

## The 4<sup>th</sup> European Human Rights Moot Court Competition 2015/2016

### ELSA in cooperation with the Council of Europe

#### ASSOCIATION LENITER-ALEGRIA, GREEN EXPLOITATIONS INITIATIVE AND 135 OTHERS v KANDELIA

1. The applicants are two associations and 135 Kandelian nationals living in Kandol-Alto, a town situated in the mountainous area of Kandelia. The village is considered the cradle of the Kandelian civilisation, being the first capital of the short-lived Kandelian Empire, 12 centuries ago. Many historic and religious sites are found in the area.
2. Kandol-Alto is also a pilgrimage area for part of the Kandelian population of the Leniterist confession, an ancient religion still practiced by almost 35% of the Kandelian population and some minorities in neighbouring countries. Ancient sites around Kandol-Alto are considered sacred, such as the Leniter Rock, situated on the right bank of the Kand, a small mountain river. Both the rock and the river are believed to have extraordinary powers of healing and the Leniterists believe that touching the rock and praying under it, as well as washing one's face in the river and drinking its water is necessary for after-life redemption. Thus, every believer needs to make at least one pilgrimage to the Kandol-Alto site in their lifetime. It is also common that Leniterists come to take water from the Kand river to bring home for protection, especially for the old and the dying. Leniterist celebrations are performed daily under the rock, where it is said that Leniterya, the main protector, appeared to a group of children bathing in the river, in the form of a winged lady flying above the rock and asking them to spread the message that all believers should come to the rock to pray and to drink from the sacred water.
3. The industrial revolution led to the discovery of important mining potential in the region. A mining exploitation was set in place, very close to the Leniter rock, in the 19<sup>th</sup> century. It functioned until 1985, when the Government in place at that time ordered the closure of the mine, following constant protests from the Leniterist population, because it affected their religious site.
4. The mining exploitation had led to the increase of population in the region. Most of the newcomers were not of Leniterist confession and pressured the authorities to keep the mine open, in order to preserve the economic state of the region and to avoid high unemployment. After the closure of the mine, the former miners stayed in the region, and due to the large number of unemployed, the region was declared a 'disadvantaged' area, with increased financial support from the State in terms of social benefits to the resident population. However, because of several economic crises, there was increasing pressure on the Government to find a solution for the self-sustainability of this disadvantaged area.

5. Following several anti-government protests around the country, anticipated elections were organised in July 2011 and the winning party drew its votes based on a concrete plan to revitalise the region in order to become self-sustaining, including by reopening the mining site, along with the decentralisation of the five main regions of Kandelia, meaning that less financial aid would be available for the disadvantaged areas.
6. The media reported that Kamba Mining International (KMI), a company based in the neighbouring country of Kambania, had been intensely lobbying the governing party and the new regional authorities to reopen the exploitation facility.
7. A leaked report issued by the company and addressed to the Ministry of Industry of Kandelia presented a long-term plan for the extraction industry, with detailed financial and economic information as to the benefits of the reopening in terms of employment, concession fees, etc., as well as concrete details of the extraction method to be used, namely a process in which gold and silver is extracted from low-grade ore by spraying it with sodium cyanide.
8. The company also referred to another earlier publication, an environmental impact assessment carried out in 2010 in order to obtain an environmental compliance certificate. In their analysis of the effects of sodium cyanide on health, the specialists from the institute that carried out the assessment said that there was no risk provided the relevant norms were complied with and there were no accidents, but expressed uncertainty about the impact of the process on the environment.
9. Both reports highlighted the important financial input brought to the region by the reopening of the mine, splitting the population in two: those who strongly supported the revival plan and thus the reopening of the exploitation, and those who strongly opposed it, namely the Leniterist believers, who argued that any such exploitation would pollute their sacred river and affect their pilgrimage site, as the exploitation facility was only a few kilometres away from the Leniter rock.
10. In March 2012, the Government decided to hold a referendum on the matter. The national result was a 59% approval of the revival plan. In April 2012, the regional revival plan was adopted and negotiations started for reopening the exploitation. A concession deal was signed with KMI on 30 May 2012 and the exploitation facility was officially inaugurated at the end of that year.
11. Two associations, the applicants in the present case, Association Leniter-Alegria (ALA - the religious association of the Leniterist believers) and Green Exploitations Initiative (GEI – a local NGO fighting heavy industrialisation and promoting the protection of the environment) have challenged the regional authorities' decision to implement the revival plan, namely the measures concerning the reopening of the mining site. Several hearings were held and a decision of the Kandol-Alto Administrative Court was supposed to be delivered in December 2014, but has not yet been issued.

