

**294/04 Zimbabwe Lawyers for Human Rights and IHRDA (on behalf of Andrew Barclay Meldrum) / Zimbabwe**

[26 Annual Activity Report, pp. 34-53, Annex 3]

**Summary of Facts**

1. The communication is submitted by the Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (the Complainants) on behalf of Mr Andrew Barclay Meldrum (the victim). It alleges that Mr Meldrum's rights of freedom of expression and freedom to disseminate information were violated by the Republic of Zimbabwe (the Respondent).

2. It is stated by the Complainants that Mr Andrew Barclay Meldrum's an American citizen was legally admitted into Zimbabwe in October 1980 and settled permanently until 2003 when he was deported. It is alleged that the Ministry of Home Affairs of Zimbabwe on 10 February 1980 issued Mr Meldrum with a permanent residence permit which allowed him to work as a journalist and since then he has been a foreign correspondent for the *Mail and Guardian*, a paper published in the United Kingdom.

3. The Complainants state that on 7 May 2002, Mr Meldrum published an article in the *Daily News* (an independent paper that has been closed by the Respondent State) on the internet version of the *Mail and Guardian*. As a result of the publication, the Complainants claim Mr Meldrum was charged with "publishing falsehood" under section 80 (1) (b) of the Access to Information and Protection of Privacy Act, (AIPPA). Mr Meldrum was found not guilty on 15 July 2002. The Complainants state that on 7 May 2003, the Supreme Court of Zimbabwe declared section 80 (1) (b) of the AIPPA unconstitutional in the case of *Lloyd Zvakavpano Mudiwa v The State*.

4. It is further alleged that immediately after his acquittal, Mr Meldrum was requested to report to the Immigrations Department Investigations Unit and was served with a deportation order issued in terms of section 14 (i)g of the Immigrations Act. Mr Meldrum appealed the deportation order within 24 hours to the Ministry of Home Affairs as required by the Immigrations Act. Meanwhile, an application challenging the deportation order was filed by his lawyers in the High Court. On 17 July 2002, the High Court ordered that Mr Meldrum should be allowed to stay in the country until the Supreme Court had dealt with all the constitutional matters raised in the matter.

5. The Complainants allege further that on 16 May 2003, Mr Meldrum was summoned to the Immigration Department where he was informed that he could no longer work as a journalist. He was informed that he had not been accredited in terms of the Access to Information and Protection of Privacy Act. Mr Meldrum informed the immigration authorities that he had filed an application to the Supreme Court and pending the outcome he should be allowed to practice journalism as provided by the Act. The Immigration authorities then informed him that they had a deportation order issued by the Ministry of Home Affairs which empowered them to deport him forthwith without disclosing the reason for the deportation. Mr Meldrum was then forced into a car and taken to the airport.

6. They claim that an urgent appeal was filed in the High Court to interdict the deportation order and to compel the State to bring Mr Meldrum before the High Court by 1530hrs that same day. But at 15:30hrs, the State Counsel appeared in court without Mr Meldrum. The High Court gave another order prohibiting the State from deporting Mr Meldrum. At about 2000hrs, the State Counsel informed the Court that Mr Meldrum could not be located. The High Court issued another order for the release of Mr Meldrum and this order was served on the immigration authorities by Mr Meldrum's lawyer who had to

drive to the airport for that purpose. In spite all these efforts and Court orders, the State defiantly deported Mr Meldrum.

### **Complainant**

7. The Complainants allege that the Respondent State has violated articles 2, 3, 7 (1a) (b), 9, 12(4), and 26 of the African Charter on Human and Peoples' Rights.

### **Procedure**

8. The complaint was received at the Secretariat of the African Commission on 6 October 2004.

9. On 12 October 2004, the Secretariat wrote to the Complainants acknowledging receipt of the complaint and informing them that it will be considered at the Commission's 36<sup>th</sup> Ordinary Session.

10. On 13 December 2004, the Secretariat wrote a letter to inform Parties that at its 36<sup>th</sup> Ordinary Session held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the above mentioned communication and decided to be seized thereof.

11. On 3 February 2005, the Complainants transmitted their arguments on admissibility.

12. On 22 February 2005, the Secretariat acknowledged receipt of the Complainants' arguments on admissibility and inform them that the communication will be considered on admissibility at the 37<sup>th</sup> Ordinary Session of the African Commission scheduled to take place from 27 April to 11 May 2005 in Banjul, The Gambia.

13. The Secretariat of the African Commission wrote a Note Verbale to the Respondent State transmitting Complainants' submissions on admissibility and reminding the Respondent State that the Secretariat is yet to receive their submission on admissibility.

14. A fax message was received by the Secretariat on 14 March 2005, from the Respondent State requesting a postponement of consideration of the communication on admissibility to the 38<sup>th</sup> Ordinary Session.

15. The Secretariat acknowledged receipt of the above mentioned fax and forwarded the decision of the 36<sup>th</sup> Ordinary Session of the African Commission to the Ministry of Foreign Affairs by Note Verbale dated 13 December 2004 and urged the Respondent State to submit on admissibility so that a decision could be taken at the next session of the African Commission.

