



## African Human Rights and Access to Justice Programme

### Legal Opinion Case No. 130

Legal Expert: Krissie Hayes

National Lawyer: Zimbabwe Lawyers for Human Rights (ZHLR)

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#### Summary of Opinion

Zimbabwe is in clear violation of international law in the present case. The facts of the case involved the deportation of Andrew Mullen despite his being acquitted of the charges against him, and despite the existence of a stay on his deportation order by the judiciary. Zimbabwe has violated the rights of aliens, as well as the right to a fair hearing. Zimbabwe is a signatory to the African Charter on Human and People's Rights as well as a signatory to the International Covenant on Civil and Political Rights, it will be seen that the present case violates both of these international instruments. All levels of government, the executive, the legislature and the judiciary must ensure that the rights and fundamental freedoms are upheld.

#### **Question on which the opinion is sought:**

In this case, the complainant was a journalist of American origin, who had resided in Zimbabwe for 23 years. He was charged but was acquitted when his charge was found unconstitutional. He was served a deportation order, which was awaiting a challenge in the Supreme Court. There was a barring by the High Court on his deportation. Before the case came to court, the Minister for Home Affairs deported him to the United Kingdom. The questions in the present case are: 1) Whether this violates the rights of aliens under international law; 2) whether this is in violation of the right to a fair and public hearing; and 3) whether this is a form of discrimination violating international law.

The answers will be given in three parts: Firstly, it will be seen that under international law to which Zimbabwe has acceded to be bound, aliens have the right to challenge deportation and have the case reviewed by the designated competent authority. Once an alien is lawfully within a State, he is entitled to have the rights in the covenant respected. In this case, the judicial authority responsible was not given a chance to hear the case and the alien was not given a fair opportunity to submit reasons against his expulsion. Secondly, it will be seen that the complainant was not afforded the rights enunciated in international law as afforded to other residents in the State concerned. One such right is the right to a fair and public hearing by an independent tribunal. Whilst the judicial

authorities were initially expected to review the case, in accordance with international law, their independence and jurisdiction was taken away and the complainant was deported without such a hearing. This is in violation of both international and regional human rights instruments to which Zimbabwe has agreed to be bound. Thirdly, it can be argued that the complainant was discriminated against in this process for reasons we are unable to obtain. These reasons could potentially include his place of origin, or his political or other opinion<sup>1</sup>.

It can be seen that whilst the relevant human rights obligations have been entrenched to an extent in domestic constitution and legislation, they must be reflected in practice as well. It is the responsibility of all levels of government to enforce human rights obligations including the executive. In the present case, the complainant was denied his human rights in Zimbabwe.

### **International Law**

Zimbabwe is under an international obligation to respect the fundamental human rights and freedoms as proscribed by the various international instruments it has signed as well as obligations under customary international law. The Universal Declaration of Human Rights states that everyone has the right to recognition everywhere as a person before the law<sup>2</sup>. Article 7 provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Further, Article 8 states that everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

In addition to this, Zimbabwe is a signatory to the International Covenant on Civil and Political Rights. In order to give effect to these rights and obligations, Zimbabwe must ensure that all people within its jurisdiction are given these rights both in legislation and in practice. Such obligations do not merely extend to citizens of Zimbabwe, but to every person residing in the state party. This obligation extends to all levels of government including the executive. Any act by the executive, which deprives a person within its jurisdiction of these rights, is a breach of Zimbabwe's international obligations.

#### **Is Zimbabwe in violation of the Rights of Aliens?**

The complainant in the present case is of American origin, and therefore considered an alien in terms of international law. Currently and historically aliens have been discriminated against and required special protection under international law. A number of international instruments deal specifically with such persons,<sup>3</sup> and special provision

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<sup>1</sup> Note if it were on the ground of political or other opinion, Zimbabwe will be in violation of the right to freedom of expression and freedom of conscience. However, with insufficient information it will not be dealt with in detail in this legal opinion

<sup>2</sup> Article 6

<sup>3</sup> For example: The *Convention on the Status of Refugees 1952* is not relevant to the present case as the complainant is not a refugee. The *Convention on the treatment of Migrant Workers and Their Families (CMW)* which has not been signed by Zimbabwe and therefore not directly enforceable in the present case

has been made for aliens in most major human rights instruments. State parties are not under an obligation to allow non-residents to enter or remain within their sovereign territory, however, once an alien has lawfully been allowed to enter or remain within a state, due process must be followed to ensure their rights are upheld in all respects. In the present case the complainant was lawfully within the State of Zimbabwe, and therefore entitled to the minimum human rights norms and standards.

Article 13 of the International Covenant on Civil and Political Rights states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person especially designated by the competent authority.

The Committee has discussed this provision and given substance to it in General Comment 15<sup>4</sup>. It was said by the Committee that in general the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. It was further noted that a state may impose general conditions upon an alien in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the covenant.

In this case there appears to be little debate as to whether the complainant had entered Zimbabwe lawfully, therefore, he was entitled to the protections in the international instruments, including due process if he were to be considered for deportation.

