

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders

REFERENCE: AL
ZMB 4/2015:

11 January 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 25/2, 24/5, and 25/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding **alleged undue delays in reviewing the application for registration of the Engender Rights Centre for Justice, the subsequent refusal to register it, as well as charges brought against its head, Mr. Paul Kasonkomona.**

The **Engender Rights Centre for Justice** is a non-governmental organisation working to promote respect for the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.

Mr. **Kasonkomona** is a well-known human rights defender from Zambia advocating for the rights of sex workers and access to health for LGBTI persons.

The alleged criminal charges against Mr. Kasonkomona following his appearance on a television show were the subject of a previous allegation letter sent to your Excellency's Government on 14 May 2013, case no. ZMB 1/2013. We acknowledge receipt of responses on 13 August 2013 and 28 August 2013, respectively, noting that consultations with respect to the matters raised in the above letter were being undertaken and that the Special Rapporteurs would be informed as soon all the information was collated. We regret that to date no further information was received in this regard. We consider responses to our communications an important part of the cooperation of Governments with Special Procedures mandate holders and urge the authorities to provide as soon as possible detailed responses to all the concerns raised the previous communication.

According to the new and updated information received:

Attempt to register the Engender Rights Centre for Justice

In July 2011, Mr. Paul Kasonkomona, attempted to register a non-governmental organization by the name of “Engender Rights Centre for Justice” by way of a submission to the then competent authority, the Registrar of Societies, under the Ministry of Home Affairs (MoHA). After the first review, Mr. Kasonkomona was allegedly informed by the Ministry of Home Affairs to resubmit the documentation, without terms like “sex workers”, “human rights” and “transgender” in constitution of the organization.

In December 2011, Mr. Kasonkomona filed another submission and subsequently received no written response for four to five months.

Throughout 2012, Mr. Kasonkomona approached the Ministry of Home Affairs to enquire about his dossier and advocate for the registration of the association, yet he was not provided a written response. When he inquired in person, he received different responses including the request to remove the terms found controversial by the Ministry and to pay more money for the registration because “it was a human rights organisation”.

In 2013, Mr. Kasonkomona made another attempt to register the organisation under the Companies Act with the Patent and Companies Registration Agency. It is reported that other non-governmental organizations that work on LGBTI issues in Zambia are registered under this act as a “club”, however, there are limitations regarding the allowable funding these entities can receive and the geographical areas where they are permitted to operate.

Aware of these restrictions, Mr. Kasonkomona nevertheless attempted to register and was told to submit the paperwork with three possible names for the organization. The Patent and Companies Registration Agency conducted a name search on the basis of the core objectives of the organization, and Mr. Kasonkomona was informed that his organization was supposed to be registered under the Ministry of Community Development, Mother and Child health.

Mr. Kasonkomona subsequently tried to register with the Ministry of Community Development, Mother and Child Health. It took him several months to file the request because the competency to register nongovernmental organizations had been transferred from the Ministry of Home Affairs to the Ministry of Community Development in the meantime and the unit that was needed for the registration had not yet been created at the time of his request.

In January 2015, Mr. Kasonkomona went to the established office of the Registrar of Non-Governmental Organizations at the Ministry of Community Development,

Mother and Child health, and then was asked to submit an updated constitution of organization, as well as its profile and structure, which he did promptly. About four days later, he was told that the paperwork was in order and he was given the forms for payment of the fee and for fingerprints of members of the board. The forms were sent to the Police Authority, who reportedly cleared them and returned them to the aforementioned Ministry.

Mr. Kasonkomona was then informed that his application was due to be decided upon at the end of February 2015 by the Board at the Ministry of Community Development, Mother and Child Health.

In the early days of March, Mr. Kasonkomona was reportedly told by the Ministry that his application had been sent to the Ministry of Justice for their interpretation on its conformity with legislation in Zambia. Despite his attempted follow-up on whether a decision was granted by the Ministry on various occasions by phone and in person, Mr. Kasonkomona received no clear response.