16. In this respect, the Secretariat requested the Respondent State if they could make their submissions on admissibility with respect of all pending communications by 18 April 2005. The Secretariat also asked the Respondent State to inform it whether the government of Zimbabwe would like to make oral submissions, so that it can advise the Complainants and the Members of the Commission accordingly.

17. During its 37<sup>th</sup> Ordinary Session, held from 27 April to 11 May 2005, in Banjul, The Gambia, the African Commission considered the said communication and deferred consideration thereof to its 38<sup>th</sup> Ordinary Session pending the Respondent State's submissions of its arguments on admissibility.

18. On 24 May 2005, the Secretariat informed both parties about the Commission's decision. The Secretariat also reminded the Respondent State that it had not submitted its submissions on admissibility requested it to do so before 15 October 2005 so that the Commission could decide on the admissibility at its forthcoming session.

19. On 13 October 2005, the Secretariat reminded to the Respondent State to submit its argument on admissibility, for consideration during the 38<sup>th</sup> Ordinary Session to be held from 21 November to 05 December 2005 in Banjul, The Gambia.
20. On 31 October 2005, the Respondent State informed the Secretariat that the transmission of its submissions would be slightly delayed.
21. During the 38<sup>th</sup> Ordinary Session, the Respondent State finally submitted its arguments on admissibility.
22. On 14 December 2005, the Secretariat wrote to both parties informing them that at its 38<sup>th</sup> Ordinary Session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission considered the communication and declared it **admissible**.
23. The Secretariat also informed both parties that the African Commission would consider the communication on the merits at its forthcoming session, and requested them to forward their arguments on the same.
24. On 04 April 2006, the Secretariat sent a reminder to both parties to submit their arguments on the merits.
25. On 26 July 2006, the Secretariat wrote to both parties informing them that, at its 39<sup>th</sup> Ordinary Session held from 11-25 May 2006, in Banjul, The Gambia, the African Commission considered the communication and decided to defer its decision on the merits at its 40<sup>th</sup> Ordinary Session to be held from 15-29 November 2006 in Banjul – The Gambia.
26. On 3 November 2006, the Secretariat wrote a reminder to the Respondent State to request its submissions on the merits of the case, as soon as possible.
27. On 26 November 2006, the Secretariat received the Complainant's submissions on the merits and the Secretariat was informed that the Respondent State has been duly served a copy of the submission.
28. On 08 December 2006, the Secretariat informed both parties that at its 40<sup>th</sup> Ordinary Session held from 15-29 November 2006 in Banjul-The Gambia, the African Commission considered the communication and decided to defer its decision on the merits to its 41<sup>st</sup> Ordinary Session scheduled from 16-30 May 2007 in Ghana, in order to allow the Respondent State to submit its arguments on the merits.
29. The Secretariat of the African Commission wrote a reminder to the Respondent State to submit its arguments on the merits before 10 of May so that the Commission could take a decision at its 41<sup>st</sup> Ordinary Session.
30. At its 41<sup>st</sup> Ordinary Session held in Accra-Ghana from 16 to 30 May 2007, the African Commission considered the communication and decided to defer its decision on the merits to its 42<sup>nd</sup> Ordinary Session, in order to receive the Respondent State's arguments.
31. The Secretariat wrote reminders on 25 June 2007 and 25 September 2007 to the Respondent State to submit the requested arguments on merits latest by 15 October 2007 for consideration during the 42<sup>nd</sup> Ordinary Session held from 14 to 28 November 2007.
32. On 19 December 2007, the Secretariat wrote to inform both parties that at its 42<sup>nd</sup> Ordinary Session held from 15 to 28 November 2007 in Brazzaville, Congo, the African Commission considered the communication and decided to defer its decision on the merits to its 43<sup>rd</sup> Ordinary Session, in order to receive the Respondent State's arguments.
33. On 19 March 2008, the Secretariat informed both parties about the decision and reminded the Respondent State to submit its arguments on the merits in order to allow the Commission to take a decision on the matter.
34. At its 43<sup>rd</sup> Ordinary Session, the Commission considered the communication and decided to defer its decision on the merits to its 44<sup>th</sup> Ordinary Session.

35. At its 44<sup>th</sup> Ordinary Session held from 10-24 November 2008, in Abuja, Nigeria, the African Commission deferred consideration of the communication due to lack of time.

### **Decision on admissibility**

#### **The Complainant's arguments**

36. The Complainant had argued the complaint had complied with Article 56 (3), because the information was based on court records and affidavits.

37. Regarding Article 56 (5), the Complainants submit that the victim was not given the opportunity to exhaust the local remedies that were available to him, and that the High Court had ordered on many instances that he be allowed to stay in the country until a decision was made on the constitutional issues, which he had raised in an application pending before the Supreme Court. Complainants submit that in terms of Section 24 of the Zimbabwe Constitution, any issues that pertain to the Zimbabwean Bill of Rights are referred to the Supreme Court, as the court of first instance on alleged case of human rights infringements. They argue that the deportation of the victim by the Immigration Department was in contempt of court orders, which had stayed his deportation.

