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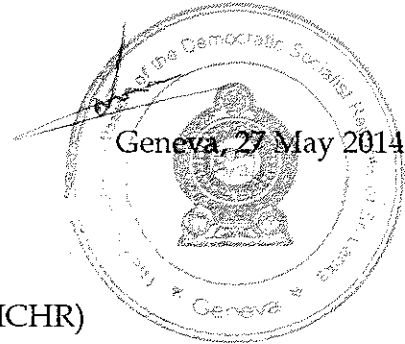
The Permanent Mission of the Democratic Socialist Republic of Sri Lanka to the United Nations Office in Geneva and Other International Organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human Rights (Office of the Chairperson-Rapporteur of the Working Group on the Issue of Discrimination against Women in Law and in Practice and the Office of the Special Rapporteur on the Human Rights of Migrants) and has the honour to refer to Joint Allegation letter dated 28 January 2014 addressed to H.E. Mr. Ravinatha Aryasinha, the Ambassador / Permanent Representative of the Permanent Mission Sri Lanka to the United Nations in Geneva, by Ms. Frances Raday, Chairperson-Rapporteur of the Working Group on the Issue of Discrimination against Women in Law and in Practice and Mr. François Crépeau, Special Rapporteur on the Human Rights of Migrants with regard to provisions of Circular 13/2013 issued by the Sri Lanka Bureau of Foreign Employment on 7 June 2013.

The Permanent Mission of Sri Lanka has the honour to transmit to the Office of the High Commissioner for Human Rights the response received from the Ministry of Foreign Employment Promotion and Welfare of the Government of Sri Lanka on the Joint Allegation under reference. (Please see **Annex.**)

The Permanent Mission of Sri Lanka would appreciate acknowledgement of receipt of this communication by the Office of the High Commissioner for Human Rights.

The Permanent Mission of the Democratic Socialist Republic of Sri Lanka to the United Nations Office in Geneva and Other International Organizations in

Switzerland avails itself of this opportunity to renew to Office of the High Commissioner for Human Rights (Office of the Chairperson-Rapporteur of the Working Group on the Issue of Discrimination against Women in Law and in Practice and the Office of the Special Rapporteur on the Human Rights of Migrants) the assurances of its highest consideration.



Office of the High Commissioner for Human Rights (OHCHR)

(Attn: i. Ms. Frances Raday

Chairperson-Rapporteur of the Working Group on the Issue of Discrimination
against Women in Law and in Practice

ii. Mr. François Crépeau

Special Rapporteur on the Human Rights of Migrants)

Special Procedures Branch

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Joint Allegation letter dated 28 January 2014

Response by the Government of Sri Lanka
Ministry of Foreign Employment Promotion and Welfare

1. The Joint Allegation Letter dated 28th January 2014 sets out the following allegation.

"That the Circular 13/2013 of June 7, 2013 issued by the Sri Lanka Bureau of Foreign Employment discriminates against women and restrict their rights to freedom of movement and work"

This is the substantive issue raised. It is further elaborated by three other alleged implications of the enforcement of this circular.

- i. That the enforcement of this circular could contribute to irregular migration practices, forcing women into difficult situations, potentially leaving them vulnerable to exploitation including becoming victims of trafficking and abuse
- ii. That the circular reinforces gender stereotypes by placing sole responsibility for child care upon women
- iii. That the circular seems to apply to licensed foreign employment agents thus leaving one part of the sector, namely domestic agents.

2. Truth of the facts stated in the letter

The relevant circular was issued under the direction of Ministry of Foreign Employment promotion & Welfare (M/FEPW) and implemented by the Sri Lanka Bureau of Foreign Employment (SLBFE). It has now been updated by a new circular issued in December 2013. It is observed that the allegation letter does not contain any facts but only observations of a general nature. The opinion that the circular is discriminatory is founded upon its application to female migrants having children, as domestic workers. This opinion is misconceived and it does not seem to be based upon a sufficient consideration of the totality of facts and circumstances related to the issue of low skilled female migration for employment outside Sri Lanka and its consequences to the Sri Lankan children and families left behind.

3. Measures taken to ensure the enjoyment of all rights by women wishing to migrate on an equal basis with men

This response seeks to demonstrate the background to the decision to establish and implement a family support mechanism in terms of the relevant circulars. They seek to balance and harmonize several interests and rights involved in the decision of a mother to migrate abroad for employment and they are in accord with the relevant norms of international law. In particular it is an attempt to provide mothers sufficient space to take a considered decision to migrate rather than decide in compulsion of events, especially with employment agents providing substantial up front incentives to migrants.

4. Exodus of mothers and catch up regulation

From the late 1980's over a million mothers migrated as domestic workers to the Middle East in the most drastic step taken for economic survival within a new Sri Lankan economy which entered the globalized era. State regulation came one step behind and has struggled to mitigate the tremendous social cost of this unprecedented phenomenon in the history of this island.