Mr. Kasonkomona called the Registrar on 22 May 2015 and was reportedly told by an employee that the Ministry of Justice allegedly communicated with the Registrar and stated that “they should not register an organisation that works with a ‘criminalised population’”. In response, Mr. Kasonkomona requested a decision in writing, which the employee pledged to complete.

Mr. Kasonkomona received a written notification on 27 May 2015 wherein the Registrar stated that “[t]he application was presented before the NGO Registration Board for approval; however, due to the nature of the organization’s area of focus, it was deferred to allow for consultation and guidance from relevant authorities.”

Two weeks after receiving that notification, Mr. Kasonkomona went to the Ministry of Community Development, Mother and Child Health, where the Registrar told him that should the Ministry of Justice not provide a statement with its position by the end of June, the registration would be granted on the condition that two employees of the Ministry of Community Development, Mother and Child Health be stationed at the organization’s premises in order to monitor its activities.

On 7 August 2015, the Registrar of the Ministry of Community Development, Mother and Child Health communicated the decision to refuse registration of Engender Rights Centre for Justice. It noted that:

“[with reference to Engender Rights Centre for Justice, the registrar regrets to inform that they] are unable to register [the] Organization under NGO Act no.16 of 2009 as Article 4 sections a, b, and c of [the] organisational objectives are conflicting with the Penal Code, Cap 87 of the Laws of Zambia. Sections 146 (i) and 147 of Cap 87, clearly indicate that anyone engaging in prostitution is guilty of a misdemeanour; [the

Registrar] therefore find[s] it difficult to register an NGO that will promote the rights of something perceived to be illegal as that will be against the Law.

Further, section 15 of the NGO Act no.16 of 2009 empowers the Board to reject an application for registration if:

- (a) the proposed activities or procedures of the NGO are not in the public Interest, and
- (b) the terms of the constitution are repugnant to, or inconsistent with the provisions of any Law of the land.”

With these in mind, therefore, [the Registrar] found it difficult to register Engender Rights Centre for Justice as a legal Non-Governmental Organisation [o]perating in Zambia. [It is the hope of the Registrar] that [the Executive Director] [...] take into account the above concerns as [they] consider making another application in the future.”

Judicial proceedings against Mr. Kasonkomona

As indicated in the allegation letter dated 2013, while the registration request was being processed, on 7 April 2013 Mr. Kasonkomona appeared on the television program Muvi TV where he expressed the need for improved access to health care by sex workers, prisoners and sexual minorities. He was subsequently arrested and then charged with “soliciting for immoral purposes” under section 178(g) of the criminal code, as detailed in case no. ZMB 1/2013. Mr. Kasonkomona was denied bail in relation to those charges, under the alleged reason that a police investigation was underway. On 11 April 2013, after four days in detention, he was taken to court where he was granted conditional bail.

On 25 February 2014, the magistrate’s court ruled in favour of Mr. Kasonkomona, upholding the importance of the right to freedom of expression, notwithstanding how controversial the subject matter may have been.

On 5 March 2014, Mr. Kasonkomona received notice of the prosecutor’s intent to appeal the court’s decision. However, the appeal was only filed on 20 October 2014, exceeding the 60-day limit to submit appeals: the prosecutor’s petition was not dismissed as extemporaneous and was allowed to proceed.

On 15 May 2015, the ruling on the appeal was issued and Mr. Kasonkomona was acquitted by the High Court. To date, Mr. Kasonkomona has not received notice of further intent to appeal.

Throughout the court case, the registration process for Mr. Kasonkomona’s non-governmental organization did not move forward.