38. That the victim could not have pursued any other remedies other than approach the courts for a vindication of his rights. They argue that the fact that he was given an opportunity on one occasion to appeal to the Minister of Home Affairs, who is responsible for immigration, does not at all prove the availability and effectiveness of local remedies, since the decision of the Minister 'is and was more of a review by a quasi judicial individual government official or functionary, who is not obliged to make considerations in accordance with legal rules which in all fairness takes away the very principles of natural justice and due process of the law (sic) which are covered under Article 7 of the Charter'.

39. The Complainants further argue that the Commission has ruled that only remedies of a judicial nature are considered to be effective remedies for acts of human rights violations. This, they rely on the Commission's decision in the *Constitutional Rights Project vs. Nigeria* where the commission ruled that:

*"the Civil Disturbances Act empowers the Armed Forces Ruling Council to confirm the penalties of the Tribunal. This power is a discretionary, extraordinary remedy of a non-judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complaint seeking remedies from a source, which does not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective"*

40. The Complainants added that in the *Constitutional Rights Projects* case (*supra*) the Commission stated further that the types of remedies that existed were of a nature that did not require exhaustion according to Article 56(5).

41. It is also alleged that the victim was ordered to make representations to the Minister of Home Affairs on why he should not be deported after being served with his deportation order. The exhaustion of local remedies in this case would fall away as the Minister of Home Affairs being the person responsible for the Immigration Department, the state arm which was responsible for infringing on his rights, could not in any way proffer an effective remedy, the Complainants assert.

42. The Complainants submit that when the victim sought judicial protection of his rights, the Immigration Department deported him regardless of the court orders, which stayed his deportation, adding that the practice by the Respondent State to disobey courts orders has made it a senseless [*sic*] for an aggrieved party to seek or obtain any form of remedy.

43. The Complainants therefore argue that, 'one can safely conclude that the failure by the government of Zimbabwe to respect court orders thereby denying local remedies to victims of human rights violations amounts to constructive exhaustion of local remedies'.<sup>1</sup>

44. The Complainants urged the Commission to draw inspiration from the Inter-American Court decision on the same principle, which states as follows; "...when remedies are denied for trivial reasons or without examination on merits, or if there is proof of the existence of a practice or policy tolerated by the government, the effect of which is to impede persons from invoking internal remedies that would normally be available to others, resort to such remedies becomes a senseless formality."

### **Respondent State's arguments**

45. The Respondent State relies on two grounds:

#### **1. Disparaging language (Article 56(3))**

46. The Respondent State submits that the language used in the communication is disparaging to the Republic of Zimbabwe, in particular, the Department of Immigration in Zimbabwe and, as such, the communication should be considered inadmissible. The Respondent State claims that the language used to describe the deportation and events preceding the deportation of the Complainant expose the State and the Department of Immigration of Zimbabwe to unnecessary ridicule. It argues that international attention garnered by the *Land Reform Programme*, is exacerbated by such disparaging statements are [sic], among other things, that there is no rule of law in Zimbabwe, court orders are not enforced and crimes against humanity are committed by high ranking State officials.

#### **2. Exhaustion of local remedies (Article 56(5))**

47. Concerning Article 56(5), the Respondent State submits that the Complainants have not attempted to exhaust local remedies and, as such, the communication should be considered inadmissible. According to the Respondent State, the victim, while still resident in the Republic of Zimbabwe, approached the local courts on a number of occasions seeking redress. The State argues that the victim does not, however, need to be physically in Zimbabwe in order to avail himself of available domestic remedies. That he can instruct his lawyers from wherever he is and the relevant action can be done through his lawyers. The State argues further that his lawyers could, for instance, make issue of the alleged contempt of court by Immigration Officials, and also push for the revocation of the deportation order and subsequent reinstatement of the victim's residence permit.

48. Consequently, the Respondent State argues that the communication does not meet the requirements of Article 56(3) and 56(5) and should be declared inadmissible.

49. During its oral submission, the Respondent State submitted that following discussions with the Complainants, it decided to abandon its argument of disparaging language, but maintains the issue of non exhaustion of local remedies.

### **Decision**

50. When the parties made oral submissions before the Commission, the Respondent State submitted that, it had decided to abandon the argument on disparaging language but maintained the grounds on issue of non exhaustion of local remedies. The Commission takes note of that submission, and would not make a ruling on Article 56 (3) since the parties are not at issue on the question of disparaging language.

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<sup>1</sup> As was established in the cases of *Godinez Cruz vs. Honduras* (Inter-American Court on Human Rights, Series C No. 5 at 69, *John D Ouko vs. Kenya* (ACHPR Decision 232/99) and *Rencontre Africaine pour la Defense des Droits de l'Homme vs. Zambia* (ACHPR Decision 71/92).

