



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Case Reference No: WC/2008/0411

In the matter of:

Kemp, James

Complainant

and

University of Cape Town

Respondent

FINDING

1. **Introduction**
- 1.1 The South African Human Rights Commission ("the Commission") is an institution that was established in terms of Section 181 of the South African Constitution Act 108, of 1996 ("The Constitution");
- 1.2 The Commission is mandated in terms of Section 184 of the Constitution to-
 - 1.2.1 promote respect for human rights and a culture of human rights;
 - 1.2.2 to promote the protection, development and attainment of human rights;
 - 1.2.3 and monitor and assess the observance of human rights in the Republic.
- 1.3 Further, the Commission is empowered in terms of Section 184(2) of the Constitution to investigate matters, and to report on the observance of human rights in the Republic.
- 1.4 In addition, Section 184(2) (c) and (d) vest authority in the Commission to undertake research and to educate the Republic on human rights related matters.
- 1.5 The Commission's authority and powers are supplemented by the provisions contained in the *Human Rights Commission Act 54 of 1994* together with the Regulations in respect of the procedures in dealing with the alleged violations.

2. Background

- 2.1 On 13 June 2008, the Commission received a complaint from Mr. James Kemp, the Freedom Front Plus Campus Spokesman for the Western Cape.
- 2.2 Mr. Kemp alleged that the University of Cape Town ("UCT") guidelines for admission to study medicine violated his Section 9 (equality), Section 22 (freedom of trade, occupation and profession), and Section 29(1)(b) (the right to further education) rights under the Bill of Rights.
- 2.3 According to Mr. Kemp, the UCT admissions guidelines for holders of a National Senior Certificate specified that "Black students must obtain 74%, Coloured students must obtain 78%, Indian students must obtain 88%, and White students must obtain 91% if they wish to study medicine in 2009 at UCT."
- 2.4 Hugh Amoore, the Registrar at UCT, responded to Mr. Kemp's allegations on 29 September 2008. According to Mr. Amoore, Section 37 of the *Higher Education Act 101 of 1997*, as amended, requires that the UCT admissions policy make provision to redress past inequalities. Mr. Amoore stated that the policy's objectives are threefold,
- (1) UCT is committed to being flexible on access;
 - (2) UCT is committed to being flexible in redress; and
 - (3) UCT is committed to being rigorous on success.
- The University Council determines the admissions policy in light of Section 37 of the Higher Education Act and this policy is reviewed annually.
- 2.5 Mr. Amoore stated that Mr. Kemp's allegations were based on a faulty understanding of the MBChB admissions policy. In his letter of response, he explained that the Council and the Senate determine the minimum requirements for admission. Those students meeting the minimum qualifications are then selected for admission based upon a weighted combination of an Applicant's: (1) achievement in the National Senior Certificate (NSC); (2) achievement in the National Health Science Placement Tests (HSPT); and (3) the score the Applicant achieves on a personal report form. Thus, a student's NSC score will comprise 60% of the overall weighted score, the HSPT will comprise 30% and the personal report form will comprise 10% of the overall weighted score.
- 2.6 Mr. Amoore also noted that the scales were different for specific groups of Applicants. The "Open" (refers to White South African Students, International Students and Students who out of preference have not declared their race-definitions found in the preamble) and Indian Applicants have personal report form points included in their overall weighted score, but the personal report form points are not factored into the Black and Coloured Applicants' applications. The reason for the different scales, Mr. Amoore stated in a telephonic conversation, is that it is often difficult for Black and Coloured students to obtain the personal reports. Accordingly for reasons of fairness, this requirement has been waived for these Applicants.
- 2.7 According to Mr. Amoore, the Council and the Senate also determine the maximum number of students per class and sets target numbers for Black, Coloured, and Indian student admissions. UCT then chooses the best Black, Coloured and Indian Applicants, which will total less than or equal to the target numbers initially determined. The

remaining "Open" places in the class are given to the best applicants remaining in the applicant pool. These students are usually White, but not always. Given South Africa's history of educational and socio-economic inequality, and based on UCT's past experiences with Applicants, the *probable* 2009 cut-off level for applicants will be the following:

