

UGANDA / JUDGMENT

Amnesty International v Zambia (Communication 212 of 1998) [1999] ACHPR 1 (5 May 1999)

[1999] ACHPR 1

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African Commission on Human and Peoples Rights

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5 May 1999 Communication No. 212/98

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS Twenty-Fifth Ordinary
Session 26 April - 5 May 1999

AMNESTY INTERNATIONAL v. ZAMBIA

DECISION

| BEFORE: | CHAIRMAN: Mr. Youssoupha Ndiaye VICE CHAIRMAN: Dr. |

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| | Vera |

| | Valentino Duarte Martins COMMISSIONERS: Dr. Ibrahim Ali |

| | Badawi |

| | El-Sheikh, Dr. Mohammed Hatem Ben Salem, Professor E. V. O. |

| | Dankwa |

| | Professor Issac Nguema, Mrs. Julienne Ondziel-Gnelenga, Dr. |

| | Nyameko Barney Pityana, Mr. Kamal Rezag-Bara |

| Citation: | Amnesty Int'l v. Zambia, Comm. 212/98, 12th ACHPR AAR
Annex V (1998-1999) |

| Publications: | IHRDA, Compilation of Decisions on Communications of the
African
Commission On Human and Peoples' Rights Extracted
from the |

| | Commission's Activity Reports 1994-2001, at 371 (2002);
Documents of the African Commission on Human and Peoples' |

| | Rights, at 745 (Malcolm D. Evans & Rachel Murray eds., 2001); |

| | (2000) AHRLR 325 (ACHPR 1999) |

| Represented By: | Mr. Ahmed Motala |

RAPPORTEUR

23rd session: Commissioner Pityana

24th session: Commissioner Pityana

25th session: Commissioner Pityana

SUMMARY OF FACTS

1. The communication is submitted by Amnesty International on behalf of William Steven Banda and John Lyson Chinula.
2. Complainant alleges that Zambia has violated the provisions of African Charter in that:
 - (1) 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.
 - (2) 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 para-military police officers. He entered Malawi through Mchinji border post and later dumped at Lilongwe Police station.
 - (3) John Lusson Chinula was removed from his home in Ndola on 31 August 1994. He was driven to Lusaka International Airport with the intention of deporting him. 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.
 - (4) 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 multi-party 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. Complainant alleges that the Zambian government's deportation of the two men amounted to "forcible exile".
- 6. Complainant alleges that attempts to seek redress through existing national legal remedies both in Zambia and in Malawi have been futile.
- 7. 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. Complainant states that Banda and Chinula have obtained two judgements at the High Court of Malawi confirming that they were not citizens of Malawi. The government of Malawi has failed to comply with the judgement of the Court wh . Complainant states that Banda and Chinula have obtained two judgements at the High Court of Malawi confirming that they were not citizens of Malawi. The government of Malawi has failed to comply with the judgement of the Court which ordered that they be assured to return to Zambia. They have therefore exhausted all available local remedies at their disposal.
- 9. Complainant prays that the Commission adopt interim measures to allow the deportees to return to Zambia immediately. Complaint:
- 10. Complainant alleges that Articles 2, 5, 7(1)(a), 8, 9, 9(2), 10, 12(2), 13(1), 18(1), 18(2) of the African Charter have been violated. Procedure:
- 11. 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 finilization 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 them 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 was received but did not enclose the communication referred to.
- 16. The representative of the Government of Zambia appeared before the Commission on 26th and 27th 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 26th 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.

THE 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 one's 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 in a strange country destitute.

- 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 restriction as provided for by law for the protection of nation security, law and order, public health and 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 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 judgements/orders obtained by William Banda and John Chinula;
 - i. Consent Order of 13 March 1995, High Court of Lilongwe, in Miscellaneous Cause No. 2 of 1995;
 - ii. Judgement of 30 June 1997, High Court of Malawi in Lilongwe, in Miscellaneous Cause No. 2 of 1995;
 - iii. Judgement No. 16 of 1994, Supreme Court of Zambia in Lusaka, in Banda vs. Chief Immigration Officer and Attorney General;
 - iv. Judgement No. JH/12 of 1991, High Court of Zambia in Chipata, in Banda vs 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 judgement by Kakusa J in the High Court of Zambia held at Chipata; the judgement 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 judgement 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 "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..." (at p J25). 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 "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
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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 be Zambians, the petitioner would have received a favourable declaration considering his long stay in Zambia and the role he played" (J25).

- 31. It is not denied that on the day of the judgement, 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 judgements 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 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 being 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. It was not proved, therefore, that Banda was in Zambia illegally.

- 36. Zambia has contravened Article 7 of the Charter in that he was not allowed to pursue the administrative measures, which were opened 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 lost sight of. 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 cannot say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all account, 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 para 30 of 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 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 "caw-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 or 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 alterm 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 *Rencontre Africaine pour la Défense des Droits de l'Homme / Zambia* (Communication 71/92). 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 action was accelerated upon the assumption of office of 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 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 of the Charter, which states;

"Every individual shall have the right to the 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 John K. Modise / 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:

"the 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(1) and 18(2) of the Charter;
- (1) "The family shall be the natural unit and basic 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)(a) states that:

"Every individual shall have the right to have his cause heard...

...

- (1) the right to an appeal to competent national organs against acts of 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 holds a violation of Article 2; holds a violation of Article 7(1)(a); holds a violation of Article 8; holds a violation of Article 9(2); holds a violation of Article 10; holds a violation of Article 18(1) and (2).

Bujumbura, 5th May 1999.

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