of Salif's mother and grandfather; should have ordered the provision of Braille textbooks and learning aids; and should have mandated him to wear his preferred religious dress in school. On 30 September 2012, the Constitutional Court upheld the appeal of the state and dismissed the cross-appeal by CAN! It ordered that Salif be returned from the detention centre (where he was still being held with his family pending the outcome of their asylum application) to the place of safety and to the school he was attending, under the conditions prevailing at the time the case was submitted.
- 14 Immediately after the matter had been decided by the Constitutional Court, CAN! directed a communication in terms of article 44 of the African Charter on the Rights and Welfare of the Child to the African Committee of Experts on the Rights and Welfare of the Child, requesting the Committee to investigate the violations of Salif's rights under the African Children's Charter, and to grant appropriate remedies. The Committee investigated the matter and, before taking any decision, on 14 February 2013 referred the matter to the African Court on Human and Peoples' Rights (African Court) for its determination.

The case is now before the African Court on Human and Peoples' Rights. The matter has been set down for hearing on 3 and 4 (and possibly 7) September 2013. Prepare written memorials and argue the case for the Committee and the State of Kalaharia, respectively, on the following issues:

- (i) standing and the admissibility of the case before the African Court;
- (ii) the ongoing detention of Alima, Sadig and similarly-placed asylum seekers;
- (iii) the right of Salif to Braille text books and a teacher to instruct him in the use of Braille; and
- (iv) the right of Salif to be provided with clothing compliant with his religion and materials necessary for his prayers.