51. Both parties made submissions on Article 56(5) regarding the question of non-exhaustion of local remedies. The Commission has stated in previous decisions, (see paragraph 39 above) that the principle of exhaustion of domestic remedies, presupposes existence of effective judicial remedies. Administrative or quasi judicial remedies which do not operate impartially are considered as inadequate and ineffective. The Respondent State argues that the victim did not exhaust domestic remedies. It argues that, the mere fact that the victim was outside the country could not stop the victim instructing lawyers to approach the courts on his behalf i.e.; the victim did not require or need to be inside the country to access the domestic remedy. The Respondent State submitted further that the victim could have initiated contempt proceedings.

52. The Complainants submitted at length on the non applicability of Article 56(5) and argued in favour of invoking the principle of constructive exhaustion of local remedies. In summary, they submit that the disregard by the Respondent State of various court orders prior to, and coupled with, the deportation of the victim, denied him the opportunity to exhaust local remedies. Secondly they submit that there were no domestic remedies to exhaust, since the judicial remedies had proved ineffective. The appeal to the Minister was a non judicial remedy, for purposes of addressing human rights violation. Such a remedy does not fall within the scope of Article 56(5), it failed to comply with rules of natural justice. In any case it was the Minister who had ordered the deportation, thus he could not be expected to proffer any remedy to the victim.

53. The Commission agrees with the Complainants' arguments. The Commission is of the firm view that immigration officials of the Respondent State had no basis in law to disregard court orders. The Complainants referred the Commission to the *Cordinez Cruz* [sic] decision, on constructive exhaustion of local remedies. The Commission has looked at the decision in terms of Article 60 of the Charter and finds it very persuasive. The Commission has previously applied this principle too, where the Complainant or victim is impeded from exhaustion of domestic remedies through the conduct of the Respondent State.

54. The deportation of the victim in the case under consideration had been effected in the face of several High Court orders, the Commission finds that to require the victim to pursue further judicial remedies, when all efforts at seeking judicial remedies had been frustrated and ignored by the Respondent State, would have amounted to a "senseless formality" in the true meaning of the words. The remedy which would have granted protection to Mr Meldrum, namely the application pending in the Supreme Court, was considered by the Respondent State's immigration officials, as "trivial" and of no legal consequence. The Respondent State had notice of the pending application in the Supreme Court, and yet effected the deportation. It actively participated in impeding the victim from accessing the remedy.

55. The Commission therefore holds that the conduct of the Respondent State brings this communication within the scope of constructive exhaustion of remedies principle. By accepting the applicability of the principle of constructive exhaustion of domestic remedies in this case, the Commission distinguishes this case from its decision in communication 219/98 *Legal Defence Centre/The Gambia*<sup>2</sup> in which it declared the communication

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<sup>2</sup> In communication 219/98 *Legal Defence Centre/The Gambia*, the victim, one Mr Sule Musa was deported by the Gambian authorities to Nigeria. The Commission sought clarification during its 25<sup>th</sup> Ordinary Session, whether the Complainant could have recourse to domestic remedies, to which no response was received. The Commission declared the communication inadmissible, observing that; "...the victim does not have to be physically present in a country to avail himself of available domestic remedies, such could be done by his counsel... Rather than approach the Commission first, the Complainant ought to have exhausted available

inadmissible for failure by a deportee to exhaust local remedies, since the circumstances were not similar.

56. The decision in the *Legal Defence Centre* is distinguishable because in that case, no effort was made to exhaust domestic remedies. In the case under consideration, the Respondent State was actively engaged in frustrating the restraint orders obtained from the domestic court. The Commission is aware that its decisions on admissibility must be based on the criteria under Article 56, it must however reiterate that States Parties are obliged to respect their obligation to guarantee the independence of the judiciary under Article 26 of the Charter. It is the view of the Commission that Article 56(5) must be read in the context of the Article 26 of the Charter. A State which ignores its duty to guarantee an independent judiciary fails to provide effective remedies to human rights violations, and thereby undermines the protection of human rights under the Charter.

57. On these grounds, the African Commission declares the communication admissible.

### **Decision on the merits**

#### **Complainant's submissions**

58. The Complainants allege the violations of Articles 2, 3 (1) and (2), 7 (a), 9, 12 (4) and 26 of the African Charter.

59. Concerning alleged violations of Articles 2 and 3 of the Charter, the Complainants submitted that the deportation of Mr Meldrum was based on vague and unsubstantiated reasons of a danger to public order, national security and breach of his work permit.

60. The Complainants state that the allegations against Mr Meldrum were never proven in the domestic courts, but the Respondent State proceeded to deport him despite numerous High Court orders that he should not be deported, until the constitutional application for stay of deportation had been heard.

61. The Complainants allege that the act of deportation constituted an unfettered exercise of discretion by the Chief Immigration Officer, which was tantamount to indiscriminate action by state authorities and violated the right equality before the law, therefore it is a violation of Article 2 of the Charter.

62. The Complainants conclude that the deportation of Mr Meldrum was not in anyway motivated by the desire to promote peace and security, neither was it to accomplish a given pressing social need, it was to physically censor him from disseminating information within Zimbabwe.

