

LAWYERS BEYOND BORDERS
Building Partnerships for Justice
for Migrant Workers

Case Digest

Prepared for the
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Lawyers Beyond Borders

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Abstract

This case digest is the result of efforts put forth by the participants of the 4th Regional Lawyers Beyond Borders Conference, held in Bangkok, Thailand on November 22-23, 2016. Ahead of the conference, participants were asked to submit relevant legal cases concerning migrant workers and their access to justice.

Participants provided short summaries about cases involving a migrant worker that was heard and decided by an administrative, quasi-judicial or judicial body, with or without appeal, that resulted in a decision favourable to the migrant worker, and which the decision may be implemented by state action.

These case descriptions and their significance have been documented to serve as a resource for lawyers working to improve access to justice for migrant workers while working abroad in various countries.

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Case 1

A claim for compensation raised by deceased migrant workers’ families

Submitted by: Rizwin Kochery of Kochery and Partners LLP

Doha, Qatar

Statement of Facts

The facts of the case arose out of a gas cylinder explosion which occurred in a restaurant in Doha, Qatar. As a result of the explosion, fire spread to nearby shops and establishments. Seven migrant workers, including Indian and Nepal nationals that were working at a nearby shop succumbed to serious burn injuries and failed to survive. The victims’ families instituted a case against their employer claiming for compensation. The deceased were not insured by the company.

Legal Issues Involved

- Whether an employer is liable to provide compensation in case of any injury or death caused to his employee during work, or in the course of his work, which is not the direct result of his work.

The Labour Court in Doha ordered a compensation of QR 200,000 (\$55,000 USD) in each of the seven cases, amounting to QR 1.4 million (\$384,500 USD). The amount of QR 200,000 was considered as “blood money”, and is prescribed under the Labour Law of Qatar as the compensation payable to injured employees or the heirs of those deceased.

Significance of the Ruling

The Court ruled that if “any injury” is caused to a worker, whether directly or indirectly, during the course of his work, the concerned employer is liable to compensate him. The case is a landmark one, as it successfully established an employer’s responsibility, both morally and legally, towards his employees. It also outlines an employer’s responsibility to provide adequate compensation for injured employees, even in the absence of valid insurance coverage.

Case 2

Citizen Lawsuit of Nunukan Case

Submitted by: Yunita of LBH Jakarta

Jakarta, Indonesia

Statement of Facts

During January – August 2002, the Malaysian government enforced a policy to deport 137,256 undocumented Indonesian migrant workers through Nunukan, North Kalimantan, Indonesia. The incident has since been recognized as the “Nunukan Tragedy”. In May 2002, the Malaysian government announced immigration law A1154 of 2002, creating harsh punishments for undocumented migrant workers. Since the law was effectively implemented in August 2002, 179,904 Indonesian migrant workers have asked for amnesty. The deportation through Nunukan effectively began in March 2002, however, because of the lack in oversight by the Indonesian government, there have since been 176,250 people abandoned in Nunukan. During this time, migrant workers and their families lived in 10 x 50 meter emergency tents. Every tent was inhabited with thousands of people, and the supply of food, water, and sanitation was not well managed. Due to these conditions, since October 2002, 81 people have died.

Legal Issues Involved

Responding to the conditions in Nunukan, an advocacy team of deported Indonesian migrant workers involved in the incident have stated that the Indonesian government has conducted tort, as mentioned in the 1365 Indonesian civil code, due to their neglect of undocumented migrant workers in Nunukan. The laws that have been used as basis of the tort are: (1) The Indonesian constitution; (2) law number 39 of 1999 relating to human rights; (3) good governance principle.

In pursuing the case, the advocacy team chose to use a citizen lawsuit mechanism, seeing as the victims were in Nunukan (North Kalimantan), while the responsible parties are in Jakarta (the capital city of Indonesia). The advocacy team believes that the responsible parties are: (1) The President of Republic of Indonesia; (2) the vice

president; (3) welfare coordinator minister; (4) minister of foreign affairs; (5) ministry of social; (6) minister of labor and transmigration; (7) minister of health; (8) The Indonesian ambassador in Malaysia; and (9) immigration directorate general.

The decision to litigate the case was made after non-legal advocacy hadn't been sufficient enough, as the government took the stance that blame should be placed on the undocumented migrant workers themselves. On January 24, 2003, a citizen law suit had been registered in Central Jakarta district court by 53 plaintiffs through the advocacy team.

