
Amnesty International v Zambia (2000) AHRLR 325 (ACHPR 1999)

Communication 212/98, Amnesty International v Zambia□□□□

Decided at the 25th ordinary session, May 1999, 12th Annual Activity Report

Rapporteur: Pityana

Deportation

Admissibility (exhaustion of local remedies - deportation, 25)

Evidence (Commission not to judge facts, 32)

Expulsion (deportation - no reasons given, 33)

Expression (right to receive information, 33; persecution because of opinions expressed, 45-46)

Fair trial (right to be heard - no possibility to challenge deportation in court, retroactive legislation, 35-38, 52-53)

Interim measures (request for return of body for burial, return to home country, 39-40)

Limitations (limitations should not undermine rights guaranteed by constitution and international standards, 42)

Interpretation (the rules of natural justice apply, 42)

Equality, non-discrimination (discrimination on the grounds of political or other opinion, 43-44)

State responsibility (duty to give effect to rights in the charter in national law, 44)

Conscience (deportation for political reasons, 46, 47)

Association (deportation aimed against political activities, 48-49)

Family (effect of deportation on family, 50-51)

1. The Communication is submitted by Amnesty International on behalf of William Steven Banda and John Lyson Chinula.

2. The complainant alleges that Zambia has violated the provisions of African Charter in that:
(a) Mr William Steven Banda was served with a deportation order on 10 November 1991. The reason given was that 'in my opinion by his presence he (is) likely to be a danger to peace and

good order in Zambia'. He contested the order through the courts of Zambia. (b) On 25 October 1994, William Steven Banda was deported to Malawi unlawfully, wrongfully and out of political malice. He alleges that he was blindfolded and drugged, driven by Zambian immigration service and paramilitary police officers. He entered Malawi through Mchinji border post and was later dumped at Lilongwe Police station. (c) John Lyson Chinula was removed from his home in Ndola on 31 August 1994. He was driven to Lusaka International Airport to be deported. He was served with a deportation order signed by the Minister of Home Affairs alleging that he was a threat to Zambia's peace and security. He was forcibly sedated and later found himself at Lilongwe police station in Malawi. His Warrant of Deportation also alleged that he was 'by his presence, likely to be a danger to peace and good order in Zambia'. No reason in law or in fact was advanced for this finding. (d) Both complainants were prominent political figures in Zambia. They were leading members of UNIP, the party that had been in power since independence in 1964. UNIP was defeated by MMD in the first multiparty elections of November 1991.

3. William Steven Banda exhausted all domestic remedies in that his matter went to the Supreme Court of Zambia. John Lyson Chinula could not effect any remedies through the Zambian courts because he was deported and was given no opportunity to approach the Zambian courts.

4. It is alleged by the complainant that prior to his forcible expulsion from Zambia under order of deportation, William Banda exhausted local remedies through his appeal to the High Court of Zambia in 1992 and the Supreme Court of Zambia in 1994.

5. The complainant alleges that the Zambian government's deportation of the two men amounted to 'forcible exile'.

6. The complainant alleges that attempts to seek redress through existing national legal remedies both in Zambia and in Malawi have been futile.

7. The complainant also charges that John Chinula was not allowed recourse to the national courts of Zambia. He was prevented from returning to Zambia by threats of imprisonment by the Zambian authorities.

8. The complainant states that Banda and Chinula have obtained two judgments at the High

Court of Malawi confirming that they were not citizens of Malawi. The government of Malawi has failed to comply with the judgment of the court which ordered that they be assured of return to Zambia. They have therefore exhausted all available local remedies at their disposal.

9. The complainant prays that the Commission adopts interim measures to allow the deportees to return to Zambia immediately.

Complaint

10. The complainant alleges that articles 2, 5, 7(1)(a), 8, 9(2), 10, 12(2), 13(1), 18(1), 18(2) of the African Charter have been violated.

Procedure

11. The communication is dated 6 March 1998 and was sent by mail.

12. On 18 March 1998 a letter was sent to the complainant acknowledging receipt.

13. At its 23rd ordinary session held in Banjul, The Gambia, the Commission decided to be seized of this matter and declared the Communication admissible. The Commission also requested that provisional measures be adopted by the government of Zambia, namely to allow the burial of Mr John L Chinula in Zambia and the return of Mr William S Banda to his family in Zambia pending the finalisation of the matter by the Commission.

