

HUMAN RIGHTS COMMITTEE

Silva, Godwin, de Silva and Perera v. Zambia

Communications Nos. 825-828/1998

25 July 2002

CCPR/C/75/D/825-828/1998

ADMISSIBILITY

Submitted by: Welvidanelage Don Hugh Joseph Francis Silva (825/1998), Don Clarence Godwin (826/1998), Sunil Randoombage de Silva (827/1998), T.J.A. Perera (828/1998)

State party concerned: Zambia

Date of registered communication: 28 October 1997 (825/1998), 27 November 1997 (826/1998), 28 October 1997 (827/1998), 25 October 1997 (828/1998) - (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2002,

Adopts the following:

Decision on admissibility

1. The authors of the communications are Mr. Welvidanelage Don Hugh Joseph Francis Silva, Don Clarence Godwin, Sunil Randoombage de Silva and T.J.A. Perera, citizens of Sri Lanka. They claim to be victims of a violation by Zambia of articles 8, paragraph 3 (a) of the International Covenant on Civil and Political Rights (the Covenant). They are not represented by counsel.

The facts as submitted by the authors

2.1 The authors, attorneys at law, state that, between 21 August and 3 September 1991, they were offered each a position as assistant legal aid counsel to the governmental services of the Republic of Zambia. The offer included a salary in local currency and an inducement allowance of an amount varying between US\$ 4,260 and 7,080 per annum, paid in Sri Lanka on a monthly basis. Travel to and from Zambia was to be paid by the Zambian Government, provided that the authors did at least

24 months of service.

2.2 The authors accepted the offer of appointment and travelled to Zambia. Mr. Silva assumed his duties from 1 July 1992, Mr. Godwin and Mr. de Silva from 6 May 1992 and Mr. Perera from 8 April 1992.

2.3 The authors claim that there were undue delays in the payment of the inducement allowance (1) and that, from 1 April 1993, between nine months and a year after they assumed duties in Zambia, a tax amounting to 35 per cent was deducted from the allowance. The authors contend that the tax deduction constitutes a gross violation of the agreement between them and the Government of Zambia. They thus requested the Government either to reimburse the amount of the tax or to terminate their contract and arrange for a return to Sri Lanka.

2.4 According to the authors, the Government did not respond to their request. As a result, and because of lack of money, the authors did not have the possibility to return Sri Lanka before they had completed 24 months, as it was provided in their contract. The authors were thus forced to work under conditions to which they had never agreed. All of them resigned between April and December 1994 and returned to Sri Lanka.

2.5 With regard to the exhaustion of domestic remedies, the authors refer to an attempt made by Mr. de Silva on 4 August 1994 to seek relief in the High Court of Zambia in Lusaka. In the latter case, the High Court advised the parties to settle the matter amicably, but it is submitted that the Government of Zambia did not offer any relief to Mr. de Silva or to the other authors. Moreover, the authors submit that, before they had a chance to pursue further remedies, they invoked the contractual clause to terminate their appointment and to be provided with return travel to Sri Lanka.

The Complaint

3.1 The authors submit that because of the deduction of 35 per cent tax on their inducement allowance, they were not able to return to Sri Lanka before they had served 24 months, the conditions to be provided with return travel to Sri Lanka. It is argued that if the State party had wished to change the terms of the contract, they could have terminated the first contract with the possibility to return to Sri Lanka and could have made propositions for a new contract. Nevertheless, the Government did not make such an offer because it allegedly needed the authors' services. This would allegedly amount to forced labour and constitutes therefore a violation of article 8, paragraph 3 (a) of the Covenant.

3.2 In addition to the reimbursement of the tax on the inducement allowance, Mr. Perera asks to be paid the amount of the inducement allowance for the third year of contract, which he could not finish as he was forced to leave Zambia, and the gratuity according to the contract.

The State party's observations on the admissibility and merits of the communication

4.1 By note verbale of 26 April 2000 and 26 March 2001, the State party made its submission on

the admissibility and merits of the communications.

4.2 On the admissibility, the State party argued that the authors of the communications have not exhausted domestic remedies. The State party submits that even though Mr. de Silva was advised by the High Court to settle the matter amicably with the Government, this would not have prejudiced the outcome of any ensuing judicial proceedings and an appeal could have been made to the State party's Supreme Court. The State party also notes that the authors freely decided to invoke the clause in their contract that gave them the right to be provided with a return travel to Sri Lanka, which rendered difficult to pursue domestic remedies and therefore exonerates the State party's government.

4.3 Furthermore, the issues raised by the authors could have been dealt with appropriately at the ministerial level since, on several occasions, they were informed of government procedures, which they used for reassessment of salaries, travel for families and quarters.