63. The Complainants recall the jurisprudence of the Commission dealing with cases of expulsion of non-nationals from State Parties to the Charter, in which concluded that deporting non-nationals without providing them the opportunity to challenge their deportation before the courts, constitute discrimination and inequality before the law. Article 2 of the Charter obligates State parties to ensure that persons living in their territory, be they nationals or non nationals, enjoy the rights guaranteed in the Charter<sup>3</sup>.

64. The Complainants argued that Mr Andrew Meldrum was arrested and charged under the Access to information and Protection of Privacy Act (AIPPA), but the charges against him were subsequently dismissed in court, and the State never appealed. Further, the sections of the Act which were deemed to have breached were subsequently struck off and declared unconstitutional.

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local remedies in the Gambia..." (emphasis added). It must be stated here that the distinguishing factor relied by the Commission in the Zimbabwe case is the role played by the State in impeding access to the local remedies available.

<sup>3</sup> *Union Interafricaine des Droits de l'Homme and Others vs. Angola* (2000) AHRLR 18 (ACHPR 1997) at para. 18.

65. The Complainants submit that, in essence, the deportation of Mr Andrew Meldrum is unfounded at law.

66. Concerning Article 7 (1) (a) and (b), the Complainants note that the failure by the Respondent State to obey court judgments or orders constitutes a violation of the Charter and breaches the duty and right to have independent and competent tribunals and courts mandated with the protection of rights as provided in the Charter.

67. The Complainants submit further that the deportation order was a violation of the presumption of innocence which is a doctrine well founded under the principles of natural justice as it gives an accused person the opportunity to have his cause heard by an organ competent to determine such guilt or innocence.

68. They argue that, when an individual, who has a vested interest in the matter, acts contrary to principles of natural justice, and becomes the first and last institution of appeal, then decisions of such an individual would be a violation of the Charter, in particular Article 7 (1) (a) and (b).

69. The Complainants emphasise that the Access to Information and Protection of Privacy Act allows journalists to practice for six months whilst their accreditation applications were pending, and Mr Meldrum was still within the transitional reprieve period and was, in terms of the Act, allowed to work as a journalist while his application was pending.

70. The Complainants note further that the free practice of the profession of journalism and freedom of expression ought to be interpreted to include freedom to impart and receive information, and this was abrogated by the Respondent State.

71. It is alleged by the Complainants that Mr Meldrum had been charged [with] publication of falsehoods, charges he was acquitted of in the Magistrate's Court, against which the State never appealed. They state further that the same provision of AIPPA under which Mr Meldrum [was] charged, was declared unconstitutional by the Supreme Court.<sup>4</sup> The Complainants submit that the only way for the Respondent State to deter Mr Meldrum from the free practice of his profession was to physically censor him through an arbitrary act of deportation.

72. The Complainants consider that the response of the State to perceived, real or illicit threats to national security, public order was disproportionate to the threat, if any, posed by the writings of Mr Meldrum.

73. Referring to Article 12 (4), the Complainants affirm that non-nationals admitted in any State Party to the Charter should enjoy the same rights entitled to nationals. Thus, according to the Complainants, the expulsion of Mr Meldrum did not satisfy the provisions of the Charter as it was arbitrary in so far as it was improper, disproportionate and contrary to the law and the principles of natural justice.

74. Recalling the restriction on fundamental rights guaranteed by the Charter, the Complainants affirm that the limitations are founded where the drafters of the Charter include clawback provisions such as "in accordance with the law", "abides by the law", "within the law" and more clearly stated under Article 27 (2).

75. Relying on the principles of necessity and proportionality and referring to international jurisprudence, the Complainants submit that the act of restriction of a right must not be arbitrary, unfair or based on irrational considerations, but must be rationally connected to the objective, and should not impair the right or freedom in question more than is necessary to accomplish a given objective or a pressing social need.

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<sup>4</sup> See para. 3 (supra)



76. Further, the Complainants argue that several international human rights instruments to which Zimbabwe is a party recognise the importance of nondiscrimination in the pursuit and enjoyment of human rights by nationals and non-nationals. The Complainants also submit that the deportation of Mr Meldrum was in violation of Article 26, read together with Article 7 of the Charter. According to the Complainants, Article 7 as has been ruled by the Commission gives meaning to the individual right, whilst Article 26 emphasises on the importance of institutions which give effect to the right in Article 7.

77. The Complainants argue that Mr Meldrum was deported while his case was yet to be heard by the Supreme Court sitting as a constitutional court, thus rendering the right to appeal in this instance illusory. The Complainants submit that the Respondent State, through various organs had defied court orders and allowed such actions to become “acceptable standard of deviation” from enforcing rights guaranteed in the Charter.

78. The Complainants submit that Article 26 of the Charter was violated by pointing to the wanton disregard of court orders by the Respondent State and non-state entities as clear evidence of the non-existence of the rule of law, principles of natural justice, and presumption of innocence. For the Complainants, these latest principles are elementary indicators of the existence of a proper functioning judiciary, an executive which operates within the law, and a legislature which appreciates the essence of separation of powers.

79. The Complainants argued that the actions of the Respondent State were a violation of Article 9 (1) and (2) of the Charter, which provides for freedom of expression, and the right to receive and impart information. They claim that the deportation of Mr Meldrum deprived him of his rights, as well as denying the general citizenry their rights to receive information.

