

Socio-Economic Equality in the Courts: The Litigator's Perspective

For the last three years, ERT has worked toward producing a book which is forthcoming later this year, entitled Economic and Social Rights in the Courtroom: A Litigator's Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights. As the research for this publication found, whilst there has been much development before courts around the world in advancing protection of socio-economic rights and, separately, equality and non-discrimination, to date there is a dearth of litigation focusing explicitly on the right to equal enjoyment of socio-economic rights.

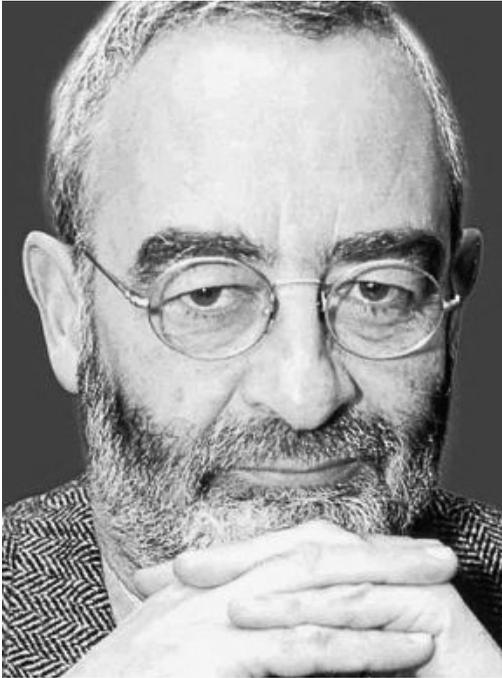
Addressing socio-economic disadvantage and poverty is arguably the biggest but most pressing challenge for equality lawyers in the 21st century. The gap between the rich and poor is ever increasing, both within particular countries and across borders. And yet, there is some way to go before human rights are implemented in such a way as to adequately address this challenge.

ERT spoke with two experts in matters of socio-economic rights and the rights to equality and non-discrimination, both of whom have a wealth of experience of litigating these rights before the courts. Geoff Budlender is a practising barrister in South Africa. He was one of the founders of the Legal Resources Centre and continues to undertake socio-economic rights work now that he is in private practice. Iain Byrne is Acting Head of the Economic, Social and Cultural Rights Team at Amnesty International. During his time at INTERIGHTS, he was involved in numerous socio-economic rights cases being brought before courts in Europe.

ERT: You are widely recognised for your expertise in strategic litigation in relation to the socio-economic rights of the poor. How did you get involved in this work? What life experiences and major influences played a role in getting you to your present position?

Geoff Budlender: From my schooldays, I was in general opposed to apartheid, I think mainly because that was what I learnt from my parents, who were liberal. When I went

to university, I became a student activist. I learnt in practical ways about the realities of apartheid, by working with the people who were on the receiving end of apartheid in various ways. I was heavily influenced by Steve Biko, who was a leader in the black consciousness movement and the South African Students Organisation. He made a very effective and radical challenge to white liberalism. I was forced to re-think who I was, and what I could and should do in the struggle against apartheid. I changed my course of study from



medicine to law because I thought it created opportunities to make a contribution.

When I first became a lawyer, I was involved in representing political activists who were being prosecuted for their anti-apartheid activities. I then became interested in how the law could be used strategically to challenge some of the underlying iniquities of apartheid. In 1979, I was one of the founders of the Legal Resources Centre (LRC), a public interest law centre which was established with that goal.

Finally, in 1994, we achieved political democracy. The challenge now became how to deal with the deeply entrenched poverty and inequality which had been created by apartheid. The struggle against apartheid had not only been a struggle for the vote – it was also a struggle against poverty, hunger, landlessness, homelessness, poor education and so on. So it was not surprising that the 1996

Constitution included pretty generous social and economic rights – the challenge became how to operationalise them.

My involvement in these issues was a natural progression from the work which I had previously done. I left the LRC for just under four years to serve as civil service head of the new Department of Land Affairs, which was creating and implementing a national land reform programme. I then returned to the LRC for another four years, during which almost all of my work was in strategic litigation on socio-economic issues. Now I am in private practice as a barrister, still doing a good deal of work in that area.