14. On 10 July 1998, the Secretariat of the Commission wrote to the Ministry of Foreign Affairs, Zambia, informing it of the decision of the 23rd ordinary session, drawing attention to the request for provisional measures to be taken by the government of Zambia.

15. A copy of the note was also sent to the Embassy of Zambia in Addis Ababa. When there was no reply, the Secretariat sent a reminder on 17 September 1998. The embassy replied on 21 September that the note verbale had been received but did not enclose the communication referred to.

16. The representative of the government of Zambia appeared before the Commission on 26 and 27 of October 1998 at the 24th ordinary session. He presented a statement in response to the communication.

17. At the 24th ordinary session, the Commission postponed consideration of this for a decision on the merits to the next session.

18. On 26 November 1998, the Secretariat conveyed the decision of the Commission to the parties concerned.

19. In preparation for a hearing on this matter, the Rapporteur for this communication requested the parties to address only some of the critical matters he had identified. Mr Ahmed Motala represented Amnesty International. Mr Clifford Msika of the Centre for Human Rights and Rehabilitation, Lilongwe, Malawi, assisted him. Mr William Steven Banda was also present. The Zambian government was represented by Mr Palan Mulonda, Senior State Advocate in the Ministry of Legal Affairs accompanied by Mr K K Nsemukila, Deputy Permanent Secretary, Home Affairs Department and Ms Lucy M Mungoma of Foreign Affairs Department with responsibility for Africa and OAU relations. The Commission also heard testimony from Mr William Steven Banda.

Argument

20. Mr Motala argued that Zambia was bound by the African Charter which it ratified in 1984. It, therefore, was obliged to extend the rights in the Charter to 'every individual' except where political rights are specifically indicated as in article 13 for example. He argued that Zambia was in violation of article 12 especially sub-article 2 which provides that 'every individual' has a right to leave his country and to return. It also says that a 'non-national legally admitted in a territory of a State party may only be expelled from it by virtue of a decision taken in accordance with the law' He alleged discrimination on the basis of ethnic group and social origin (article 2) and on

the basis of political opinion. The treatment the complainants received violated the victims rights to human dignity and freedom of movement. In the case of Chinula, he was deprived of the right to have his cause heard (article 7). He insisted that the actions against complainants were politically motivated. They have been left destitute in a strange country.

21. Mr Mulonda, for the government, stated that the government did not act with political malice. It acted within the law. The investigations against Banda began in 1976 and against Chinula in 1974, long before the present regime came into power. He denied that the deportees were drugged and dumped across the border. He stated that the Malawi authorities received them. The government of Zambia was acting within its sovereign rights in ordering its internal affairs, regulating immigration and was within the provision or limitation of the right stipulated in article 12: 'This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.'

Law

Admissibility

22. Admissibility of communications under the African Charter is governed by article 56, which sets out conditions that must be met before they are considered by the Commission.

23. Article 56 of the Charter reads: 'Communications shall be considered if they: ... (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged' . . .

24. This provision of the Charter is necessarily first considered before any substantive consideration of a complaint.

25. In the present case all local remedies have been exhausted and there is documentary evidence made available to the Secretariat of the Commission in support of this claim. As already stated in the case of Chinula, the arbitrary deportation prevented him from exercising this right.

26. The complainant has attached to the communication copies of the following judgments/orders obtained by William Banda and John Chinula: Consent Order of 13 March 1995, High Court of Lilongwe, in Miscellaneous Cause no 2 of 1995; Judgment of 30 June 1997, High Court of Malawi in Lilongwe in Miscellaneous Cause no 2 of 1995; Judgment no 16 of 1994, Supreme Court of Zambia in Lusaka, in Banda v Chief Immigration Officer and Attorney-General; Judgment no JH/12 of 1991, High Court of Zambia in Chipata, in Banda v Chief Immigration Officer and Attorney-General. For these reasons the Commission declares the communication admissible.

Merits

27. Zambia ratified the African Charter on Human and Peoples' Rights in January 1984.

28. A number of supporting documents were submitted: On Banda, the transcript of the judgment by Kakusa J in the High Court of Zambia held at Chipata; the judgment on appeal by Bweupe DCJ in the Supreme Court in Lusaka. The various decisions of the Malawi Court and affidavits submitted in support. The government also submitted documents on Banda and Chinula.

