

255/02 : Garreth Anver Prince / South Africa

Summary of Facts

1. The complaint is filed by Mr Garreth Anver Prince, a South African citizen of 32 years of age, against the Republic of South Africa.
2. The Complainant alleges that despite his completion of the academic requirements for admission as an attorney in terms of the Attorney's Act 53 of 1979, and despite his willingness to register for a contract of community service for a period of one year, which is a requirement under the said Act, the Law Society of the Cape of Good Hope (the Law Society) declined to register his contract of community service.
3. The Complainant alleges that the Law Society's refusal to register him was based on his disclosure, made in his application with the Law Society, that he had two previous convictions for possession of cannabis under section 4(b) of the Drugs and Drug Trafficking Act and his expressed intention to continue using cannabis. The Complainant stated that the use of cannabis was inspired and required by his Rastafari religion. The Law Society held that such a person was not a fit and proper person to be admitted as an attorney.
4. The Complainant alleges that reasoning and meditation are essential elements of the religion. The use of cannabis is central to these essential practices of the religion that serve as a form of communion. He alleges that the use of cannabis was believed to open one's mind and helped Rastafari gain access to the inspiration provided by Jah Rastafari, the Living God. He further alleges that the use of cannabis in Rastafari religion was the most sacred act surrounded by very strict discipline and elaborate protocol. The use of the herb, as it is commonly known, is to create unity and assist in establishing the eternal relationship with the Creator.

Complaint

5. The Complainant alleges violations of [Articles 5, 8, 15](#) and [17\(2\)](#) of the African Charter on Human and Peoples' Rights.
6. The Complainant prays that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.
7. The undated complaint was received at the Secretariat on 12th August 2002.
8. On 16th August 2002, the Secretariat wrote to the Complainant acknowledging receipt of the complaint, and informing him that his complaint has been registered and scheduled for consideration at the Commission's 32nd Ordinary Session.
9. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
10. On 4th November 2002, the Secretariat wrote to the complainant and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.
11. On 19th December 2002, the Secretariat received the Complainant's written submissions on admissibility of the communication, which was forwarded to the Respondent State on 17th February 2003. In the same letter, the Secretariat reminded the Respondent State to forward its written submissions on the admissibility of the communication before the 33rd Ordinary Session.
12. By a Note Verbale of 31st March 2003, which was not received in a legible print out form, the Respondent State confirmed receipt of the Commission's correspondences and requested the Commission to extend the deadline for the submission of its response on the admissibility of the complaint for another three months.
13. On 8th April 2003, the Secretariat wrote to the Respondent State confirming receipt of their correspondence and requesting them to resend the said request to it as the same did not reach the Secretariat in a legible print out form.
14. By a fax of 5th May 2003, the Respondent State confirmed its request for more time to enable it prepare and forward its written submissions on admissibility of the communication to the Commission.

15. At its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003, the African Commission examined the communication and postponed its decision on admissibility to its 34th Ordinary Session granting the Respondent State more time as per its request.

16. On 12th June 2003, the Secretariat wrote to the Complainant and the Respondent State informing them of this decision and further reminding the latter to forward its written submissions on admissibility of the same before the 34th Ordinary Session of the Commission.

17. On 12th September 2003, the Secretariat of the African Commission received the written submissions on admissibility of the Respondent State. This was forwarded to the Complainant on 23rd September 2003.

18. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission examined the complaint and declared it admissible.

19. On 10th December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their respective written submissions on the merits of the communication before the 35th Ordinary Session.

20. On 12th March 2004, the Respondent State forwarded its written submissions on the merits of the communication and expressed its wish to lead oral arguments on the matter during the 35th Ordinary Session of the African Commission, receipt which the Secretariat acknowledged on 17th March 2004. A similar request to address the African Commission orally was sent to the African Commission by the Complainant on 11th and 23rd March 2004.

21. On 17th March 2004, the Secretariat of the African Commission forwarded a copy of the Respondent State's written submissions on the merits to the Complainant.