After a long process in court (January – December, 2003), the judges of the Central Jakarta district court granted part of the claim of the plaintiff. During the verdict, judges stated that the Indonesian government was not sufficient in giving protection to its citizens overseas. The Indonesian government was criticized by the district court for its actions, with judges mandating the implementation of concrete steps to fix and monitor a working mechanism to address these issues. Furthermore, the outcome involved coordination with the defendants on the regulation and supervision of Indonesian migrant workers and their families. Unfortunately, the higher court eventually annulled the verdict of the district court.

Significance of the Ruling

Although the claim was annulled in a higher court, the claim's significance is as follows:

- This instance of a citizen law suit was unprecedented, and has since become a legal innovation in Indonesia.
- The public are aware of the situation in Nunukan, and have become more involved in the issue, allocating more efforts to help the victims.
- There is recognition by the court stating that the government's response to the incident was not acceptable in giving proper protection to the migrant workers in Nunukan.
- Following the central Jakarta district court, the Indonesian government enacted Law 39 of 2004, implementing further measures to aid in the placement and protection of Indonesian migrant workers overseas.

The advocacy team that helped to bring forward the case used a multi-faceted strategy, including: investigation, legal work, campaign work, and research from the migrant workers' convention of 1990. The investigation team collected the data in Nunukan by investigating the relevant migrant workers' deaths and their causes, and interviewing all parties including the victims, community, and governments. All the data was then given to the legal and campaign team. Based on the data from the investigation team, the legal team drafted the claim as evidence of the tort by the Indonesian government. Meanwhile, the campaign team used the investigation report as basis to improve the public's awareness on the situation in Nunukan. Lastly, the research team then gave the relevant input to government bodies for them to regulate the law of migrant workers' protection in order to work towards realizing the migrant workers convention of 1990. After lobbying the government, the advocacy team has since been invited to talk with the Indonesian government, yet a law has not fully accommodated the results of the research.

Case 3

Legal Right to Challenge Wrongful Termination

Submitted by: Raiz Kochery of Kochery and Partners LLP

Doha, Qatar

Statement of Facts

Migrant worker, Mr. Moideen, was working in Qatar as an assistant at a local company. Per the offer letter, the salary offered was QR 4500 (\$1235 USD) per month, but was later reduced to QR 3000 (\$825 USD). Even after the original deduction, the company paid only QR 1500 (\$410 USD) against his salary. As the claim was for the balance amount, the labour committee advised him to approach the labour court for the same. A case before the Labour court was then filed, attaching with it the copy of the offer letter and bank statements claiming the due amount. On receipt of notice from the court, the company's management offered a mutual settlement on the claim, yet the settlement terms were not acceptable. An absconding complaint was then raised by the company against the employee (Mr. Moideen), yet the police did not entertain the complaint, as there was a labour case filed prior to this complaint.

During this time, the company again filed a police complaint through one of their employees, stating that Mr. Moideen had physically assaulted them while in the office. Meanwhile, the company put forward a new settlement scheme in which they intended to withdraw the criminal case that was filed against Mr. Moideen, if he was to sign a document stating he had received all of his pending dues. Shortly after, the company issued a termination letter to Moideen on the grounds of Article 61 of the labour law.

In the criminal court, the case was decided in Moideen's favour, and the criminal case was then dismissed, as the court found it was fabricated. During the labour case, the court appointed an expert for verification of the documents, and to prepare a report. The expert has since also challenged the illegal termination under Article 61 of the Labour Law.

Legal Issues Involved:

- Whether or not the employee is eligible for the amount due as per the submitted claim.
- Whether the termination is illegal or not in accordance with provisions of the labour law.

The court held that migrant worker (Moideen) was entitled to the claim after examination of the documents. It is evident that the employer made an offer for QR 4500 (\$1235 USD), and later it was mutually settled at QR 3000 (\$825 USD). By verifying the bank

statements submitted and the expert report, the court reached the conclusion that the employee was entitled for the due amount, considering the monthly salary as QR 3000 (\$825 USD). The court also rejected the contention raised by the employer that non-payment was due to company loss and market conditions.

Considering the second issue, the judges determined that the termination of the worker under Article 61 of the Labour law is illegal, as the criminal case against the claimant was found fabricated by the criminal court, and there were no other acts under the purview of Article 61. Therefore, the employee is entitled to the entitlements as per the law.

Significance of the Ruling

Under the labour law, if the employment contract is of an indefinite duration, either the employer or the employee may terminate the contract by giving written notice (without stating any reason for the termination). Such termination is not challengeable before the law. Although, article 61 gives power to an employer to terminate an employee immediately without notice, or the payment of EOSB if the employee commits an act of gross misconduct. The employee can also challenge this type of termination.