Iain Byrne: Like many people, I first became interested in human rights as a member of Amnesty International. However, in those days (the 1980s) Amnesty did not work on socio-economic rights, reflecting the relative lack of attention given to those rights by international NGOs at that time. I would not have imagined that nearly 30 years later I am now part of the economic, social and cultural rights (ESCR) team at Amnesty, the organisation having started to work on them a decade ago.

It was not until I studied at the Human Rights Centre, Essex University in the 1990s that I became more aware of socio-economic rights. This interest was reinforced when I taught a postgraduate course on the subject in Brazil for the Centre followed by research for a study auditing ESCR protection and enjoyment in the UK.

During my time at INTERIGHTS, working with my colleagues, I developed the socio-economic rights work of the organisation. In so doing I became involved in litigation including the first cases taken by INTERIGHTS to the European Committee of Social Rights (ECSR) under the collective complaints mechanism.



One of the biggest influences on me personally was the late Professor Kevin Boyle at Essex University. Not only was Kevin a brilliant academic but he was committed to translating this expertise into practical action (in his particular case taking ground-breaking cases to the European Court of Human Right). At the same time he was also encouraging and supportive of younger colleagues. It was thanks to Kevin that I came to work on socio-economic rights and to realise their importance in ensuring that everybody can enjoy a dignified and decent life.

ERT: How do you see the relationship between the rights to equality and non-discrimination on the one hand and socio-economic rights on the other? How do you asses global developments in human rights in the last few decades in these two areas?

Geoff Budlender: I see these rights as closely connected. Socio-economic rights

are a means of addressing inequality. And the right to equality is a means of achieving socio-economic rights.

When our Constitution was negotiated, there was controversy about whether it should entrench and protect existing property rights. There was a concern that this would entrench the existing inequality. The introduction of socio-economic rights was in part to create a counter-balance to the possible entrenchment of inequality. In practice, socio-economic rights are poor people's rights, because wealthy people are able to use their own resources to achieve their social and economic needs or desires.

Iain Byrne: The two are inextricably linked. As the UN Committee on Economic, Social and Cultural Rights (CESCR) has stated, "[n]on-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights".¹

Ensuring equality and non-discrimination for all is an immediate and cross-cutting obligation and the failure to do so is a clear rights violation. This fundamental guarantee is reflected in the current debate around the post-2015 development goals as exemplified in the need this time "to leave nobody behind" – compared to the failure of the current Millennium Development Goals (MDGs) to incorporate human rights which has resulted in huge inequalities across many of the current goals.

In 2009 the CESCR recognised the importance of the link with a dedicated General Comment. In so doing, the Committee specifically highlighted "economic and social situation" as a ground of discrimination, noting that "[a] person's social and economic situ-

ation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.”²

Both areas have witnessed a significant growth in standard-setting and jurisprudence during the last 20 years. In particular there has been an increasing amount of socio-economic rights caselaw at all levels, much of it concerning lack of equal access to, and enjoyment of, rights such as health, education and adequate housing. The recent coming into force of the International Covenant on Economic, Social and Cultural Rights’ own complaint mechanism (nearly 40 years after its civil and political rights counterpart) should herald significant new decisions, as will a similar system for the Convention on the Rights of the Child.

However, this increasing judicial attention has not always translated into positive economic and social change on the ground, especially for the most disadvantaged and marginalised. Implementation remains a key challenge.

ERT: To what extent is the lack of enjoyment of socio-economic rights a problem of inequality in the jurisdiction in which you have been practicing?

Geoff Budlender: Inequality is both a cause and a manifestation of the lack of enjoyment of socio-economic rights in South Africa. Unequal access to education, health care and employment aggravates and perpetuates the lack of enjoyment of socio-economic rights. Inequality lies at the heart of it all.

Iain Byrne: Inequality is clearly one of the most (if not the most) significant issues im-

pacting on lack of socio-economic rights enjoyment in Europe. The austerity measures implemented by governments across Europe following the financial crisis have resulted in systematic and widespread socio-economic rights retrogression.

However, the impact has been particularly disproportionate on disadvantaged minorities such as the Roma, migrants, people with disabilities and children living in low income families. Even where economies are recovering we are often seeing growing inequality as people at the bottom do not share in socio-economic progress. This phenomenon is reflected in the assessments by human rights bodies such as the Council of Europe’s European Committee of Social Rights and the UN’s Committee on Economic, Social and Cultural Rights.