80. The Complainants recall that the restrictions on freedom of expression under international law have been examined under various tests of necessity, proportionality and achievement of a legitimate objective, and request the Commission to apply the same tests to the present communication.

### **Respondent State’s submission**

81. The Respondent State did not formally submit its arguments on the merits in spite of several reminders. However, it should be noted that in its submission on admissibility dated 16 November 2005, the Respondent State also made arguments relating to the merits of the communication. The African Commission here below summarises those arguments and considers them as the State’s submissions on the merits of the present communication.

82. In relation to the alleged violation of Article 2, the Respondent State denies that the victim’s right to equality before the law was violated. The State submits that the Complainant faced deportation because of alleged violations of the terms of his Residence Permit which entitled him to stay in Zimbabwe. According to the State, it is wrong to suggest that Mr Meldrum’s right to equality before the law was violated because of his opinion and/or origin.

83. Concerning Article 3, the Respondent State submits that the victim was afforded protection of the law, adding that it is on record that the victim approached local courts in Zimbabwe at least four times prior to his deportation and that the matters were given due consideration.

84. With regards to the alleged violation of Article 7, the Respondent State submits that the victim was not denied his right to appeal. The State argues that he made an application to the High Court which, in turn, was referred to the Supreme Court, noting that the issues were still pending before the Supreme Court at the time the victim left for the

United Kingdom. The Respondent State argues that the Complainant was at liberty to approach the courts, whenever he deemed it necessary to do so.

85. Concerning Article 9, the Respondent State submits that while the right to freedom of expression is enshrined in the *Constitution of Zimbabwe* and contained in Article 9 of the African Charter, it would be inappropriate for the victim to seek to enforce that right by way of publishing falsehoods. Moreover, the State avers, publications of falsehoods are in direct contravention of the *Access to Information and Protection of Privacy Act* (AIPPA).

86. On the alleged violation of Article 12(4), the Respondent State submits that Immigration Officials responsible for Mr Meldrum's deportation were guided by Section 14(1)(g) of the *Immigration Act*. Under this law, the State argues, Mr Meldrum was declared a prohibited immigrant and the Chief Immigration Officer revoked his Residence Permit in terms of Section 20(2) of *Statutory Instrument* 195 of 1998. The decision to deport Mr Meldrum, according to the Respondent State, cannot therefore be considered as outside of the provisions of the law as it was made by the Chief Immigration Officer who was acting within the purview of the law governing the deportation of non-nationals, namely the *Immigration Act*.

87. Concerning Article 26, the Respondent offers no argument in response to allegations made by the Complainant.

### **Decision of the Commission on the merits**

#### **Alleged violation of Articles 2 and 3**

88. The Commission has considered the submissions of both parties regarding the alleged violations of the African Charter.

89. With respect to the alleged violation of Article 2 of the African Charter, the Complainants argue that the deportation of Mr Meldrum was based on vague and unsubstantiated reasons of a danger to public order, national security and breach of his work permit, adding that the deportation process gives unfettered discretion to the Chief Immigration Officer, and this is tantamount to indiscriminate practices by state authorities and erodes the right to equality before the law, therefore it is a violation of Article 2 of the Charter. The Complainants also argue that Article 2 guarantees against discrimination based on national origin.

90. Article 2 of the African Charter provides that:

*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 any status.*

Article 3(2) provides that “[e]very individual shall be entitled to equal protection of the law”.

91. Discrimination can be defined as any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.<sup>5</sup> Article 2 of the African Charter stipulates the principle of non discrimination, which is essential to the spirit of the African Charter.<sup>6</sup>

92. The Respondent State argued that Mr Meldrum was deported because he violated the terms of his residence permit and therefore submit that Article 2 was not violated. The facts as presented by the Complainants indicate that the victim, Mr Meldrum, was legally

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<sup>5</sup> See The [UN] Human Rights Committee, General Comment No. 18.

<sup>6</sup> See Communication 241/2001 - Purohit and Moore / The Gambia, para 49.

resident in the Respondent State, his residential permit had not expired, and he had not been refused accreditation by the MIC. His application contesting the denial of accreditation under AIPPA was still pending before the Supreme Court. The High Court had ordered that he remain in the country until his application in the Supreme Court is disposed of. It had issued a restraining order against his deportation. In short, he was [o]n all-fours legally resident in the Respondent State.

93. The Respondent State did not give any details concerning the terms of the residence permit which Mr Meldrum violated. The Commission is not satisfied by the reasons or explanations given by the Respondent State. It is not very clear why he was deported. Given the circumstances, it can only be concluded that he was deported because he was a non-national who had published what the Respondent State considered to be falsehoods, which are not protected by the Constitution. In its decision in the case between *Institute for Human Rights and Development in Africa v Republic of Angola*<sup>7</sup>, the African Commission held that '*although governments have the right to regulate entry, exit and stay of foreign nationals in their territories, and ... although the African Charter does not bar deportations per se, the African Commission reaffirms its position that a State's right to expel individuals is not absolute and it is subject to certain restraints, one of those restraints being a bar against discrimination based on national origin*'.