Departures of female domestic workers from 2010-2014

Before Issuing the Circular					After Issuing the Circular	
2010	2011	2012	2013	2012 (July- Dec)	2013 (July- Dec)	2014 (Jan -Apr)
112,752	107,491	119,052	99,317	59,710	42,816	27,246

5. Context of vulnerability

The National Labour Migration Policy¹ prepared by the Ministry of Foreign Employment Promotion and Welfare in 2008, had acknowledged the challenges facing the regulation of migration and countering the trafficking of victims that takes place within it, by the following quoted section.

"In terms of managing the labour migration process, Sri Lanka is yet to have control over the process in order to ensure migration in dignity, security and equity for Sri Lankan citizens. As a labour sending country, Sri Lanka's focus on labour migration is determined by the demands of the international labour market that has shaped the profile of the country's migrant labour force. Despite diverse initiatives, both by the State and the Non - Governmental sector, Sri Lankan migrant workers face a multitude of obstacles at all stages of the migration process; pre departure, in service and upon return and reintegration. Much of these issues stem from the profile of Sri Lanka's migrant work force where the majority of workers fall within the low skilled and housemaid categories."

The principal causes for exploitative and abusive situations faced by migrant workers are also laid down in the said Policy:

"They are personal, regulatory and structural. The lack of skills that prevents low skilled workers from obtaining higher skilled employment; inadequacies in training as well as the failure to learn from the training provided due to low levels of education, social stresses and mindset; the lack of contracts and State to State agreements to safeguard and protect migrant workers, the lack of state monitoring mechanisms in labour receiving countries that provide for proactive monitoring and protection mechanisms through diplomatic missions; lack of legal mechanisms for redresses are some reasons for this exploitation and abuse."²

"Despite safeguards provided by the State, migrant workers, especially those in the low skilled category face numerous exploitative and abusive situations in work. These are documented and range from non - payment of salaries, early and forced termination without compensation, exploitative work conditions such as long hours of work, burden of work, lack of rest and leisure to abusive situations including verbal, physical and mental and sexual abuse and confiscation of travel documents."³

These factors underscore the risks and dangers of low skilled female migration. With the migration of mothers to these low skilled employments it will in turn impact seriously on the spouses and children left behind.

However the thrust of the state interventions up to June 2013 had been to provide necessary information and pre-departure training to prospective migrants rather than introducing a proactive family support mechanism to address the vulnerabilities.

¹ p44.

² National Labour Migration Policy p 45

³ National Labour Migration Policy p 45

6. Pre – 2013 June Responses of the Sri Lanka Bureau of Foreign Employment (SLBFE)

The Sri Lanka Bureau of Foreign Employment Act (as amended by Acts of 1994 and 2009) has been in operation since 1985 and these enactments define the main powers and duties of the SLBFE regarding migration in the following areas:

1. Promotion and development of foreign employment market
2. Regulation of Foreign Employment Agencies and recruitment process
3. Information provision and pre-departure training
4. Welfare services to assist workers abroad
5. Reintegration measures for returnees

7. Concerns relating to family dysfunction, child well being and child protection

Even those with a nodding acquaintance with Sri Lankan society are familiar with the pervasive and island wide incidence of mother migration as domestic workers and the impact this has had on a sufficient proportion of their children and families. Much research had been carried out in this area and the findings and recommendations made in two reports are cited below.

A *Save the Children Report in 2006*⁴ observed that children were 'seen to be more exposed to abuse without the traditional domestic roles played by the female parent. While the rates of abuse were not 'high', cases of abuse, neglect, violence and exploitation were reported from both within and outside the study samples by researchers who were 'in close interaction with the communities.' The report stated that 'a strong call for a child protection service has emerged from this study, one specific focus of which could be sexually abused children.'⁵

Two other factors highlighted⁶ should be recorded:

- One of the most critical findings of the study was the possibility that the absence of the mother on work abroad may have a negative impact on education performance and attendance of children and the lower level of performance rates of boys in relation to girls. The fact that the education levels of migrant mothers was higher than that of caregivers, including fathers, is a clear indicator that the support from home for school work may have reduced with the departure of the mother.
- Children also demonstrated considerable emotional and behaviour changes after the departure of the mother, notably loss of appetite in under-fives, and temper tantrums in all age groups, specifically adolescent age groups. There were clear links between having older caregivers and negative behavior in children, and less negative behaviour was apparent where there was no corporal punishment on children, and where fathers do not use alcohol regularly.

⁴ Save the Children in Sri Lanka (2006) *Left behind, left out: The impact on children and families of mothers migrating for work abroad – Summary Report* pp 19-30

⁵ Id p 20

⁶ Id p 27

Centre for Women's Research issued a study report in 2011⁷ which noted that social networks mobilized by migrant women were the strongest protective factor for families left behind in both urban low income locations and rural areas. It advocated the following course of action to be adopted in policy and practice for the better protection of both migrant workers and their families.