- a) Black applicants: 36 NSC points, 28 HSPT points (Personal report scores are omitted), with an overall weighted score of 74
- b) Coloured applicants: 36 NSC points, 28 HSPT points (Personal report scores are omitted), with an overall weighted score of 78
- c) Indian applicants: 47 NSC points, 32 HSPT points, a Personal Report score of 8, with an overall weighted score of 88
- d) Open applicants: 47 NSC points, 34 HSPT points, a Personal Report score of 10, with an overall weighted score of 91

2.8 According to Mr. Amoores letter, these overall weighted scores (74, 78, 88, and 91) are the *expected* cut-off numbers for Black, Coloured, Indian and Open applicants, respectively, and are not NSC average percentages, as the complainant alleged. Mr. Amoores stated that UCT has developed this admission policy, "in order to ensure redress, and to ensure a diverse class: in this we take the Applicants self-declaration of race as a proxy for measuring past inequalities. We regard this proxy as reasonable given the history of racially based legal, socio-economic and educational disadvantages under apartheid." Furthermore, according to Mr. Amoores, if the country reaches the stage where educational and other inequalities are no longer apparent, then the expected cut-off levels for all applicants would be scored on the same index and the overall weighted scores would be equal.

2.9 On 18 November 2008, Mr. Kemp responded to Mr. Amoores explanation of the UCT admissions policy and acknowledged that he may have confused the overall weighted score calculation for NSC percentages. However, he stated that Mr. Amoores response did not adequately explain the factors that go into calculating the NSC and the HSPT achievement scores, which forms 60% and 30% (for Open, Indian and Coloured Applicants) and 70% and 30% (for Black applicants) of the overall weighted score. The performance of each applicant in each test will be reported by decile e.g. a result that falls in the top 10% will be in decile 1 and a result that falls in the bottom 10% will be in decile 10. Each decile rating will be reduced to a single numerical score on the following score:

DECILE RATING	POINT SCORE
1	10
2	9
3	8
4	7
5	6
6	5
7	4
8	3
9	2
10	1

- 2.10 In addition, Mr. Kemp believes the selection method is "clearly an admission of preference by means of race as criterion to those applicants who are not White." Mr. Kemp does not believe that Section 37 of the Higher Education Act supports Mr. Amoores explanation, as the Act says that institutions must "not unfairly discriminate in any way."
- 2.11 Finally, Mr. Kemp does not believe the limitation provision contained within Section 36 of the Bill of Rights, as applied to the UCT admissions policy, is reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom. He believes that the White, African, Indian, and Coloured students currently applying for admission all had equal opportunities (at least in terms of academic opportunities) as they were all born in 1990 and all are of the same group which studied the same curriculum.

3. Applicable Law

3.1 Chapter 2, Section 9 of the Bill of Rights: Equality

- S9(1) - Everyone is equal before the law and has the right to equal protection and benefit of the law.
- S9(2)- Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- S9(3)- The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- S9(4)- No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- S9(5)- Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

3.2 Analysis

- *Section 9 (Equality)*

- 3.2.1 Affirmative action is defined as preferential treatment based on race, ethnicity or gender. Generally, affirmative action programmes are designed to help eliminate existing and ongoing discrimination, to remedy effects of past discrimination, and to create systems that promote and achieve substantive equality.