94. It would be interesting to know what the government would have done if Mr Meldrum was a Zimbabwean. Surely, the Respondent State would not have deported its own national to another country. The only logical reason the State deported him under then prevailing circumstances was because he was a non-national. In the opinion of the Commission therefore, it appears that the victim was targeted because he is not a national of the Respondent State, and this according to the Commission constitutes a violation of Article 2 of the Charter.

95. With respect to Article 3 of the Charter, [the]Complainants submit that the deportation of Mr Meldrum in defiance of the court orders amounted to a violation of Article 3 of the African Charter. Article 3 guarantees fair and just treatment of individuals within the legal system of a given country, whereby every individual is equal before the law and guaranteed equal protection of the law. Given the treatment Mr Meldrum was exposed to, would it be argued as the Respondent State does, that he was able to access the courts and therefore was given equal protection of the law?

96. The most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.

97. Factual patterns that are objectively equal must be treated equally. Thus, it is expected that if the law requires that all those who publish offensive articles against the government be brought before a judge for questioning, and if found guilty, sentenced or

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<sup>7</sup> Communication 292/2004.

pay a fine, this law should apply to all those subjected to it, including nationals and non nationals alike.

98. In the present communication, that does not seem to be the case, because the victim is a non-national, the Respondent State chose not to treat him as it would have treated nationals. It is very unlikely and impractical that if a Zimbabwean had published the same article the victim published, he/she would have been treated the same way. In the opinion of the Commission therefore, the Respondent State violated Article 3(1) of the Charter.

99. Equal protection of the law under Article 3(2) on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness.<sup>8</sup> It simply means that similarly situated persons must receive similar treatment under the law.<sup>9</sup>

100. In its decision in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development [in Africa]/Republic of Zimbabwe*<sup>10</sup>, this Commission relied on the Supreme Court decision in *Brown v. Board of Education of Topeka*<sup>11</sup>, in which Chief Justice Earl Warren of the United State of America argued that *'equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.*<sup>12</sup>

101. In order for a party therefore to establish a successful claim under Article 3 (2) of the Charter, it should show that the Respondent State had not given the Complainant the same treatment it accorded to the others. Or that, the Respondent State had accorded favourable treatment to others in the same position as the Complainant.

102. In the present communication, the Commission notes that the Respondent State treated the victim in a manner which denied him the opportunity to seek protection of the courts. Due process which was key to ensuring remedy to the deportation, and therefore the protection of the rights of the victim were denied through the arbitrary actions of the Respondent State. The African Commission therefore finds that the Respondent State violated Article 3 (2) of the African Charter.

#### **Alleged violation of Article 7 (1) (a) and (b)**

103. The Complainants argue that the deportation of Mr Meldrum violated Article 7 (1) (a) and (b). Article 7 (1) of the Charter provides 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 violating his fundamental rights as recognised 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.*

104. Article 7 (1) deals with the right to have one's cause heard, which comprises, *inter alia* (a) the right to appeal to competent national organs against acts violating their rights, and (b) the right to be presumed innocent until proven guilty by a competent court or tribunal.

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<sup>8</sup> See *People v Jacobs*, 27 California Appeal, 3d 246, 103 California Rep 536, 543, 14<sup>th</sup> Amendment, US Constitution.

<sup>9</sup> See *Dorsey v Solomon*, DCMd., 435 F. Supp. 725.

<sup>10</sup> Communication 293/2004.

<sup>11</sup> 347 US 483 (1954).

<sup>12</sup> [www.legal-explanations.com](http://www.legal-explanations.com).

105. In the present communication, the victim went to the courts of the Respondent State. The courts ruled in his favour against the deportation order. The victim petitioned the Supreme Court for enforcement of his right to practice his profession after his accreditation was rejected, but before the latter could hear the application, the Respondent State deported him. Could it be said that the victim's right to have his cause heard was violated by the Respondent State?

106. The right to have one's cause heard requires that the victims have unfettered access to competent jurisdiction to hear their case. A tribunal which is competent in law to hear a case must have been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law. Where the competent authorities put obstacles on the way which prevents victims from accessing the competent tribunals, they would be held liable. These are the issues which must be borne out [sic] by the evidence to warrant the Commission's findings of a violation.

107. In the present communication, it is clear that the Respondent State did not want the victim to be heard in the Supreme Court. To ensure that this happened, the Respondent State deported him out of the country before the date scheduled for the hearing, thus effectively preventing him from being heard. Admittedly, the victim could still have proceeded against the Respondent State from wherever he was deported to, but by suddenly deporting him the Respondent State frustrated the judicial process that had been initiated.

108. To this extent, the Respondent State is found to have violated Article 7 (1) (a) of the African Charter.

109. Regarding the allegations concerning the violation of Article 7(1) (b), the Commission finds that the deportation was effected in disregard of several High Court orders. The Immigration officers refused, or failed to produce Mr Meldrum as was ordered by the Court. By doing so they denied him the right to be heard by a competent and impartial tribunal. Instead they acted under the Immigration Act without affording him an opportunity to defend himself. The actions of the Respondent State amounted to a conclusion that Mr Meldrum was guilty of the allegations against him, contrary to the presumption of innocence. The Commission finds that the conduct of the Respondent State amounted to a violation of Article 7 (1)(b) as alleged by the Complainants.