The Committee went on to say that if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art 26).<sup>5</sup>

Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case ... This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and be represented before the competent authority or someone designated by it. An alien must be given full faculties for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national

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<sup>4</sup> ICCPR General Comment 15 (twenty-seventh session, 1986): The position of Aliens under the Covenant, A/41/40 (1986) 117 at paras. 1, 2 and 4-10

<sup>5</sup> *ibid* para 9

security” so require. Discrimination may not be made between different categories of aliens in the application of article 13.<sup>6</sup>

It can be seen at first instance that it is clear that regardless of the legality of the deportation itself, the complainant was entitled to submit reasons against his expulsion and have the matter determined by a competent tribunal. In the present case such a violation was enhanced by the fact that there was a judicial proceeding in process, which was superseded by the minister with no regard to the aforementioned rights. Where no reasons were given, it can be said that the expulsion was arbitrary and therefore in violation of article 13.

The case of *Hammel v. Madagascar* (155/1983), ICCPR, A/42/40 (3 April 1987) the Human Rights Committee dealt with the issue of deportation. Whilst the facts were different to the present case, it similarly involved a situation where correct processes for deportation were not followed. The Committee observed that article 13 put the State party under certain obligations. The committee noted that, in the circumstances of that case, the author was not given an effective remedy to challenge his expulsion and that the State party has not shown that there were compelling reasons of national security to deprive him of that remedy. In formulating its views the Human Rights Committee also takes into account its general comment 15 (27) on the position of aliens under the covenant, and in particular points out that “an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.”

In that case, there was found to be a violation of article 13 of the ICCPR.

If the facts of the present case were applied, it could be similarly concluded that the complainant was not given the full faculties for pursuing his remedy against expulsion. His rights before the judiciary were in the process of being upheld. However, when the Minister got Home Affairs deported him, these rights were abruptly denied to him.

It has further been stated that State Parties are to ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.<sup>7</sup>

The Minister has issued no reasons for such deportation therefore it is unclear whether such discrimination has taken place or not.

#### Is Zimbabwe in violation of the Right to a Fair Hearing?

It can be seen that Zimbabwe is also in violation of the ensuring the right to a fair hearing and equal access to the law. As already noted above, once an alien enters a state legally, he is entitled to all the rights in the ICCPR

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<sup>6</sup> *ibid* para 10

<sup>7</sup> HRI/GEN/1/Rev.7/Add.1 Expulsion and deportation of non-citizens 25

Article 14 provides:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law...

Article 16 provides: Everyone shall have the right to recognition everywhere as a person before the law.

Article 26 provides: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The present case alludes to a number of violations in this respect. Firstly, it can be seen that the judiciary was not independent. The court was unable to effectively operate when the executive could supersede its authority and deport the complainant with no regard to the orders of the High court. Secondly, the complainant was denied the right to appeal his case and have it reviewed by such a competent authority. The decision appears from the facts to be that of the Minister alone, with no avenue for redress. Thirdly, the complainant was denied the right to a public hearing and to have access to the reasons for the decision.

In ICCPR General Comment 13<sup>8</sup> the Committee noted that article 14 of the Covenant is of complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by competent, independent and impartial tribunal established by law.

The committee went on to say that States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative<sup>9</sup>.

Chapter 3 of the Zimbabwe Constitution sets up the judiciary and legislatively ensures their independence. However, it appears in practice this was not given opportunity to be put into effecting relation to the complainant.

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<sup>8</sup> ICCPR General Comment 13 (Twenty-first session, 1984): Article 14: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, A/39/40 (1984)

<sup>9</sup> *ibid* para. 3

Article 14(5) States that Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. In this case, the complainant was acquitted of a crime deemed unconstitutional, however, the authority of this decision was undermined by the decision to deport him and deny him all aspects of a fair hearing by an impartial and independent tribunal.

Zimbabwe was under unambiguous international obligations to guarantee the rights of the ICCPR to all persons within its jurisdiction. There are certain avenues by which states can derogate from such obligations<sup>10</sup>, however, in this case the State has given no reasons for its violation, nor has it expressed such an intention. It can therefore be said to have failed to fulfill its international obligations. These aspects will be seen to be more evident in relation to non-discrimination.

Is Zimbabwe in violation of the right to Non-Discrimination?

It can also be argued that Zimbabwe is in violation of the right to non-discrimination.

Article 2 of the ICCPR provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted

In General Comment 18<sup>11</sup> the Committee noted that non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus,

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<sup>10</sup> For example times of public emergency

<sup>11</sup> ICCPR General Comment 18 (Thirty-seventh session, 1989): Non-Discrimination, A/45/40 vol. I (1990)

article 2, paragraph 1, of the ICCPR obligates each state party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind...Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground.

The Committee continued: Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals.

Article 4 provides that even in a time of public emergency there can be no derogation from the right to non-discrimination.

In this respect it can be seen that the right to non-discrimination and the right to equality before the law often overlap. In the present case the complainant was denied the opportunity to equal protection before the law as well as the right to a fair and public hearing. On the facts it is unclear the reasons for this but appears, prima facie to discriminatory. A person not from a different national origin would likely have been given the opportunity to be heard before the courts, the complainant, therefore was discriminated against merely by the fact he was an alien to Zimbabwe.

