

Rapporteur:

23rd Session: Commissioner Badawi
24th Session: Commissioner Badawi
25th Session: Commissioner Badawi
26th Session: Commissioner Badawi
27th Session: Commissioner Badawi
28th Session: Commissioner Badawi
29th Session: Commissioner Badawi

Summary of Facts:

1. This communication is submitted by an NGO, Africa Legal Aid (AFLA), on behalf of a minor Isaac Banda and his brother Robert Banda.
2. The Complainant alleges that the above-mentioned minor is reported to have been fraudulently taken out of his country of origin, Malawi and subjected to working conditions close to slavery in The Gambia by someone called Collyer, a British.
3. According to the Complainant, Mr. Collyer proposed to employ the minor Isaac Banda as a domestic servant while he was residing with his parents in Malawi and undertook to finance his studies in lieu of salary.
4. Following such an arrangement and with the help of one Nyilenda, Mr Collyer is reported to have persuaded the minor Isaac Banda together with his parents to agree that the latter follow him to The Gambia and continue to serve him under the same terms of the above-mentioned arrangement concerning his education.
5. On their arrival in The Gambia, it is reported that the minor Isaac Banda was not allowed access to education. Occasionally, he is reported to have been denied food. Furthermore, his employer, in 1995, is reported to have ordered him to immediately leave his house. Thanks to the intervention of the African Centre for Democracy and Human Rights Studies and the Centre for Youths and Children, the minor Isaac Banda was repatriated to his country of origin.

Complaint:

6. The Complainant claims a violation of **Articles 5 and 18(3)** of the African Charter on Human and People's Rights, **Article 24 (1)** of the International Covenant on Civil and Political Rights, **Articles 11 and 32(1) and (2)** of the UN Convention on the Rights of the Child.

Procedure:

7. The communication was received at the Secretariat of the Commission on 23rd October 1997 by fax. The original copy arrived later by post.
8. The Secretariat acknowledged receipt of the communication on 27th October 1997 and requested the Complainant to furnish it with further information.
9. The communication was ready but could not be considered by the Commission at its 22nd ordinary session from 2nd to 11th November 1997.
10. Africa Legal Aid reacted to the request for further information on 30th January 1998 thus:
 - That the minor, Isaac Banda, lived in the house of a man called Collyer in The Gambia at the same time as his brother Robert Banda who referred the case to Africa Legal Aid.
 - According to the Complainant, the two brothers who are reported to have returned to their country of origin did not have the means to take court action in The Gambia. The Complainant further states that the authorities of that country, having allowed such injustice to take place on their territory without intervening, allows one to wonder if the local remedies available are efficient and effective.
11. At its 23rd ordinary session held in Banjul, The Gambia from 20th to 29th April 1998, the Commission decided to be seized of the communication and requested more information on the circumstances surrounding the entry into Gambia and the treatment of the child while in The Gambia.
12. On 26th May 1998, the Secretariat sent letters to the Complainant and the State Party concerned informing them of the Commission's decision.
13. At its 24th ordinary session held in Banjul, The Gambia from 22nd to 31st October, the Commission postponed consideration of the communication to the 25th ordinary session.
14. On 20th January 1999, the Secretariat dispatched letters to the Parties notifying them of the decision.
15. At its 25th ordinary session held in Bujumbura, Burundi, the Commission postponed consideration of the communication to the 26th ordinary session due to lack of time.
16. On 13th May 1999, the Secretariat of the Commission notified the parties of this decision.
17. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible and requested for arguments on the merits of the case.

18. On 21st January 2000, the Secretariat of the Commission informed parties of the decision.
19. The matter was also taken up on 10th March 2000, by the Legal Officer at the Secretariat in a meeting with Mrs. Tomasi and Mr. Almami Taa, State Counsel in the Department of State for Justice, The Gambia concerning communication 219/98. The State Counsel promised to meet the State Party's obligation as requested.
20. The Complainant responded to the Commission's request for arguments on the merits of the case on 12th April 2000.
21. On 17th April 2000, the Complainant's brief was forwarded to the State Party for its information and necessary action.
22. At its 27th ordinary session held in Algeria, the Commission deferred consideration of the case to the next session and requested the Respondent State to furnish the Secretariat with its submission on the merits of the case.
23. The above decision was communicated to parties on 10th July 2000. The Secretariat is yet to receive the Respondent States' response.
24. At its 28th ordinary session in Benin, the African Commission reviewed the case and decided to re-examine its admissibility at the 29th ordinary session. The Commission also decided to examine the merits of the case at the said session.
25. On 14th November 2000, the Secretariat wrote to the Respondent State informing it the decision taken at the 28th ordinary session and reminded them to furnish the Commission with arguments on both admissibility and merits of the case and in particular on the facts implicating State obligation under the African Charter.
26. On 14th November 2000, the Secretariat also wrote to the Complainant informing them of the decision taken at the 28th ordinary session and requested them to furnish the Commission with more arguments on the merits of the case and in particular on the facts implicating State obligation under the African Charter.
27. On 21st March 2001, the Secretariat of the African Commission received submissions from the Complainant as earlier requested.
28. On 3rd April 2001, the Secretariat wrote to the Complainant acknowledging receipt of the said submissions.
29. On 17th April 2001, the Secretariat received submissions on admissibility from the Respondent State.
30. At its 29th ordinary session, the Commission heard submissions from the representatives of the Complainant and the Respondent State.