22. By a Note Verbale of 21st May 2004, the Respondent State informed the Secretariat that the parties in the matter have consulted on the date for the hearing of the communication by the African Commission and kindly requested the latter to consider the same on the 29th May 2004, which date would be most suitable for them to appear.

23. The parties have concluded their exchange of submissions on the merits. They are now both requesting the African Commission to allow them to lead oral arguments to complement their submissions on the same. The African commission granted them audience as requested to enable them complement their written submissions and to enable the African Commission to engage the parties during their presentations.

24. At its 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th Ordinary Session.

25. On 17th June 2004, the Secretariat informed both parties of this decision.

26. At its 36th Ordinary Session that took place from 23rd November to 7th December 2004, the African Commission considered the communication and took a decision on merits thereto.

Law

Admissibility

27. Since both parties have not contested the issue of admissibility of this communication, and since the complaint complies with the requirements under [Article 56](#) of the African Charter, the African Commission decided, unanimously, to declare it admissible at its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003.

28. As per the original complaint, the Complainant is a 32 year old man who wishes to become an attorney in the courts of South Africa. Having satisfied all the academic requirements of the South African Attorney's Act (the Act), he applies to register a contract of community service with the Law Society of the Cape of Good Hope (the Law Society). Under the same Act, registering articles of clerkship or performing community service, as Mr Prince wished to do, is another requirement that an applicant should fulfil before he/she could be admitted as an attorney to practice before the High Court. As per the provisions of the Act, the Applicant, such as [sic] Mr Prince should serve for a period of one year. Before serving so, however, the Act requires that the Applicant should provide proof to the

satisfaction of the Law Society that he/she is “fit and proper person”. In his application to the Society, and as part of the legal requirement, Mr Prince disclosed not only that he had two previous convictions for possession of cannabis under the Drugs and Drug Trafficking Act (the Drugs Act) but that he intended to continue using cannabis as inspired and required by his Rastafarian religion.

29. The Law Society declined to register Mr Prince’s contract of community service taking the view that a person who, while having two previous convictions for possession of cannabis, declares his intention to continue using the substance, is not a “fit and proper person” to be admitted as an attorney. Mr Prince alleged that the Law Society’s refusal to register meant that as long as he adhered to the requirements of his Rastafari faith, he would never be admitted as an attorney. Accordingly, Mr Prince brought this complaint alleging violation of [Articles 5, 8, 15](#) and, [17\(2\)](#) of the African Charter. In his prayers to the African Commission, the Complainant requested the African Commission to find the Respondent in violation of the said Articles, and that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

30. In elucidating his claims, the Complainant cites two South African statutes as having an impact on the practice of the Rastafarian religion: the Drugs Act and the Medicines and Related Substances Act (the Medicines Act). The former lists cannabis as an undesirable dependence-producing substance and prohibits its use and possession, in line with the stated purpose of the Act: to prohibit the use and possession of dependence-producing substances and dealing in such substances. It, however, exempts the use or possession of this substance in certain circumstances such as for medicinal purposes, subject to the provisions of the Medicines Act, which in turn regulates the registration of medicines and substances. The latter Act, however, prohibits the use or possession of cannabis except for research and analytical purposes. The Complainant alleges that the purposes of the prohibitions contained in these two Acts coincided and hence both Statutes proscribed the sacramental use of cannabis and therefore impacted upon the religious practices of Rastafari. The proscriptions are unlimited in terms that they also encompassed the use or possession of cannabis by Rastafari for *bona fide* religious purposes failing to distinguish between Rastafari and drug abusers thereby grouping genuine religious observation with criminality. He alleges that the Respondent State thus violated his right to dignity [[Article 5](#)], his right to freedom of religion [[Article 8](#)], his right to occupational choice [[Article 15](#)], and his right to a cultural life [[Article 17.2](#)].