### **African Charter**

In addition to Zimbabwe's obligations under the ICCPR, Zimbabwe is a signatory to the African Charter on Human and People's Rights and therefore has obligations under regional bodies.

The African Charter on Human and People's Rights<sup>12</sup> similarly provides for the right to a fair trial.

Article 3 states that every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law.

Article 17 ensures that every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to be heard and tried within a reasonable time by an impartial court or tribunal.

It should be noted that article 17 embodies other international instruments relevant to the particular state. Therefore the rights of aliens mentioned above would be encompassed under this provision.

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<sup>12</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 *entered into force* Oct. 21 1986

Article 2 provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized 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 or social origin, fortune, birth or any other status.

Article 9 provides that every individual shall have the right to receive information; and every individual shall have the right to express his opinions within the law.

The African Commission on Human and People's Rights<sup>13</sup> has stated that the essential elements of a fair hearing include:

- (a) Equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal or military;
- (b) Equality of all persons before any judicial body without distinction whatsoever as regards race, colour, ethnic origin, sex, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;
- (j) An entitlement to an appeal to a higher judicial body.

The Commission went on to say that all the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body.

The independence of the tribunal is also of importance. The Commission<sup>14</sup> stated that the independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities. Furthermore, the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body defined by law.

There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revisions except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law. All judicial bodies shall be independent from the executive branch.

The Commission went on to say that a judicial body shall base its decision only on evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restriction, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason<sup>15</sup>.

In the present case the judiciary was not given opportunity to decide the case before it. There was unwarranted interference with the judicial process by the executive, which was

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<sup>13</sup> In ACHPR /Res.41(XXVI)99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1996)

<sup>14</sup> *ibid*

<sup>15</sup> *ibid*

not done in accordance with the law. This therefore undermines the independence and authority of the judiciary and therefore the rule of law in any state.

It is worth acknowledging that in 1998 Zimbabwe signed the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' rights

### **Domestic Law**

The Constitution of Zimbabwe<sup>16</sup> reflects the international law in many respects. Chapter 3 is the Declaration of Rights.

Article 18(1) provides that subject to the provisions of this constitution, every person is entitled to the protection of the law; Article 20 provides for the protection of freedom of expression; Article 21 provides for the protection of freedom of association. Article 23 provides a for the right to non-discrimination in law and effect.

However, it is well established that merely enshrining such rights in legislation or constitutions will not suffice to fulfill international obligations. It must be put into effect. In this case, regardless of whether the national laws on their face protect the complainant from such abuse, it must be shown that this is reflected in practice by the state.

### **Recommendations for litigation**

The circumstances of the case unfortunately preclude the complainant of the opportunity to seek redress in Zimbabwean Courts due to the fact that he is no longer in the jurisdiction. The complaint must therefore be made before international bodies dealing with human rights violations.

In relation to direct violations of the ICCPR, the Human Rights Committee could choose to comment in its next report on Zimbabwe. However, Zimbabwe has not signed the Protocol giving the Human Rights Committee jurisdiction to hear individual complaints. The violations are nevertheless relevant in regional considerations, as can be seen below.

The first option available for a complaint against Zimbabwe would be the African Commission on Human and Peoples' Rights. Pursuant to article 47 of the Charter, another State party may make such a complaint to the Charter. However, this will not apply for the Zimbabwe Lawyers for Human Rights. Alternatively, article 55 allows for communications other than those of State Parties, whereby, before each session the secretary of the Commission shall make a list of such communications and if a simple majority of the Commission decides, such communications shall be so considered.<sup>17</sup> The Charter is silent as to who the "other" complaints may be but it has been argued that this

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<sup>16</sup> As amended to No. 16 of 20 April 2000

<sup>17</sup> See article 56 for the factors relevant to such consideration

could include NGOs such as the Zimbabwe Lawyers for Human Rights.<sup>18</sup> It should be noted that the abovementioned law from the ICCPR and other human rights bodies shall be directly relevant in the African Commission deciding on the complaint before it; pursuant to article 60.

Zimbabwe has signed<sup>19</sup> the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights<sup>20</sup>. The complaint could then be submitted to the African Court for this issue.

Pursuant to article 5 of the Protocol, there are a number of bodies suitable to submit this case to the court: Firstly, the Commission may forward the case on to the court for consideration; secondly, an African Intergovernmental organization; thirdly, America as a State party whose citizen has been a victim of a human rights violation. For the present purposes, this section provides: The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of the Protocol<sup>21</sup>.

Article 30 provides that parties to the protocol undertake to comply with the judgment of the court.

It must be considered that these decisions are not binding, as there exists no mechanisms for ensuring enforcement of such decisions or communications.

End.

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<sup>18</sup> [http://www.chr.up.ac.za/centre\\_publications/ahrs/indiv\\_complaints.html#submission](http://www.chr.up.ac.za/centre_publications/ahrs/indiv_complaints.html#submission)

<sup>19</sup> in 1998. However, it has not ratified the protocol to date.

<sup>20</sup> Entered into force on 25 January 2004

<sup>21</sup> this must be acceded to by the State concerned