ERT: Can you talk a little bit about the legal landscape in your jurisdictions regarding equality in respect to socio-economic rights? What is the extent of the courts’ involvement in this area?

Geoff Budlender: Because of the litigation history in respect of socio-economic rights that I mentioned earlier, the courts have only slowly become involved with issues of equality in respect of socio-economic rights. We now have a fairly well-developed jurisprudence with regard to the meaning of “unfair discrimination”, the core concept in our equality right. However, we have not yet adequately translated this into a means of addressing systemic inequality in the provision of services or benefits. In some ways, our task should be easier than in many other countries because of the close correlation between race and poverty.

It is relatively easy to characterise some forms of social inequality as racial inequal-

ity. This means that we have not yet had to address the sometimes contested question of poverty as a ground of discrimination.

Iain Byrne: Although not every European country has a comprehensive framework of legally entrenched socio-economic rights (e.g. the UK and Ireland lack such) all of them will have some form of regulatory legislation governing areas such as housing, education, health, work and social security. This will often involve scrutiny by quasi-judicial bodies such as employment or housing tribunals with a right of appeal to courts. Many (if not the majority) of the cases will concern lack of equal access or discrimination which could of course also be examined by dedicated equality rights bodies.

All of the above demonstrates that economic and social issues are capable of both adjudication and enforcement even if the actual number of cases concerning alleged violations of substantive legally entrenched socio-economic rights may be relatively small but growing. Across Europe from Hungary to Finland, from Portugal to Latvia, courts have handed down significant socio-economic rights related decisions. Only recently, Portugal's Constitutional Court struck down government austerity measures cutting public sector pensions.

ERT: Has there been much litigation in which the rights to equality and/or non-discrimination have been employed to protect the socio-economic rights of disadvantaged groups?

Geoff Budlender: The litigation to attempt to enforce socio-economic rights got off to a bit of a false start: the issue of equality was not raised in either of the first two big cases, *Soobramoney*³ (the right to health services, 1997) and *Grootboom*⁴ (the right to housing,

2000). The focus was on the content of the positive obligation on the state to fulfil the rights. We chased after the minimum core for a while. That proved to be a dead end.

I think *Treatment Action Campaign* (prevention of mother-to-child transmission of HIV, 2002) was the first occasion on which equality was raised in a major socio-economic rights case – but it was raised as a subsidiary argument amongst many others and received little attention. It was only as we progressed, that we began to appreciate the full significance of an approach based on the right to equality. We should have picked this up earlier.

An early case (*Larbi-Odam*,⁵ 1998) dealt with discrimination in the refusal to employ non-citizen permanent residents as teachers. But I think most of us missed the signal which it sent. Even now, the issue of equality is not adequately explored and raised. It is too often raised only as a “fall-back” argument. We have not adequately explored either its content or the question of appropriate remedies for a breach.

Iain Byrne: Some of the groundbreaking socio-economic rights cases at both the domestic and supranational level have involved issues of equality and/or non-discrimination with respect to disadvantaged groups such as the Roma and migrants. These include *DH v Czech Republic*⁶ before the European Court of Human Rights, concerning systematic discrimination against Roma pupils in the education system and a number of cases before the European Social Rights Committee (e.g. *FIDH v France*⁷ – medical assistance for illegal migrants; *ERRC v Italy*,⁸ *ERRC v Greece*⁹ and *INTERIGHTS v Greece*¹⁰ – inadequate housing for Roma).

Both the European Convention on Human Rights (ECHR) and the European Social Char-

ter contain dedicated provisions on equality and non-discrimination (Article 14 of the ECHR and Article E of the Revised Charter), both of which have to be argued with other substantive rights provisions.

ERT: In your experience, what are the main challenges in litigating the socio-economic rights of the disadvantaged?

Geoff Budlender: The fundamental problem is that inequality is so gross and all-pervasive that one sees it in all parts of our national life, all the time. Government is committed to addressing it, but often does so clumsily or ineffectively. We have not yet worked out a means of identifying which aspects are vulnerable to constitutional challenge and what the appropriate remedies would be.

A good example of this is the school system, which is highly unequal and, in fact, dysfunctional in some places. There is a constitutional right to basic education and a constitutional right to equality. The breach is obvious. The remedy is, however, less obvious.

Iain Byrne: Beyond the general challenge in socio-economic litigation of ensuring sufficiency of evidence, involving disadvantaged groups can present particular challenges.