29. Regarding William Steven Banda, the judgment of Justice Kakusa in the High Court is instructive. The judge found that there was no evidence, on a balance of probabilities, to prove that Banda was born in Zambia of Zambian parents. He found that Banda was an unreliable witness. He, however, refused to rule as to where Banda originated from. He dismissed all evidence that suggested that Banda was from Malawi as inadmissible and hearsay. He also noted that the government had failed to produce the alleged Malawian father of Banda. The judge also made the following obiter dictum without justifying his opinion, that (at p J25):

Once it is shown on a balance of probabilities that a petitioner is not a citizen of this Republic he becomes a deportable person even if the country to which he must proceed is unknown ... possession of a National Registration Card ... does not confer citizenship ...

It appears that the authorities relied on this statement in deporting William Steven Banda.

30. The judge also expressed himself in sympathy with Banda's predicament. He said (at J25):

The petitioner has been in Zambia for a long time and has, in his own way, contributed in the political arena ... Zambia has become almost the petitioner's only home - a de facto situation - upon which the executive may exercise its discretion and, maybe, consider normalising the status of petitioner should he apply ... If this court were empowered to declare persons like petitioner to be Zambians, the petitioner would have received a favourable declaration considering his long stay in Zambia and the role he played.

31. It is not denied that on the day of the judgment, William Steven Banda was taken into custody and deported to Malawi. In addition, Banda charges that his pleas that he be taken to South Africa were ignored including his request for a five-days stay of execution of the warrant.

32. It is evident that the Malawi courts are irrelevant for purposes of deciding this matter against Zambia. The fact that they declared complainants not to be Malawi citizens is neither here nor there. Secondly, the Commission is not competent to substitute the judgments of the Zambian courts, especially on matters of fact. It must be accepted that the legal processes were appropriate and conducted in a manner that showed respect for the rule of law. The legal processes in Zambia did not violate the principles of the Charter. The Commission must, therefore, accept that William Steven Banda was not a Zambian by birth or descent.

33. This does not mean, however, that the Commission should not raise questions of law especially as the Zambian courts did not consider the obligations of Zambia under the African Charter. The court also failed to rule on the alleged reason for the deportation, namely, that his presence was likely 'to endanger peace and good order in Zambia ...' There was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this 'opinion' of the Minister of Home Affairs for the action taken. The fact that Banda was not a Zambian by itself does not justify his deportation. It must be proved that his presence in Zambia was in violation of the laws. To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (article 9(1)).

34. The Rapporteur invited the parties to give guidance on the authority of the Charter where it was in contradiction to domestic law. That seems relevant because Zambia ratified the Charter by Executive Act. That means that there is a legislative process that domesticates international

human rights treaties. Mr Mulonda affirmed Zambia's commitment to abide by the treaties it is party to. He also confirmed that Zambia operated a dual legal system and that the Charter is not considered to be a self-executing measure. Nonetheless, Zambia accepted the binding character of the Charter in Zambia.

35. By all accounts, though, Banda was in possession of Zambian national registration certificate and a passport. For many years he freely used these without challenge. Immediately following the verdict of the Supreme Court, he voluntarily presented himself to the police but he was forcibly deported. This meant that he was denied the opportunity to pursue the option of applying for citizenship by naturalisation in terms of the Citizenship Act. Granted, the government argues that Banda had obtained the documents of registration and passport by making false claims about his place of birth. He could not, therefore, be approaching the court with clean hands. The unstated implication was that the chances of his obtaining naturalisation were negligible. In truth, of course, the court did not say that Banda was an illegal immigrant. It simply disputed his claims to being Zambian by birth. It was not proved, therefore, that Banda was in Zambia illegally.

36. Zambia has contravened article 7 of the Charter in that Banda was not allowed to pursue the administrative measures which were open to him in terms of the Citizenship Act. More importantly, Zambia is in breach of article 7(2) which says that: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed ...' By all accounts, Banda's residence and status in Zambia had been accepted. He had made a contribution to the politics of the country. The provisions of article 12(4) have been violated.

37. The allegations of violations of articles 2, 4, 5, 6, 9 and 10 may now be addressed. The evidence that William Steven Banda was a political opponent of the ruling MMD cannot be overlooked. The manner in which he was treated was demeaning of the dignity and status of somebody of his standing in society. It appears that he was singled out for action because of his ethnic origin, which incidentally, is also found in Zambia. The authorities insisted on deporting him to Malawi even though he told them that he knew nobody there. There was no compelling evidence that he had roots in Malawi having lived in Zambia, by their own admission, since about 1964. Counsel for Zambia argued that Banda was 'accepted' by the Malawi immigration authorities. Whatever may have been the 'legal' basis for such 'acceptance', Malawi courts have ruled that they were not citizens of Malawi. In addition, unlawful deportation could not be said to obliterate their rights in Zambia.