31. The Complainant, in requesting for an exemption for sacramental use of cannabis, further explains that he does not ask for the overall decriminalisation of cannabis, rather for a reasonable accommodation to manifest his beliefs in accordance with his Rastafari religion. Such reasonable accommodation ensures a religiously pluralistic society that is an important principle of any democratic society. He adds that Rastafari is a minority and vulnerable group, a political minority not able to use political power to secure favourable legislations for themselves.

32. In its initial response of 5th September 2003, the Respondent State argues that attorneys are obliged to uphold the law and wilful defiance of the law suggests that such a person is not fit and proper to be admitted as an attorney. This is so even if the person applying for admission believes that a law or a provision thereof contravenes his or her fundamental rights. Until such time that a law or a provision thereof has been declared unconstitutional or has been changed by legislative or other means, everyone has duty to obey the law or provision in question.

33. The Respondent State further argues that any religious practices must be conducted within the framework of the law and must, if necessary, be adapted to comply with the law as failure to do so will result in anarchy. Rastafari is a genuine religion protected by the South African Constitution. The recognition of and the right to practice a religion and engage in associated activities may not be exercised in a manner which is inconsistent with the Bill of Rights and the Rule of Law under which no one would be punished except for a distinct breach of law to which everyone is subject. Religious practices and the freedom to practice a religion must be conducted strictly in accordance with the law, which must be obeyed.

34. Contrary to the Complainant’s allegation, the Respondent State avers that the fact that reasonable limitations are placed on the practice of a religion in the interests of society does not negate the essential right to freedom of religion. The Constitution permits limitation of rights without

which the rights of others may be infringed with unintended consequences. The prohibition on the use of cannabis is a reasonable and permissible limitation on the freedom of religion. The legal restrictions placed on the use of cannabis do not erode the necessity to ensure religious pluralism, are rational and legitimate and do not invade the right any further than it needs.

35. The Respondent State further avers that lawyers have a duty, at all times, to uphold the Constitutions and the rule of law, which includes adhering to the law, adapting one's religious practices to conform with the law and generally setting an example to others. The Complainant's professional difficulties are due to his refusal to accept and adhere to the relevant laws and that the worship of the Creator is possible without cannabis. The impugned provisions of the law do not compel Rastafari to desist from taking part in an aspect of the cultural life of their community.

36. In conclusion, the Respondent State admits that the impugned provisions do prohibit the use or possession of cannabis for *bona fide* religious purposes but they are not overbroad and that the Constitutional Court has upheld the restrictions placed on the use of cannabis.

37. In its further written submissions on the merits, the Respondent State raised the following points: That the matter has been carefully considered by the South African Courts which found that while the legislations in question did limit Mr Prince's constitutional rights, specifically the right to freedom of religion, such limitations were justifiable under the South African Constitution which allows limitations only in terms of law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Limitations may also take place taking into account all relevant factors, including:

1. The nature of the right;
2. The importance of the purpose of the limitation;
3. The nature and extent of the limitation;
4. The relation between the limitation and its purpose;
5. and the less restrictive means to achieve the purpose.

That in considering the matter, the South African Constitutional Court made a careful analysis of the Bill of Rights and struck a careful balance between competing interests in society, while remaining acutely aware of the historical context and unique feature of the South African society of which it is the highest judicial body.

That the African Commission should apply extreme care in considering this matter as a determination that will in effect contradict the decision of an esteemed judicial body will inevitably carry seeds of possible conflict between domestic and international legal systems, and will upset the careful balances struck within the young and developing human rights system of member states of the AU.

That the South African Courts, in denying Mr Prince's application, and in striking a balance between his rights and the interests of the wider society, did not only do so with South African domestic law in mind, but in the process also took into account the widest possible scope of international law, both customary international law and treaty law, including the African Charter. By using the same international law sources as the South African Courts, the African Commission should come to the same conclusions as that of the South African domestic courts.