The very fact that people are disadvantaged means that they are frequently marginalised from society, including the legal system. For such groups, trying to convince them that litigation can be an effective means of achieving positive and meaningful change in their lives can be difficult. Even if *pro bono* legal assistance is available, the length of time of some litigation (especially if it involves exhausting all available domestic remedies and going to supranational bodies such as the European Court of Human Rights) can be lengthy with no guarantee of implemen-

tation at the end. The more disadvantaged the group, the greater the likelihood that it will be subject to some form of stigma and/or prejudice which will have a negative influence on the willingness of the state to comply with any positive decision.

Assuming victims can be identified and willing to proceed (something, of course, which is not required for the collective complaints system under the Social Charter but is more a question of effective collaboration with national NGOs), the challenge of evidential proof can be daunting in socio-economic cases. Clearly, and particularly in proving inequality and discrimination, the use of statistical data can be vital. However, such disaggregated data does not always exist, especially with respect to ethnic minorities such as the Roma or undocumented migrants, requiring potentially costly and time consuming collection and analysis.

Even if a successful case can be argued, the court may consider that what it is being asked to do exceeds its powers and is something more within the remit of the legislature or executive. This is clearly the case where socio-economic rights are not explicitly constitutionally entrenched and/or there are significant policy or resource implications.

Finally, as I have reiterated before, even if the victims' complaints are upheld, the challenge of implementation remains, which may deter future litigants.

ERT: What are the key strategic considerations you take into account when deciding whether to take litigation and how it should progress? Apart from legal strategies, how should the litigation interact with the wider advocacy strategy? To what extent is and should the media be involved?

Geoff Budlender: Major litigation works best when it is part of broader strategy. In major cases, the achievement of rights involves many actions: public education about the rights; social mobilisation by the people affected; campaigning and advocacy (including through the media); litigation; and the monitoring and enforcement of compliance with the order made by the court. The litigation has to be planned with all of this in mind.

A test case has to be carefully chosen in order to present the most favourable case and facts to the court. And underlying all of this is that the case must be “owned” by the people who are affected, not by the lawyers.

Iain Byrne: The first question you need to ask is what problem are you seeking to address and whether litigation can make a contribution to resolving it? In many cases it will be unlikely that litigation on its own can address the wider underlying political and socio-economic issues, but at the very least it should be able to play a positive role and not be counterproductive. Effective and ongoing consultation with partners and victims is vital in this respect; otherwise there is a danger of international organisations parachuting in and out.

In so doing you need to comprehensively address the risks and assumptions. Clearly the prospects of success will be a significant criterion. However, even if the prospects look bleak and there is a strong likelihood that the case will be lost, this does not automatically mean that you decide not to take a case. The surrounding publicity, increase in public awareness and resulting political pressure could make strong headway in the positive change being sought. To this end, getting the media on board early on to understand the issues at stake and why the case is being brought is important. This may not mean

there is much attention given to the filing of a case or even the hearing compared to the final outcome but at least journalists are briefed so that they can be motivated to devote sufficient space at key moments.

The potential for wider social mobilisation around the case, particularly in terms of securing implementation, is another key factor. Affected communities and civil society organisations should be able to appreciate the significance of using the litigation as a springboard for raising related concerns. Above all, such litigation requires a long term commitment from all the key actors beyond just the actual hearing phase.

ERT: What has been the most memorable case in the area of equality in respect of socio-economic rights that you have been involved in and why?

Geoff Budlender: The most memorable equality case was in the pre-Constitutional era, and it was not about socio-economic rights (*Machika v State President*, 1983). Part of the apartheid master-plan was the denationalisation of all South Africans of African origin. They were allocated to “homelands” on an ethnic basis, whether or not they had ever lived in the 13% of the country which constituted those “homelands”. The apartheid parliament would declare each of the “homelands” constitutionally “independent” Their citizens would then lose their South African citizenship. In time, there would be no South African citizens of African origin. Between 1976 and 1981, four of the nine “homelands” were declared constitutionally independent. The fifth, KwaNdebele, was to be declared independent in 1983. This led to widespread resistance, and vicious repression.

Four rural women challenged the legal validity of the puppet administration which

had been established for the area. They contended that this apartheid institution, created by law, had not been validly established – because women had been excluded from qualifying as candidates and from voting. The governing statute authorised racial discrimination, but it did not explicitly authorise discrimination on the grounds of gender.