While we do not wish to prejudge the accuracy of these allegations, serious concern is expressed at reportedly undue delays in reviewing the application for registration of the Engender Rights Centre for Justice and the subsequent refusal to register it. Further concerns are expressed that such refusal could be directly related to the organization's peaceful activities in advocating and speaking out against discrimination and defending the rights of LGBTI persons in Zambia. Further concern is expressed about the judicial proceedings against Mr. Kasonkomona that appear to result from the legitimate exercise of his right to freedom of expression on a TV show and more generally to his human rights activities within the Engender Rights Centre for Justice.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comments you may have on the above-mentioned allegations.
2. Please confirm the legal grounds for rejecting the application of Engender Rights Centre for Justice and explain how the denial of registration is compatible with international human rights norms and standards governing the right to freedom of association.
3. Please explain the reason why it took more than 4 years to take a decision on the registration application of the Engender Rights Centre for Justice.
4. Please confirm the legal basis for the charges brought against Mr. Kasonkomona, and how these are compatible with international human rights norms and standards governing the rights to freedom of expression and to freedom of association.
5. Please provide details on measures taken to ensure that human rights defenders, including those working on issues related to sexual orientation and gender identity, including LGBTI issues, are able to carry out their legitimate and peaceful activities freely and without fear of judicial harassment or other restrictions.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Maina Kiai

Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst

Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to the rights to freedom of expression and opinion and freedom of association, enshrined in articles 19 and 22, respectively, of the International Covenant on Civil and Political rights (ICCPR), acceded to by Zambia on 10 April 1984.

We wish to remind your Excellency's Government of the duty to guarantee equal protection before the law and to prohibit discrimination on any ground under article 26 of ICCPR, and recall that the words "or any other grounds" have been interpreted to include sexual orientation. The right to freedom from discrimination on grounds of sex is also recognized in article 2 of the African Charter on Human and Peoples' Rights, which was ratified by Zambia on 10 April 1984. The African Commission, in outlining that the aim of the principle in article 2 is to ensure equality of treatment for individuals, listed sexual orientation as one of the grounds of prohibited discrimination (Twenty-First Activity Report of the African Commission on Human and Peoples' Rights, para. 169 (EX.CL/322 (X))).

Furthermore, we would like to refer to Human Rights Council resolution 24/5 (operative paragraph 2), in which the Council "reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law."

In addition, in his report (A/HRC/26/29), submitted to the Human Rights Council, the Special Rapporteur on the rights to freedom of peaceful assembly and of association stated that: "where a registration regime exists, requirements should be framed such that no one is disadvantaged in the formation of her or his association, either by burdensome procedural requirements or unjustifiable limitations to substantive activities of associations. The State has an obligation to take positive measures to overcome specific challenges that confront marginalized groups [...] in their efforts to form associations" (para. 56). The Special Rapporteur also highlighted that "the Human Rights Committee has clarified that any limitations to rights protected by the International Covenant on Civil and Political Rights, when permitted by the Covenant, may not be imposed for discriminatory purposes or applied in a discriminatory manner. Therefore, provisions restricting or prohibiting the right to freedom of association of a specific group on discriminatory grounds, such as sexual orientation or gender identity, is not permitted under the Covenant and must be reviewed with a view to repeal" (para. 64). In this same report, the Special Rapporteur recommended that States "[t]ake all necessary measures to ensure that discrimination on prohibited grounds is eliminated, including in legislation or in practice, whether perpetrated by the State or by non-State actors" (para. 73 (b)).

We would also like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1, 2, 5, 6 and 12.

With regard to article 7 of the Declaration on human rights defenders, the Special Rapporteur on the situation of human rights defenders has stated that the right to develop and discuss new human rights ideas is enshrined in the Declaration on Human Rights Defenders as an important provision for the ongoing development of human rights. This includes the right to discuss and advocate for human rights ideas and principles that are not necessarily new but that, in some contexts, may be perceived as new or unpopular because they address issues that might challenge tradition and culture. In this connection, the Special Rapporteur has encouraged States to do the necessary to guarantee the principle of pluralism and recognize the right of defenders to promote and advocate for new human rights ideas or ideas that are perceived as new. The Special Rapporteur has further encouraged States to take additional measures to ensure the protection of defenders who are at greater risk of facing certain forms of violence and discrimination because they are perceived as challenging accepted sociocultural norms, traditions, perceptions and stereotypes, including about sexual orientation and gender identity.

Lastly, we would like to recall resolution 17/19 of the Human Rights Council, where the Council expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.