- 3.2.2 The UCT admissions policy is an example of an affirmative action programme. It specifically targets racial and ethnic groups that faced systematic discrimination under apartheid. As an affirmative action scheme, the admissions policy allows students from different racial and ethnic groups to be evaluated on different scales and allows for test score variation between these groups. It acknowledges that the legacy of apartheid still permeates society and that those groups previously disadvantaged have not yet achieved substantive equality with those who were favoured under apartheid. As Mr. Amooore acknowledged, the UCT admissions policy was specifically designed to provide a means to redress past discrimination and to promote the educational efforts of those groups systematically disadvantaged under apartheid.
- 3.2.3 The Constitution provides strong support for affirmative action programmes. Section 9(2) of the Bill of Rights states that, "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." Thus, it is constitutional for measures to be taken that protect and advance groups disadvantaged by unfair discrimination.
- 3.2.4 There is, however, a limitation placed on Section 9 (2) measures. In order to comply with the provision, the measure must meet the internal test of Section 9(2). This test was detailed in the landmark case, *Minister of Finance v. Van Heerden 2004 (6) SA 121 CC*. Accordingly, the State or other institutions can defend challenges to a Section 9(2) measure by showing that the measure: (1) targets persons or categories of persons who have been disadvantaged by unfair discrimination; (2) is designed to protect and advance such persons or categories or persons; and, (3) promotes the achievement of equality.
- 3.2.5 Based upon the *Van Heerden* test, the Commission finds that the UCT admissions policy is not unfairly discriminatory. First, the admissions policy clearly targets Black, Coloured, and Indian students. These groups are widely considered to have been disadvantaged by unfair discrimination. The admissions requirements also vary between Black, Coloured, and Indian students. This is also a means of targeted redress, as the past system of apartheid consisted of a hierarchy, with Whites on top, Africans at the bottom, and Coloured and Indian groups in the middle.
- 3.2.6 Second, the admissions policy is designed to protect and advance those groups that have been disadvantaged by unfair discrimination. For instance, Black and Coloured students are measured on a weighted scale that does not include a personal report requirement. Given that many Black and Coloured students face difficulties obtaining these reports, their schools sometimes lack capacity to send these personal reports, and the personal reports, even if obtained, can be less reliable, accordingly the university has waived the Black and Coloured personal report requirements for admission to the MBChB program. This measure gives Black and Coloured students a better chance to gain admission to UCT. Without such measures in place, these groups that traditionally have difficulties obtaining these personal reports would unlikely be admitted. Such a system would simply reinforce the legacy of the apartheid.
- 3.2.7 Third, the admissions policy allows for variations in the NSC and HSPT scores according to the applicant's self-declared race. While the cut-off levels for the NSC, HSPT and overall weighted score is lowest for African applicants and highest for the Open

applicants, UCT has adopted this admission policy to redress the racially based legal, socio-economic and educational disadvantages under apartheid. For these reasons, the Commission finds that the UCT admissions policy is designed both to protect and advance those groups that have been disadvantaged by unfair discrimination.

- 3.2.8 Finally, for many of the reasons detailed above, the Commission finds that the UCT admissions policy promotes the achievement of equality. Primarily, this is achieved through an admissions policy that aims to redress past inequalities by giving groups still impacted by the legacy of apartheid an improved chance of admission, which leads to increased educational parity.
- 3.2.9 According to *Van Heerden*, once it is shown that a Section 9(2) measure is valid, then it cannot be considered unfair discrimination. In other words, an affirmative action policy that conforms to the three-part test laid out above can never be in violation of the Section 9 Equality provision contained in the Bill of Rights. Furthermore, for a valid Section 9(2) measure, it is unnecessary for the State or any other institution to demonstrate that there is a better way to achieve the goals of the affirmative action programme.
- 3.2.10 Mr. Kemp argues that White, Black, Indian, and Coloured students currently applying for admission to UCT all had equal academic opportunities. The Commission finds this argument disingenuous. There remains a vast disparity between schools providing educational opportunities to White students and African students in South Africa. Moreover, the system of apartheid has left lasting effects that have not yet disappeared. This makes it critical that government and other institutions take positive steps to implement measures aimed at mitigating the disparities between those favoured and disfavoured under apartheid. As noted in the *Bill of Rights Handbook*: Currie et al

"Segregation and apartheid created a political and economic system that favoured some people and unfairly discriminated against others. The system left a legacy of inequality which inhibits the enjoyment and exercise of the constitutional rights of a large number of people in South Africa. A person who is illiterate, uneducated or undereducated is not in the same position to enjoy the right of freedom of expression or political right as a person who is educated. The right to equality therefore does more than simply prohibit discrimination or unequal treatment by the state or by private individuals. It also imposes a positive obligation on the government to act so as to ensure that everyone fully and equally enjoys all the rights and freedoms."