As per Article 12 of the Sponsorship law (4 of 2009), the Ministry can temporarily transfer expatriate sponsorship if there are court cases between the sponsor and the expatriate. Invoking the said provision, a request before the Human Rights department for the transfer of sponsorship was filed, attaching the judgment and the details of two other cases (a criminal case and an absconding case). After verification of the request, the human rights department has approved a temporary transfer of sponsorship.

Case 4

Illegally Terminated and Evicted Employee

Submitted by: Maya Biju of Abdullah Hussain Advocates

Dubai, United Arab Emirates

Statement of Facts

The Employee at hand is employed at a maintenance company in which the employer has never paid his salary properly. He was made to work overtime and also given duties that were never there in his contract. The company has a previous record of ill-treating the workers, often not paying their salary on time or paying less than is described in the contract. After being laid off, the employee was illegally terminated and asked to vacate the labour accommodation. The employer even went to the extent of disconnecting the water supply so the employee was compelled to leave the accommodation. He was illegally terminated, and the employer threatened to implicate him in criminal charges if he approached the Consulate authorities or court. Upon hearing legal advice, the employee approached the labour court.

Legal Issues Involved:

- Illegal Termination from employment and retention of passport by the employer.
- The employer did not cooperate with the labour office to solve the issue.
- Refused giving the passport and cancel the visa by giving benefits.
- Filed a criminal complaint with the police against the employee.

Upon filing the petition for the release of the passport, the court ordered in favour of the employee. After conducting the normal procedures, the court ruled that the employee was entitled for 3 months' compensation in lieu of notice. The court invoked its powers to cancel the visa, reserving his rights to get all the benefits for the years worked and pending salary. The Prosecution rejected the criminal case for lack of evidence.

Significance of the Ruling

Even though the employer refused to cancel, the court cancelled the visa, enabling the employee to take up his new employment and receive all of his benefits inclusive of his return ticket and unpaid leave salary.

Because of the appropriate advice and proper direction given to the employee, he was able to win the case without spending lawyer fees. An effort was put forth to call the employer, along with settlement and moral support being given to the employee.

Case 5

Chinese Female Trainee who was Almost Forcibly Repatriated

Submitted by: Ryoko Minagawa of Lawyers for Trafficked Victims (LTV)

Tokyo, Japan

Statement of Facts

Before starting to work, the plaintiff signed a statement which contained the wording that they were prohibited from pregnancy, and agreed to be returned to China if it was breached. The plaintiff became pregnant, and the responding supervising organization that reported the case by the employer brought the worker to the airport, attempting to force her onto a plane. The next day, the plaintiff had a miscarriage. Following the incident, the plaintiff had a press conference, addressing these problematic issues. She was then punitively dismissed by the employer because of the supposed damage the press conference inflicted on the reputation of the employer.

Legal Issues Involved

- Responsibility of a supervising organization and an employing company for damages suffered due to their illegal acts.
- Legal effects of the provision which prohibits pregnancy.
- The cause and effect of forcible repatriation and miscarriage.
- Validity of punitive dismissal.

The court ruled that the supervising organization was responsible for the forcible repatriation, and not the employer. It was also ruled that the legal provision prohibiting pregnancy was void because of its moral implications, the miscarriage was caused by the forcible repatriation, and that the punitive dismissal was invalid.

Significance of the Court's Ruling

The court ruled that there was a forced repatriation attempt by the responding supervisory organization, dismissing the argument of the organization that they supported the voluntary return based on the plaintiff's intention. The court also explicitly ruled that the "statement" on which a worker is made to swear that they will be forced to return once they are pregnant is not only against the public order and morals, but also against Article 9 (3) of Equal Opportunity Act, which prohibits adverse treatments due to pregnancy.

The plaintiff called a supporting NGO from the airport, seeking for their assistance, and lawyers then represented the worker in litigation.

Case 6

The State vs. Md. Shariful Islam "Sharif", and Others (2012)

Submitted by: Abdullah Al Hasan, LBB-Bangladesh

Dhaka, Bangladesh

Statement of Facts

In this Case, a mute boy, aged 14, was trafficked by three local people from the same village as the victim. The accused were involved in separate activities while committing the trafficking offence. The first accused beckoned the boy to talk with them inside a closed shop nearby. Then, the first accused handed over the victim to the second accused, who persuaded the victim to believe that the third accused would give him a good job in India. The third accused then sold away the victim to someone else in India. Up until the date of delivery of the judgment, the victim remained missing.

Legal Issues involved

- Whether the three accused had trafficked the victim to India by luring the victim.