Relying on long-established administrative law doctrine, the women contended that their exclusion amounted to unlawful discrimination which rendered the relevant administrative decisions invalid. A conservative judge upheld the argument as correct. The process of “homeland independence” was stopped in its tracks.

The case was memorable for many reasons, not least the brave and wonderful applicants. At a legal or doctrinal level, it illustrated that the principle of equality can be a private tool even in the absence of a bill of rights or equivalent instrument.

Iain Byrne: In *INTERRIGHTS v Greece*,¹¹ a collective complaint before the European Committee of Social Rights, as well as obtaining a positive decision regarding widespread housing violations against the Roma community, we managed to set an important precedent. The case was the first to revisit an issue previously considered by the Committee some five years earlier (*ERRC v Greece*).¹² Despite protests from the Greek government that this case covered exactly the same facts (wrong – it raised new issues as well as showing the ongoing failure to address previous violations) and was more appropriately dealt with under the periodic reporting system, the Committee declared the case admissible. In so doing the Committee made it clear that it was not prevented from considering complaints solely because similar issues were assessed during the re-

porting cycle. In upholding the complaint the Committee found that the Roma continued to experience widespread discrimination in access to housing and that its previous criticisms had not been adequately addressed.

More generally, the case demonstrates the importance of adjudication bodies – whether domestic courts or international tribunals – continuing to monitor implementation of their decisions and, if appropriate, make further findings of violations to increase the pressure on the state to comply.

The case could not have happened without the involvement of the local partner, the Greek Helsinki Monitor, which had worked on the first case with another international NGO and continued to commit to working on the Roma despite an increasingly hostile environment. Although domestic organisations cannot automatically bring complaints (compared to registered international organisations) but require permission from states, they play a critical role in providing the necessary evidence and contacts with affected communities.

ERT: What practical impact do you think litigation on the equality of access to socio-economic rights has had in your jurisdiction of expertise?

Geoff Budlender: For the reasons which I have given, equality litigation has so far had only limited impact on socio-economic rights. This is, I think, because it is in some ways easier to rely directly on the social and economic rights in the Constitution. This has however been a strategic and doctrinal mistake.

I think in time we will find that equality moves to centre stage in social and economic rights litigation. This will be so particularly

where the litigation is aimed at achieving a positive right to a benefit, as opposed to preventing the negative deprivation of a right – for example, eviction from housing. A negative right is readily protected by litigation based on the social and economic right in question. This has been the focus of most of the social and economic rights litigation. As we increasingly focus on the positive rights which are involved, the right to equality will become increasingly important. This has already started to happen in litigation around the right of access to water (*Mazibuko*).¹³

Iain Byrne: Looking at the often mixed record of implementation of even some of the leading cases such as *DH v Czech Republic*¹⁴, it is easy to be cynical about whether litigation ever makes a difference for the victims, let alone in terms of wider impact. However, in some cases litigation has led to action by government (e.g. *FIDH v France*¹⁵ did lead to changes in the provision of medical assistance to illegal non-nationals, whilst Portugal addressed child labour issues following the Social Rights Committee’s first ever decision in *ICJ v Portugal*).¹⁶

Given the widespread, entrenched and systematic socio-economic inequality across Europe, it would be surprising if litigation could make significant changes overnight. However, in the case of the Roma the litigation has at least helped to raise awareness both in and outside countries and probably contributed to the European Union taking a much stronger stand, culminating for the first time in December 2013 in a EU-level legal instrument for Roma inclusion.

ERT: Socio-economic rights cases are often perceived to require judges to make policy decisions with big implications for the state’s resources. Do you accept this analysis? And to what extent does ap-

proaching the matter from the perspective of the rights to equality and/or non-discrimination help in this regard, if any?

Geoff Budlender: Inevitably, some of these decisions do have significant resource implications. Judges are often anxious about the implications of this for the principle of the separation of powers. Judges also find it difficult to answer the question, “How much does the Constitution oblige the state to provide?”, and some doubt that this is a question which they can answer at all. The equality right offers a way through this dilemma. It offers the answer, “As much as other people receive”. That puts the state to the test – it must either equalise upward or equalise downward (assuming this is permissible), but it must equalise.