38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity

to contest the deportation order. Surely, government could not say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all accounts, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the courts of Zambia. Zambia has violated article 7 of the Charter. Having made that finding, the findings in paragraph 30 above also obtain in this circumstance.

39. The Commission had requested provisional measures in terms of rule 111 of the Rules of Procedure. Zambia must be required to allow the return of William Steven Banda with a view to his making application for citizenship by naturalisation. No evidence was led before the Commission for compensation. The evidence is that Banda had lost his job as Governor after the 1991 elections. No award for compensation is called for.

40. John Lyson Chinula died in Malawi. He was a prominent businessman. His deportation must have caused prejudice to his business interests. His family is requesting the return of his body for burial in Zambia. The government of Zambia should be required to grant that wish.

41. The government of Zambia has relied on the 'claw-back' clause of article 12(2): 'This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality ...'

42. The deportation order also stated that the deportees were considered 'a danger to peace and good order to Zambia'. The Commission is of the view that the 'claw-back' clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. Secondly, the rules of natural justice must apply. Among these are in the audi alteram partem rule, the right to be heard, the right of access to the court. The court in Zambia, in Banda's case failed to examine the basis of administrative action, and as such it has not been proved that the deportees were indeed a danger to law and order. In any event the suggestion that they were 'likely' to be a danger was vague and not proved. It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause. The Commission should act bearing in mind the provisions of articles 61 and 62 of the Charter.

43. Article 2 of the Charter reads:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion political or any other opinion, national and social origin, fortune, birth or other status.

44. By forcibly expelling the two victims from Zambia, the state has violated their right to enjoyment of all the rights enshrined in the African Charter. This article imposes an obligation on the Zambian government to secure the rights protected in the African Charter to all persons within their jurisdiction irrespective of political or any other opinion. This obligation was reaffirmed by the Commission in communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*.

The arbitrary removal of one's citizenship in the case of Chinula cannot be justified.

45. Article 9(2) states: 'Every individual shall have the right to express and disseminate his opinions within the law.'

46. Both Banda and Chinula were leading politicians and businessmen. Both had lived in Zambia for decades. Even if deportation action had been initiated against them in 1974 and 1976, it can be safely assumed that the action had been advanced unless it is proved that that was due to unlawfulness, fraud or obstruction of the course of justice. None of this was alleged. Action was accelerated upon the assumption of office of the MMD government in 1991. We are therefore persuaded that the deportations were politically motivated. This provision of the Charter reflects the fact that freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his country. The Commission has to determine whether the 'deportations', being politically motivated, violate the provisions of article 9(2) of the African Charter as the two victims were denied the right to freedom of conscience as stipulated in article 8 of the Charter.

47. Article 8 of the African Charter states:

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

48. Article 10(1) of the Charter states: 'Every individual shall have the right to free association provided that he abides by the law.'

49. In deporting the two men, the government of Zambia has denied them the exercise of their right to freedom of association. This is so since they have been prevented from associating with their colleagues in the United National Independence Party and participating in their activities.

50. As the African Commission ruled in the case of communication 97/93 Modise v Botswana, by forcing Banda and Chinula to live as stateless persons under degrading conditions, the government of Zambia has deprived them of their family and is depriving their families of the men's support, and this constitutes a violation of the dignity of a human being, thereby violating article 5 of the Charter, which guarantees the right to 'respect of the dignity inherent in a human being and to the recognition of his legal status'.

51. The forcible expulsion of Banda and Chinula by the Zambian government has forcibly broken up the family unit which is the core of society, thereby failing in its duties to protect and assist the family as stipulated in article 18 of the Charter:

(1) The family shall be the natural unit and basis of society. It shall be protected by the state (2) The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

52. Article 7(1) states that:

Every individual shall have the right to have his cause heard ... (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed ...

53. The Zambia government, by denying Mr Chinula the opportunity to appeal his deportation order, has deprived him of a right to fair hearing which contravenes all Zambian domestic laws

and international human rights laws.

For these reasons, the Commission:

[54.] Holds a violation of articles 2, [5], 7(1)(a), [7(2)], 8, [9(1)], 9(2), 10, [12(4)], 18(1) and (2).