4.4 On the merits, the State party submits that in the years 1990-1991, the Zambian Government recruited some Sri Lankan nationals to work in the Ministry of Legal Affairs due to a shortage of qualified lawyers under government employment.

4.5 The State party notes that an addendum to the initial contract of the authors was signed in June 1992, modifying slightly its terms, as a consequence of new exchange rate regimes issued by the Bank of Zambia. This addendum was duly signed by the authors. The State party also explains that the reasons for making the addendum was that, at the time, the Government sought to control the flow and circulation of foreign exchange within the country due to limited financial resources available. As a result, foreign exchange was not always available, which had unfortunate consequence on the regularity of the payment of inducement allowances. The State party finally notes that, according to the addendum, although the local salary began to attract a higher tax rate, the inducement allowance as well as the gratuity were in this regard not affected as they remained tax free.

4.6 Concerning the delays in the payment of the inducement allowance, the State party considers that this constituted an unforeseen circumstance at the time of recruitment, but reiterates that, according to its record, the totality of the allowances have been acquitted.

4.7 Concerning the gratuity provided for under the contract of appointment, the State party emphasized that the condition for obtaining such a gratuity was the completion of 30 months satisfactory resident service.

4.8 Concerning housing,(2) the State party explains that, under the contract, government quarters may be provided for when available and that in such cases, a rental contribution, which varies from one employee to another according to the salary scale, would be deducted from the salary.

4.9 Concerning employment permits, the State party underlines that they are issued in accordance with provisions under the Immigration Act and vary in their periods of validity.

4.10 The State party draws also the attention of the Committee to the fact that one month prior to commencement of duties, the authors requested reassessment of salaries which would vary their terms of engagement and necessitate a promotion by one grade. The Zambian Government eventually granted these reassessments although the conditions were not met. In addition, the authors have requested payment of expenses of private nature, such as telephone calls, taxi fares, extra food and beverages, all of which were accepted by the Zambian Government.

4.11 The State party contests the authors' allegations that their resignation prevented them from pursuing domestic remedies. It notes that the authors' working permit was not an obstacle in this regard and that they would have had ample time to resolve the matter amicably. The State party also disputes the authors' allegations that because their remuneration was unilaterally reduced they could not finance their stay in Zambia and continue litigation with an unwilling and hostile government.

4.12 Finally, the State party wishes to clarify that, contrary to what was submitted by the authors, only the local salary was affected by the higher tax rate and this had been made clear in the addendum that the authors duly signed.

Comments of the author

5.1 By letters of 16 and 28 July 2001, the authors responded to the State party's submissions.

5.2 With regard to the exhaustion of domestic remedies, the authors argue that the High Court advised to settle the matter amicably because it did not want to embarrass the Government but that no action was taken by the Government to remedy the situation. As a consequence, since there was no final decision from the High Court, the authors were prevented from appealing to the Supreme Court. Moreover, it was only at a time close to their departure to Sri Lanka that the authors were informed that no amicable settlement could be reached, which did not leave them much time for pursuing other remedies. The authors therefore consider that they have made reasonable efforts to exhaust domestic remedies.

5.3 With regard to their contractual situation, the authors stress that they have no issue with regard to the taxation of local salary but maintains that a 35 per cent tax was deducted from their inducement allowance and ask that this amount be reimbursed to them. They refer in this regard to a letter from the Attorney-General of 31 October 1994, contradicting the State party's observations of 26 March 2001, where it is stated that they are not "entitled to be paid inducement allowance [...] without deduction of tax" and that they "are entitled to be paid inducement allowance [...] after deduction of income tax".

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another

procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee considers that, for the purpose of article 2 of the Optional Protocol, the authors have not sufficiently substantiated, for purpose of admissibility, how the taxation of their inducement allowance could be seen as constituting forced labour under article 8, paragraph 3 (a) of the Covenant.

6.4 In the light of the conclusion reached above, the Committee does not need to address the issue of exhaustion of domestic remedies under article 5, paragraph 2 of the Optional Protocol.

7. The Committee therefore decides:

- (a) that the communications are inadmissible under article 2 of the Optional Protocol;
- (b) that this decision shall be communicated to the authors and to the State party.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

** The four cases have been joined in one draft because they are related to a similar claim at a similar moment and against the same State party.

[Adopted in English, French and Spanish, the English being the original version. Subsequently, to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1. Mr. Perera alleges that he received the first inducement allowance for April 1992 in April 1993.
2. None of the authors are making a specific claim with regard to housing.