### **Alleged violation of Article 9**

110. With respect to allegations of violation of Article 9 of the African Charter, guaranteeing freedoms of expression, the Complainants submit that the deportation of Mr Meldrum deprived him of his rights to receive information, and disseminate his opinions, as well as the right of the general citizenry to receive information.

111. Article 9 (1) of the African Charter provides that every individual shall have the right to receive information. Article 9 (2) states that "*every individual shall have the right to express and disseminate his opinions within the law*". Does the deportation of the victim violate his right to freedom of expression?

112. It should be recalled that the victim's deportation arose from the publication of an article that the Respondent State did not appreciate. The Respondent State resorted to deportation in order to silence him, in spite [of] a court order that he can stay [sic] in the country. Admittedly, he is not prevented from expressing himself wherever he was deported to, but vis-à-vis his status in the Respondent State, which is a State Party to the African Charter, his ability to express himself as guaranteed under Article 9 was violated.

#### **Alleged violation of Article 12 (4)**

113. In the same vein, the deportation of the victim by the Respondent State amounts to a violation of Article 12 (4) of the African Charter, which provides that “*a non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law*”.

114. The African Commission notes that the import of this provision under the African Charter is to ensure that due process is followed before legally admitted non-nationals are expelled from a Member State. In the *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola* case<sup>13</sup>, the African Commission stated that although African States may expel non-nationals from their territories, the measures that they take in such circumstances should not be taken at the detriment of the enjoyment of human rights, and that while the Charter does not bar a State's right to deport non-nationals *per se*, it does require deportations to take place in a manner consistent with the due process of law.<sup>14</sup>

115. The African Charter's requirement of due process as outlined above is also shared by similar systems elsewhere. The Human Rights Committee under the International Covenant on Civil and Political Rights, for instance, had expressed a similar concern over the treatment of aliens being deported from Switzerland when it held the latter liable for degrading treatment and use of excessive force resulting on some occasions in the death of the deportee during deportation of aliens.<sup>15</sup> The Committee recommended that Switzerland should “*ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant*” and that “*restraint methods do not affect the life and physical integrity of the persons concerned*”.<sup>16</sup>

116. Very clearly, the situation as presented by the Respondent State did not afford the victim due process of law for protection of his rights. The Respondent State ignored the court orders that he be allowed to stay in the country. The African Commission thus holds the Respondent State in violation of the provisions of Article 12(4) of the African Charter.

#### **Alleged violation of Article 26**

117. With respect to the alleged violation of Article 26, the Complainants argue that by refusing to comply with court decisions, the Respondent State not only violated Article 7, but also violated Article 26. Article 26 of the Charter provides that State Parties shall have the duty “*...to guarantee the independence of the courts...*”. The Complainants argue further that the deportation is in violation of Article 7 (a) and (b) as read together with Article 26 of the Charter, noting that Article 7 gives meaning to the individual right, whilst Article 26 emphasises on the importance of ensuring the independence and integrity of the institutions which give effect to the right in Article 7.

118. It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute.

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<sup>13</sup> Communication 159/1996.

<sup>14</sup> *Id.* Para 23.

<sup>15</sup> The UN Human Rights Committee, ICCPR, A/57/40 vol. I (2002) at para. 76 (13).

<sup>16</sup> *Ibid.*

Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.<sup>17</sup>

119. It is a vital requirement in a state governed by law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.

120. Thus, by refusing to comply with the High Court orders, staying the deportation of Mr Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of Article 26 of the African Charter.

121. In view of the above reasoning, the African Commission:

holds that the Respondent State, the Republic of Zimbabwe, has violated Articles 1, 2, 3, 7(1) (a) and (b), 9, 12(4) and 26 of the African Charter.

The African Commission recommends that the Respondent State should:

- a. Take urgent steps to ensure court decisions are respected and implemented;
- b. Rescind the deportation orders against Mr Andrew Meldrum, so that he can return to Zimbabwe, if he so wishes, being a person who had permanent residence status prior to his deportation. The status quo ante to be restored;
- c. Ensure that the Supreme Court finalises the determination of the application by Mr Meldrum, on the denial of accreditation;
- d. In the alternative, taking into account that the AIPPA has undergone considerable amendments, grant accreditation to Mr Andrew Meldrum, so that he can resume his right to practice journalism; and
- e. Report to the African Commission within six months on the implementation of these recommendations.

**Adopted during the 6<sup>th</sup> Extra-Ordinary Session of the ACHPR, Banjul, The Gambia, April, 2009.**

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<sup>17</sup> See the views expressed by K Ryan, in "Judges, Courts and Tribunals", paper presented at the Australian Judicial Conference Symposium on Judicial Independence and the Rule of Law at the Turn of the Century, Australian National University, Canberra, 2 November 1996.