- Whether the charges brought against the accused under section 6(1) of the Nari O Shishu Nirjatan Daman Ain, 2000 had been proved beyond any doubt.

The Tribunal commented that the accused were members of an 'organized traffickers' group. The Court ordered that the three accused (1) Md. Shariful Islam alias "Sharif", (2) Md. Selim Toppa, and (3) Md abu (absconding) be held guilty under section 6(1) of the Nari O Shishu Nirjatan Daman Ain, 2000. Furthermore, they were to be sentenced to imprisonment for life and to pay a fine of tk. 5000/- (\$63 USD) each. In default of paying, they shall suffer an additional rigorous imprisonment for 6 months. As the accused Md. Abu is a fugitive, his sentence shall be effective on his surrender or from the day of his arrest, whatever is earlier.

Significance of the Court's Ruling

The judgment can be regarded as a landmark case in that the Tribunal sentenced the accused despite the fact that the victim was not rescued, and thus, could not be examined in the Court.

Case 7

Mediation in the case of physical abuse, Unpaid wages, and confiscation of passports

Submitted by: Insan Association

Beirut, Lebanon

Statement of Facts

A 23 year old Ethiopian Migrant Domestic Worker contacted Insan for assistance. She was physically abused by her sponsor, who would regularly hit her. Her employer had refrained from paying her salary, and confiscated her passport and residence permit.

Legal Issues Involved

Physical abuse is punishable under the penal code, however, the problem remains with the burden of proof. In this particular case, no evidence of abuse was apparent on the victim's body. Furthermore, when the options of legal actions were discussed with the Migrant Worker, she stated that she wished to return home and did not wish to pursue legal action through the court, as these such proceedings are lengthy in nature and their outcome is not guaranteed. She stated that she wished to receive her unpaid wages and return home. Based on the facts of the case and the wishes of the victim, Insan's legal strategy was to enter into mediation with the sponsor to get him to pay the worker's wages and buy her a return ticket. The Standard Unified Contract states that, in the case that a contract has been broken due to the employer's actions, the employer should

provide the worker with a return ticket to the country of origin. In this case, the employer who had physically abused the worker is liable to pay her return ticket in addition to her unpaid salary.

Insan's lawyer contacted the sponsor and started the mediation process. Insan threatened to file a penal lawsuit against the employer for physical abuse if he did not agree to buy the worker a ticket back home and pay her wages. Initially, the employer was resistant; however after he realized the gravity of the situation, he agreed to sign a pledge at the notary public to pay the worker her salary and return ticket.

Significance of the Court's Ruling

This case is important because the Migrant Domestic Worker was able to obtain everything she wanted (salary and return ticket) without going through lengthy court proceedings, which may or may not have yielded her rights. Furthermore, we were able to obtain a quick outcome as the case was settled within a month from when the worker first came to us.

Case 8

Sunayah, The Lost Indonesian Migrant Worker in Egypt

Submitted by: Yunita of LBH Jakarta

Jakarta, Indonesia

Statement of Facts

In November 2007, Sunayah, an Indonesian migrant worker, was travelling to Egypt to work as domestic worker through the recruitment agency "Putra Banten Ltd.". The agency was not registered as official agency, so they partnered with another agency named "Hosana Adi Kreasi Ltd.". Before arriving in Egypt, Sunayah was transited through Malaysia and Bangkok.

In Cairo, Egypt, Sunayah worked as domestic migrant worker for 4 years and 7 months, yet she did not receive any payment. Her employer then moved to France, and Sunayah began working with the employer's parents. After working for 1.5 years, Sunayah asked for her unpaid salary, which resulted in physical assault to the worker. After this incident, her presence is unknown. The recruitment agency (Putra Banten Ltd) is a counterfeit company, and Hosana Adi Kreasi Ltd. does not want to be responsible for these events.

Legal Issues Involved

- The placement agency violated law no 39 of 2004, relating to the placement and protection of Indonesian migrant workers overseas.
- The unpaid salary and exploitation as mentioned in law of trafficking.
- The failure of the Indonesian government to monitor the false agency, placement, and safety of the citizen.

After coordinating, campaigning, and lobbying with the Indonesian embassy several times, Sunayah was found in Egypt with another employer. The Indonesian embassy then sent Sunayah to Indonesia.

Significance of Court's Ruling

The case shows the lack of attention paid by the Indonesian government to Indonesian citizens overseas. The lobbying and campaigning was used to pressure the Indonesia government to find its citizen, and to facilitate better monitoring and supervision in the future. Sunayah was also awarded her full salary from the second employer.