That, in order to allow the domestic legal system of South Africa co-exist with the African Charter without undue tension, the African Commission should apply the following two methods of interpretation:

- The **Principle of Subsidiarity** which delimits or distributes powers, functions and responsibilities between the state on the one hand, and individuals and groups within the jurisdiction of the state, on the other. Equally, this can be applied to distribute powers between national authorities of State Parties to the African Charter and the African Charter itself. The national authorities should have the initial responsibility to guarantee rights and freedoms within the domestic legal orders of the respective states, and in discharging this duty, should be able to decide on appropriate means of implementation. The African Commission should therefore construct its role as subsidiary, as a narrower and supervisory competence in subsequently

reviewing a state's choice of action against the standards set by the provisions of the African Charter. In terms of this construction, the African Commission should not substitute for domestic institutions in the interpretation and application of national law.

- **The Margin of Appreciation Doctrine**, which is the logical result of the application of the principle of subsidiary. It's a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards. This discretion that the state is allowed, rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape a society. Accordingly, the African Commission, in considering the matter, has to take into account the legal and factual situation in South Africa. It should not view this communication *in abstracto*, but in the light of the specific circumstances pertaining in the Respondent State. The South African Constitutional Court did take into account such specific circumstances: the ratio for the decision to limit the right to freedom of religion in terms of the Constitution was that the use of cannabis by Rastafari could not be sanctioned without impairing the State's ability to enforce its drug legislation in the interest of the public at large.

38. The Respondent State finally avers that the African Charter does not prescribe how States Parties should achieve the protection of the rights enshrined within the domestic jurisdiction, but leaves the way in which such protection is to be achieved to the discretion of States Parties.

39. The African Commission has examined the complaint and the various documents thereto and decides as follows:

Merits

Violation of the right to freedom of religion: [Article 8](#) of the African Charter

40. The Complainant alleges violation of this Article due to the Respondent State's alleged proscription of the sacramental use of cannabis and for failure to provide a religious exemption for Rastafari. The crux of his argument is that manifestation of Rastafari religious belief, which involves the sacramental use of cannabis, places the Rastafari in conflict with the law and puts them at risk of arrest, prosecution and conviction for the offence of possession or use of cannabis. While admitting the prohibition serves a rational and legitimate purpose, he nonetheless holds that this prohibition is disproportionate as it included within its scope the sacramental use of cannabis by Rastafari.

41. Although the freedom to manifest one's religion or belief cannot be realised if there are legal restrictions preventing a person from performing actions dictated by his or her convictions, it should be noted that such a freedom does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances. A parent's right to refuse medical treatment for a sick child, for instance, may be subordinate to the state's interest in protecting the health, safety, and welfare of its minor children.

42. In the present case, thus, the Commission upholds the Respondent State's restriction, which is general and happens to affect Rastafari incidentally (*de facto*), along the lines of the UN Human Rights Committee, which, in the case [K. Singh Bhinder v. Canada](#), Communication No. 208/1986 upheld restrictions against the manner of manifestation of one's religious practice. That case concerned the dismissal of the Complainant from his post as maintenance electrician of the government-owned Canadian National Railway Company. He had insisted on wearing a turban (as per the edicts of his Sikh religion) instead of safety headgear at his work, which led to the termination of his labour contract. The UN Human Rights Committee held:

If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under [popup=Article 26] All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on

any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[popup] (of the [ICCPR](#)), then, applying the criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by wearing of hard hats is to be regarded as reasonable and directed towards objective purpose that are compatible with the ICCPR.

43. The African Commission considers that the restrictions in the two South African legislations on the use and possession of cannabis are similarly reasonable as they serve a general purpose and that the Charter's protection of freedom of religion is not absolute. The only legitimate limitations to the rights and freedoms contained in the African Charter are found [Article 27.2](#); i.e. that the rights in the African Charter "shall be exercised with due regard to the rights of others, collective security, morality, and common interest". The limitation is inspired by well-established principle that all human and peoples' rights are subject to the general rule that no one has the right to "engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms" recognised elsewhere. And the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages, which are to be obtained. It is noted that the Respondent State's interest to do away with the use of cannabis and its abuse/trafficking stems from the fact that, and this is also admitted by the Complainant, cannabis is an undesirable dependence-producing substance. For all intents and purposes, this constitutes a legitimate limitation on the exercise of the right to freedom of religion within the spirit of [Article 27.2](#) cum [Article 8](#).