- 3.2.11 Mr. Kemp also argues that Section 37 of the Higher Education Act does not support the admissions policy as it states that institutions must "not unfairly discriminate in any way." However, once an affirmative action policy meets the internal test of Section 9(2), then it cannot be considered unfair discrimination. Thus, the UCT admissions policy is not in violation of Section 37 of the Higher Education Act.
- 3.2.12 For the reasons detailed above, the Commission finds that the UCT admissions policy conforms to the internal test of Section 9(2). Thus, the affirmative action measure is valid, constitutional, and is not unfairly discriminatory.
- *Section 22 (Freedom of Trade, Occupation and Profession)*

3.2.13 Mr. Kemp also alleged that the UCT admissions policy violated his Section 22 right to freedom of trade, occupation and profession. The Commission finds no violation in this regard. The Section 22 provision reads, "Every citizen has the right to choose their trade, occupation or profession freely." This particular Bill of Rights provision was not devised to protect an individual applicant's denial of admission into a professional degree program for non-discriminatory reasons. It was devised, in part, to protect groups and individuals from being unfairly denied access to particular trades or occupations, as occurred during the apartheid era. Certainly, an applicant has the right not to be unfairly discriminated against in the admissions process, but this is a distinct issue to be analyzed under the Section 9 Equality provision.

3.2.14 Furthermore, freedom of trade, occupation and profession is a negative right. This means that it simply provides people with the opportunity to become involved with a particular trade, occupation or profession. It does not, however, guarantee that the right will be automatically provided. In other words, a person does not have the right to demand entry into a particular profession or demand the right to a particular job. For these reasons, Mr. Kemp's allegation that his Section 22 rights were violated is unfounded.

- *Section 29(1)(b) (Education)*

3.2.15 Mr. Kemp also alleges his Section 29(1)(b) rights have been violated. According to this particular provision, "Everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible." Again, this is a right that does not guarantee admission into the applicant's school of choice. It is also a negative right, which means that reasonable steps by the state must be taken to achieve higher education for all, but does not guarantee the state must actually deliver further education to a specific individual or group of individuals. For these reasons, Mr. Kemp's allegation that his Section 29(1)(b) rights were violated is unfounded.

3.3 International law and its application in terms of Section 39(1) of the Constitution

3.3.1 Section 39(1) states that when interpreting the Bill of Rights (Chapter 2), a court, tribunal, or forum-

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b. must consider international law; and
- c. may consider foreign law

3.3.2 In the International Convention on the Elimination of all forms of Racial Discrimination ("ICERD") makes the following provisions:

3.3.2.1 Article 1(4): Special measure taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures of separate rights for different racial groups shall not be continued after the objectives for which they were taken have been achieved.

3.3.2.2 Article 2(2): States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

4. Conclusion

- 4.1 The Commission looks forward to the day when substantive equality between different racial, ethnic, and gender groups has been achieved and measures to redress past inequalities are no longer necessary.
- 4.2 Until this occurs, S9(2) of the Bill of Rights clearly states that measures to promote the achievement of equality and to advance groups that have been previously disadvantaged may be taken.
- 4.3 While such measures may have an undesired impact on those groups previously favoured under apartheid, they are considered necessary to implement in order to attain equality some day in the future.
- 4.4 For the reasons detailed above, the Commission finds that the admission policy of UCT does not violate Mr. Kemp's rights to equality, his right to freedom of trade, occupation or profession, his right to further education, or S37 of the Higher Education Act.

APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so **in writing within 45 days** of receiving this letter by writing to:

The Chairperson, Adv. M. L. Mushwana,
The South African Human Rights Commission,
Private Bag X2700
Houghton, 2041

INVESTIGATOR: BAHIA STERRIS (LEGAL OFFICER, WESTERN CAPE)

DATED AT JOHANNESBURG ON THIS THE 05TH DAY OF MAY 2011

APPROVED: B. J. Malatji

COMMISSIONER: BOKANKATLA MALATJI
SOUTH AFRICAN HUMAN RIGHTS COMMISSION