In other words, the state will decide what resources will be allocated to the service or benefit in question – what the court insists is that when that decision has been made, the distribution of the benefit must be done in accordance with the principle of equality. It is often very difficult to equalise downward, because those who are currently favoured are usually those who have most power or influence in the political process. They will not take easily to having their services or benefits reduced. So there will often be a political pressure to equalise upward – and the advantaged will become the allies of the disadvantaged in pressing for this. At least that’s the theory!

Iain Byrne: It is certainly true that some cases do have significant resource implications. However, this is also true for civil and political rights cases – a finding of violations in the treatment of a prisoner could have implications for reforming the whole prison system. At the same time many socio-economic cases have little or no resource implications, e.g.

respecting people's right to adequate housing by preventing forced evictions or ensuring that coercive sterilisations are not being carried out against minorities.

Clearly, if a court finds that a particular individual or group have been unfairly denied equal access to an aspect of a socio-economic right, this could have wider significant implications if many others in a similar situation are affected, e.g. all undocumented migrants should receive a certain health or welfare benefit. However, by relying on the principle of equality/non-discrimination courts may feel more emboldened to hold that nobody should be socially or economically excluded, regardless of their status or the cost implications. In this respect the historically strong equality legislative framework in the UK compensates to some extent for our lack of entrenched socio-economic rights.

ERT: What has the state's reaction been to the courts' jurisprudence in the area of equality in respect of socio-economic rights?

Geoff Budlender: As I have indicated, there has not been a great deal of litigation on equality in respect of socio-economic rights. It is too early to discern a relevant trend. The state complies with orders which are made, sometimes after some delay. There is significant anxiety in the state about the issue of the separation of powers with some prominent people warning the courts not to stray beyond their constitutional mandate.

Iain Byrne: As I have already highlighted, obtaining effective implementation of court decisions, even at the domestic level, can be challenging, particularly where there is a lack

of political will and/or significant socio-economic implications. The continuing failure of the Czech government to implement the *DH* judgment concerning discrimination against Roma pupils in the education system over 5 years later (as documented by Amnesty) is a case in point. The greater the envisaged political cost, the less likelihood of compliance and unfortunately equality/non-discrimination cases concerning unpopular minorities often fall into this category. However, failure to comply not only breaches the victims' fundamental right to a remedy but also undermines the rule of law – states should not be able to pick and choose which decisions they implement. Even if there are significant socio-economic implications, states should design appropriate implementation plans which show they are making concrete progress towards compliance.

ERT: If you could make one change to the law in relation to equal enjoyment of socio-economic rights, what would it be?

Geoff Budlender: The doctrinal development which we need is the development of appropriate remedies for the systemic breach of the right to equality. This can be done by the courts, which have wide remedial powers. As we move towards being an increasingly class-based society, discrimination on the grounds of poverty will become increasingly important. We need legislation which explicitly makes this a prohibited ground of discrimination.

Iain Byrne: To ensure that all states have a comprehensive set of legally entrenched enforceable economic, social and cultural rights which can be directly argued by everybody before domestic courts.

Interviewer on behalf of ERT:
Joanna Whiteman

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- 1 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 2.
 - 2 *Ibid.*, Para 35.
 - 3 *Soobramoney v Minister of Health, KwaZulu-Natal*, CCT32/97.
 - 4 *Government of the Republic of South Africa and Others v Grootboom and Others*, CCT11/00.
 - 5 *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*, CCT2/97.
 - 6 *D.H. and others v the Czech Republic* [GC], European Court of Human Rights, no. 57325/00, 13 November 2007.
 - 7 *The International Federation of Human Rights Leagues (FIDH) v France*, ECSR, complaint no. 14/2003.
 - 8 *European Roma Rights Center (ERRC) v Italy*, ECSR, complaint no. 27/2004.
 - 9 *European Roma Rights Center (ERRC) v Greece*, ECSR, complaint no. 15/2003.
 - 10 *International Center for the Legal Protection of Human Rights (INTERIGHTS) v Greece*, ECSR, complaint no. 49/2008.
 - 11 *Ibid.*
 - 12 See above, note 9.
 - 13 *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)*, CCT39/09.
 - 14 See above, note 6.
 - 15 See above, note 7.
 - 16 *The International Commission of Jurists (ICJ) v Portugal*, ECSR, complaint no. 01/1998.