44. Besides, the limitations so visited upon the Complainant and his fellow Rastafari fall squarely under [Article 2](#) of the African Charter which requires States to ensure equal protection of the law. As the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the Complainant's free exercise of his religious rights.

Violation of the right to occupational choice: [Article 15](#) of the African Charter

45. The Complainant has alleged that because of his religious beliefs, the Law Society refused to register his contract of community service, thereby violating his right to occupational choice. He argued that the effect of the legal restrictions on cannabis in effect denied the Rastafari access to a profession.

46. One purpose of this Charter provision is to ensure that States respect and protect the right of everyone to have access to the labour market without discrimination. The protection should be construed to allow certain restrictions depending on the type of employment and the requirements thereof. Given the legitimate interest the State has in restricting the use and possession of cannabis as shown above, it is held that the Complainant's occupational challenge can be done away with should he chose to accommodate these restrictions. Although he has the right to choose his occupational call, the Commission should not give him or anyone a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.

Violation of the right to dignity and cultural life: [Articles 5](#) and [17\(2\)](#) of the Charter

47. The Complainant lists down the main characteristics for identifying the Rastafari way of life (culture): hairstyle, dress code, dietary code, usage of cannabis, the worship of Jah Rastafari, the Living God and others. He further states that the critical form of social interaction amongst the followers of this religion is the worship of the Creator, which is not possible without cannabis, and to which the Respondent State argues to the contrary.

48. The Commission notes that the participation in one's culture should not be at the expense of the overall good of the society. Minorities like the Rastafari may freely choose to exercise their culture, yet, that should not grant them unfettered power to violate the norms that keep the whole nation together. Otherwise, as the Respondent State alleged, the result would be anarchy, which may defeat

everything altogether. Given the outweighing balance in favour of the whole society as opposed to a restricted practice of Rastafari culture, the Commission should hold that the Respondent State violated no cultural rights of the Complainant.

49. With respect to the alleged violation of the right to human dignity, the Commission holds that the Complainant's treatment by the Respondent State does not constitute unfair treatment so as to result in his loss of self-worth and integrity. As he or his fellow Rastafari are not the only one's being proscribed from the use or possession of cannabis, the Complainant has no grounds to feel devalued, marginalised, and ignored. Thus, the Commission should find no violation of the right to dignity.

With respect to the arguments of the Respondent State invoking the inter-related Principle of Subsidiarity and the Margin of Appreciation doctrine:

50. The African Commission notes the meaning attached to these doctrines by the Respondent State as outlined in its submissions to the former. The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the Respondent State that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter.

51. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the Respondent State in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.

52. Both doctrines establish the primary competence and duty of the Respondent State to promote and protect human and peoples' rights within its domestic order. That is why, for instance, the African Charter, among others, requires Complainants to exhaust local remedies under its [Article 56](#). It also gives Member States the required latitude under specific Articles in allowing them to introduce limitations. The African Commission is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in Member States.

53. That underscored, however, the African Commission does not agree with the Respondent State's implied restrictive construction of these two doctrines relating to the role of the African Commission, which, if not set straight, would be tantamount to ousting the African Commission's mandate to monitor and oversee the implementation of the African Charter. Whatever discretion these two doctrines may allow Member States in promoting and protecting human and peoples' rights domestically, they do not deny the African Commission's mandate to guide, assist, supervise and insist upon Member States on better promotion and protection standards should it find domestic practices wanting. They do allow Member States to primarily take charge of the implementation of the African Charter in their respective countries. In doing so, they are informed by the trust the African Charter has on Member States to fully recognise and give effect to the rights enshrined therein. What the African Commission would not allow, however, is a restrictive reading of these doctrines, like that of the Respondent State, which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter.

Holding

For these reasons, the African Commission finds no violation of the Complainant's rights as alleged.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights, 23rd November 7th December 2004, Dakar, Senegal.