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Admissibility

31. In its brief, AFLA claims that “State authorities were made aware of the Complainant’s situation”. This is apparently supported by the statements: “In doing so they communicated the situation of the Complainant to the authorities in The Gambia and in Malawi. The African Centre for Human Rights and Democracy Studies intervened to draw the attention of the Gambian authorities to the circumstances of Mr. Banda, to no avail”. Who these authorities are is not indicated. When the communication was made is also not stated. Those bare assertions of the Complainant that a communication was made to the authorities in the Gambia is insufficient to saddle it with responsibility for the actions of an individual, Mr. Robert Collyer, mindful of a State’s responsibility for non-State actors as was held by the Commission in communication *74/92 Commission Nationale des Droits de l’Homme des Libertes / Chad*.
32. In their reply, the Respondent State denies that they were informed of the human rights abuses suffered by Isaac Banda at the hands of Robert Collyer. In their submission, the Respondent State stresses that there are legal avenues provided for within The Gambia that the Complainant should have utilised to obtain a remedy and that such avenues are not unduly prolonged. The Respondent State argues that failure of the Complainant to access these legal avenues render the communication inadmissible for non-exhaustion of local remedies as required under Article 56(5) of the African Charter.
33. The case for non-exhaustion of local remedies.
- i. **The Complainant was a minor**
The statement of facts in the brief shows how NGOs helped him (see paragraph 5). If he could be helped to return home, he could have been assisted to pursue a remedy in the courts of The Gambia. The likes of Mr. Robert Collyer, as portrayed in the statement of facts should be made to face the full rigours of the law.
 - ii. **Complainant was indigent.**
The response to (i) above applies *mutatis mutandi*.
 - iii. **Inability to afford legal fees**
Ibidem i.e. the same as above.
 - iv. **The State did not offer legal assistance to the Complainant.**
There is no convincing evidence that the attention of the State was drawn to the plight of the victim of the alleged violation.
 - v. **The parents being in another country and being indigent.**
The NGOs could have helped, as indicated above.
 - vi. **The Complainant is residing in another State now.**
Instead of using the Commission as a court of first instance, Africa Legal Aid is advised to see what remedies are available in The Gambia and exhaust them before coming to the Commission.

34. Since, presumably, Mr. Robert Collyer is still in The Gambia, greater help in the protection of human rights will be given by ensuring that he does not continue the alleged ill-treatment of minors he brings into the country. If he persists, the attention of the Government of The Gambia should be drawn to his conduct, and the appropriate steps taken to address the issue
35. It is not in all cases that residence outside the jurisdiction will not require exhaustion of local remedies, as was held in *103/93 Alhassan Abubakar/Ghana*. In that case, the Complainant had been detained without trial for years, and he escaped from detention. He also feared that he would lose his liberty if he were to return to Ghana.
36. Reliance is also placed on the Commission's decision in *215/98 Rights International/Nigeria*. But that case is also distinguishable from the instant case. In that case Mr. Charles Bandiorn Wiwa a Nigerian student was arrested and tortured at a Nigerian military detention camp, the complaint alleged. He was horsewhipped and placed in a cell with 40 other detainees. His torture, it was claimed, resulted from his identification as a relative of Ken Saro-Wiwa, who had been executed in defiance of the Commission's request for a stay of execution under its provisional measures procedure in Rule 111 of the Rules of Procedure.
37. Having fled Nigeria in the fear for his life and on the advice of human rights lawyers, and having obtained asylum from the government of the United States of America, the Commission did not consider the exhaustion of local remedies arose in the circumstances. The Commission in that case stated *"In this particular case, the Commission found that Mr. Wiwa was unable to pursue any domestic remedy following his flight for fear of his life to the Republic of Benin and the subsequent granting of refugee status to him by the United States of America."* Additionally, and significantly the Commission stated categorically in paragraph 23 of communication *215/98, Rights International/Nigeria* as follows:

"The Commission declared the communication admissible on grounds that there was lack of available and effective remedies for human rights violations in Nigeria under the military regimes".

The same could not be said of a minor needing the protection of the State, as was the situation in the instant case.

38. The Commission should not, therefore, be taken to have laid down a hard and fast rule that whenever a Complainant finds himself outside the jurisdiction, the inescapable conclusion should be that the requirement of exhaustion of local remedies mandated under Article 56 (5) does not apply.

For these reasons, the Commission

After reconsidering its decision on admissibility as taken at its 26th Ordinary Session in Kigali, Rwanda,

Declares the communication inadmissible for non-exhaustion of local remedies having ascertained that on the one hand the Complainant did not resort to local remedies, nor were the alleged violations brought to the attention of the Respondent State.

Done at the 29th Ordinary Session held in Tripoli, Libya, 23rd April - 7th May 2001.