One final outlying issue is that her salary for 4 years 7 months from the first employer is still unpaid. The case must be coordinated with Egypt law. The Indonesian embassy stated that it is hard to handle the unpaid salary because of three reasons: (1) Egypt law states that the maximum unpaid salary that can be asked is the last one year, meanwhile the unpaid salary of Sunayah is 4 years 7 months; (2) Egypt does not have a law that regulates the foreign domestic workers, so there is no legal basis in the domestic sector; (3) the responsible employer is not in Egypt, and there is no written proof that Sunayah had been working for him. Finally, there should be a suit to the broker/placement agency in Indonesia responsible for the placement.

Case 9

Administrative detention and the settlement of unpaid wages

Submitted By: Insan Association

Beirut, Lebanon

Statement of Facts

Back in 2015, a female migrant domestic worker and her husband were lured into detention by the Lebanese general security. The decision was to detain the entire family in order to deport them. Following a successful judicial intervention by Insan Association, the family was released from detention; however their papers were withheld by General Security. Following their release from detention, the father had a falling out with his sponsor. His sponsor had previously exercised pressure on General Security because he was able to exploit them. The sponsor owed the worker more than \$7000 in unpaid wages, and refused to return the money. He also refused to sign a concession so that the worker could find a new sponsor. As a result of this dispute with the sponsor, the worker and his family became undocumented. The sponsor has pressed charges against the worker, stating that he ran away, making their detention bound to happen. On October 27, 2016, the worker and his family were detained once again by General Security, and a decision to deport the entire family was made, even though the worker had not been given his rightful wages.

Legal Issues Involved

The sponsorship system links a migrant domestic worker's legal status to one single employer. Domestic workers lose their legal status if their sponsor ends the contract, and receiving legal status independently is not possible.

Under the current sponsorship system, immigration breaches result in immediate deportation that is based on an administrative decision. If the worker is in conflict with their sponsor, they automatically become undocumented, and oftentimes countercharges of running away or stealing are pressed against the worker.

Faced with the threat of imminent deportation, Insan's prospects are narrow. Insan has decided to work on both fronts: General and the Court. Insan has submitted a mercy appeal to General security mentioning that the sponsor has caused the worker to become undocumented because he did not want to pay him his due wages. Furthermore, the appeal requested that the worker be given the chance to find a new sponsor. On the judicial front, Insan has prepared a lawsuit to be submitted to the Penal Court for Breach of Trust. The lawsuit will demand the deportation proceedings to be frozen and the family be released while the issue of unpaid wages is being settled. The major obstacle however, is the issue of evidence, as the family is currently detained, making the access to documentation very difficult.

Significance of the Court's Ruling

The case is still ongoing and no ruling has been issued yet. If the lawsuit is successful however, this has the potential to create a precedent that prioritizes the rights of migrant workers over administrative breaches, and would change the outcome of many cases involving unpaid wages for migrant domestic workers in the country. Insan's legal strategy consists of making the case that the unpaid wages must have supremacy over administrative breaches, especially because the family became undocumented through no fault of their own.

Case 10

Abdul Gafur Vs. Secretary, Ministry of Foreign Affairs, Government of Bangladesh. (HCD 1997)

Submitted by: Abdullah Al Hasan, LBB-Bangladesh

Dhaka, Bangladesh

Statement of Facts

The petitioner Abdul Gafur's daughter went missing in 1992. In 1996, the petitioner discovered that she had been trafficked to India. Gafur requested that the Government of Bangladesh help retrieve his daughter, but received no aid, and thus decided to file a petition. In November, 1996, a woman from India told the petitioner that his daughter was found in a women's home in Lilua, West Bengal, India, as a victim of human trafficking. The Petitioner wrote letters to various Bangladeshi officials. Eventually his daughter's location was confirmed, but the respondents did not take any measure for repatriation and hence the writ petition.

Legal Issues involved

- Whether or not the victim was trafficked.
- Whether the charges brought against the accused had been proven beyond doubt.
- Whether the victim is entitled to legal protection and support under the Constitution of Bangladesh.

Ruling of the Court

In its ruling, the High Court Division stated that repatriation is a fundamental right under the Constitution of Bangladesh, and therefore required that the state take action.

Significance of the Court's Ruling

Ruling in favor of the petitioner, the Court held that, under the Constitution of Bangladesh, the victim is entitled to legal protection and support (Articles 27 & 31). The Government of Bangladesh, therefore, has a responsibility to assist the petitioner's daughter as she "is languishing in foreign soil" (at Para 5). The Court ordered that the respondents "take steps" both at the State level and by approaching the Government of India in order to "repatriate the victim" within 60 days of the judgment.