12. In September 2014, heavy rains led to damages in the waste stock area of the exploitation site and a large quantity of polluted water containing sodium cyanide and other substances leaked into the Kand river, which burst its banks, causing extensive damage to the area, the Leniter Rock being overturned.
13. The authorities sealed the area a few days after the incident, in order to prevent pilgrims from using the water. However, several residents and pilgrims ended up in hospital after visiting the pilgrimage site. Several Leniterist leaders informally encouraged the community to continue using the water, in order not to expose its vulnerable members to the risk of not obtaining eternal life and also because the water was considered sacred and thus not prone to be infected.
14. An investigation concluded that a natural hazard had occurred, causing some toxic residues to be spilled in the river, but that there could be no guilt attached to the company as the natural phenomenon could not be foreseen or avoided. Tests revealed toxic substances present in the water, originating from the mining process.
15. The individual applicants and their family members have undergone extensive treatment in order to recover from skin, respiratory and gastrointestinal disorders. They mandated ALA to represent them in a civil liability claim against the company. ALA, together with and based on the support of GEI, introduced a civil action before the courts in October 2014. The regional authorities were also summoned as co-liable, due to lack of control over the exploitation site, as well as for not taking the necessary measures to inform the population about the contamination of the river.
16. ALA highlighted the considerable impact this had on the religious minority, as their sacred rock was overturned, which in their belief was the sign of the end of the world. They mentioned that several fervent believers tried to take their lives shortly afterwards, in a mass suicide event, convinced of the apocalyptic sign and the nearing end. They were saved at the last minute by the other members of the community. Following the poisoning of the members of the community with water from the river, several members of the community fell into despair, as they could no longer use the water for their daily rituals, especially to obtain redemption for the sick and the dying.
17. By a judgment of 20 February 2015, the Kandol-Alto first-instance court rejected their claims, stating that the effects (the contamination of the river, the bursting of the river banks, as well as the overturning of the sacred rock) was more likely to be linked to the heavy rains than to the company's conduct and that there was no direct proof that the disaster itself was triggered by the conduct of the company. The court based its conclusion on the findings of an expert report, namely that it could not be established with certainty that the leakage of polluted water into the Kand river was caused by the wrongful conduct of the company concerning the storage and disposal of waste, given that it had happened on the occasion of heavy rainfalls which brought considerable damage to the whole region.

18. As to the liability of the regional authorities, the court established that they lacked *locus standi*, and that the complaint should have been made against the central authorities. The applicants were also ordered to pay the incurred legal fees of the company, in the sum of 300 000 kandis (the equivalent of 30 000 EUR).
19. The applicants filed for an appeal. They reiterated their arguments and also pointed out the very large amount of legal fees, which they could not support from their own budget. They mentioned that this type of obligation, in this amount, would have a chilling effect on anyone trying to bring liability suits against major international corporations and that it unbalanced the equality of arms. Upon re-examination of the evidence and assessment of the facts and of the arguments of the parties, the panel of two judges from the Kandol-Alto Court of Appeal quashed the first-instance judgment and, by a decision of 31 May 2015, found in favour of the applicants. They ordered the company to pay them the cost of the medical treatments following the mass intoxication, as well as non-pecuniary damages in the total amount of 200 000 kandis (20 000 euros). They also ordered the regional authorities to suspend the exploitation licence until an investigation into compliance with the norms concerning mining activity was carried out, as there was clear proof of the danger to the environment posed by the exploitation, notwithstanding the effects it had on the Leniterist religious community, which had lost their most sacred place of worship and had their sacred river polluted with toxins, making it impossible to use it for their rituals. The company, along with the regional authority, were ordered to present public excuses to the religious community and to assist them, including financially, in reconstructing the pilgrimage site. The regional authority was also found liable for not taking the necessary measures to inform the population about the pollution of the river and to prevent the use of its water.
20. The company and the regional authority filed for an appeal on points of law with the Kandelian Supreme Court (KSC). They maintained that the natural disaster could not be directly linked to their conduct and thus they were not liable for the hazardous effects, which were indeed regrettable. The local authority highlighted that the suspension of the exploitation license would trigger the closure of the site, with the loss of hundreds of jobs in the disadvantaged area. Moreover, the State would also be in breach of the concession deal signed with the company, entailing heavy damages which would deplete the regional budget. Moreover, the license was granted following the implementation of a regional revival plan, which was approved by public referendum.
21. By a decision of 15 July 2015, the Supreme Court confirmed the position of the first-instance court, dismissing the claims of the two associations. The argument was based mainly on the drastic impact the closing of the exploitation site would have on the region, and reiterated the first-instance court's findings concerning the lack of proof of a causal link between the damage to the religious site and to the community on one side, and the conduct of the company or the regional

authorities, on the other. It also highlighted the fact that the authorities have adequately responded by sealing the site and that it was the religious leaders who encouraged pilgrims to continue to use the polluted water. The decision of the Court of Appeal was considered to be lacking impartiality, as one of the members of the panel was a declared Leniterist believer. It also ruled on the fees to be paid by the applicants, which at this stage would amount to 450 000 kandis (45 000 EUR). Considering the large amount, it reduced them to the amount initially estimated at first instance, namely 300 000 kandis.

## **Domestic law**

### *1. The Constitution*

Article 35 of the Kandelian Constitution provides:

“Everyone has the right to live in a healthy, balanced environment. It shall be the duty of the State and the citizens to improve and preserve the environment and to prevent environmental pollution. ... The State shall perform this task by utilising and supervising health and social-welfare institutions in both the public and private sectors. ...”

### *2. Environmental law*

Section 15 of the Environment Act, published in the Official Gazette on 27 August 1999, provides:

“Establishments and concerns which propose to carry out activities which might cause environmental problems shall draw up an environmental impact report.”

The regulations on environmental impact were adopted and published in the Official Gazette on 10 December 2002. According to these regulations, impact studies must be carried out on mining projects where the area of the site concerned is greater than twenty-five hectares. The procedure for preparing a report is launched following a request by the prospective developer to the Ministry of the Environment. An evaluation committee made up of experts and representatives from the relevant entities and from the prospective developer is set up. The ensuing report is made available to the public and examined by the committee, which determines whether it complies with the specifications and may ask for additional reports. Finally, having regard to all the elements submitted for its consideration, the Ministry of the Environment decides whether or not to issue authorisation. In addition, whatever the Ministry's decision, an application for judicial review may be made to the administrative courts.

Under section 20 of the Administrative Procedure Act, anyone who sustains damage as a result of an act by the authorities may, within one year of the commission of the alleged act, claim compensation from them.

Furthermore, under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages for pecuniary loss (Articles 50-55) and non-pecuniary loss (Article 57). The civil courts are not bound by either the findings or the verdict of the criminal courts as to a defendant's guilt (Article 59).