The support structures available to migrant workers especially at the divisional and village level need to be increased and strengthened. This calls for more pro-active state agencies dealing with migrant workers, trade unions and community based organizations which can offer specific support mechanisms to meet the needs of both migrant workers and their families.

In their recommendations, both Save the Children and CENWOR were referring to a *family support mechanism* as envisaged in Article 19.2 of the Convention on the Rights of the Child (CRC)

8. Article 19 of the Convention on the Rights of the Child. (CRC)

This article is reproduced in full below in view of its importance.

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures,

- for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention; and
- for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

The first limb of Article 19.2 defines the internationally recognized *family support mechanism* while the second defines a *child protection mechanism*. The reference to "effective procedures" is vital as it means an established, focused and competent service which can identify risk factors and mobilize resources to neutralize, counter-act and overcome those factors. They require – as a minimum measure a service that can assess a family and develop a plan to help them. This idea has been integrated within the thinking and policies of the Ministry of Foreign Employment Promotion & Welfare as measures that promote the "safe and planned migration" of workers.⁸

⁷ CENWOR (2011) *Gender Roles and Support Networks of Spouses of Migrant Workers* pp52-56

⁸ Cf. Article 44.1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

9. The mechanism introduced by the Circular of June 2013

[As this circular has now been revised by the new circular of January 2014 the mechanism will be described with reference to the latter]

The principal change to the existing regulatory scheme for registration and preparation of female migrants is the establishment of a mandatory *family background report* (FBR) which is to be prepared by the Development Officers of the Ministry of Foreign Employment Promotion & Welfare working at divisional level. These officers have now been deployed in all 330 administrative divisions and they work as part of the state social welfare sector which includes Women Development Officers, Child Rights Promotion Officers, Early Childhood Development Assistants, Social Service Officers and other officers who all serve under the administrative supervision of the Divisional Secretary of the Division. These Development Officers are university graduate recruits and they are responsible for ensuring that vital information concerning the family status of the migrant and child care arrangements made are recorded in the FBR prior to taking a decision to recommend or not recommend the applicant for migration.

The following measures have been put in place by the new circular of January 2014.

1. In preparing the FBR mothers having children below five years of age should not be recommended. Mothers having children above five years of age should only be recommended if alternative care arrangements made are satisfactory to ensure their protection.
2. The maximum age of migration as female domestic workers is 55 years. The minimum age will vary with the country as follows:
 - Saudi Arabia – 25 years
 - Other Middle Eastern countries – 23 years
 - Other countries – 21 years
3. Where a family visit cannot be made by the Development Officers of this Ministry the assistance of a Development Officer of the Ministry of Economic Development, which has appointed a Development Officer per each Village shall be obtained. The Secretary to Ministry of Economic Development has facilitated this by a circular
4. Where a recommendation is not made the reasons for refusal must be provided in the prescribed format. (Such migrants can appeal to the Divisional Secretary or make a direct appeal to the SLBFE as per the ordinary channels open to the public)

5. The Grama Niladhari must certify residence and civil status of the applicant. If spouses are separated this can be certified by the Grama Niladhari and the husband's signature dispensed with. It must be noted that the husband's signature relates to his agreement to abide by the child care arrangements made and to co-operate with the same. This is recognition of the husband's joint responsibility for the children.
6. The Public Health Midwife must certify the ages of children and her approval of the arrangements for alternative care.

In practice the migrant's first port of call is the foreign employment agency which will assist her to begin the process by filling the information required by the form. She will then be directed to the Grama Niladhari and to the Midwife and finally reach the Development Officer who is tasked with liaising with the other officers and making the family visit for evaluating the true status of family relations and arrangements for alternative care.

The time, communication and social investment made in terms of this procedure prevents ill-considered decisions that will rebound on the child and all family members including the migrant. They can delay a departure until such time that all aspects are considered and all measures taken in the best interests of the children concerned.

10. The special case of children below five years of age

A justification for withholding permission for mothers of children below five years of age does not have to be labored. What is significant in this regard is that this is not a mere prohibition but a postponement until the child remains within this protected category *coupled with the involvement of the administrative, public health and social welfare sectors to build a multi-sectoral response to the family level issues facing would be migrant mothers.*

In this context we have to bear in mind the scientific evidence that around 80% of a child's brain develops in this period and the mothers affection, care, attention and stimulation has been recognized as very essential during this formative stage of a child.

This is an approach that is consistent with the international consensus and local research on the most pressing issues facing vulnerable families and children in Sri Lanka including the vexed issue of malnutrition.

In view of these policy and practice challenges the need for pro-active interventions from special sectors like migration are critical in ensuring that marginalization and invisibility of children below five years of age is reduced.

11. Balancing rights and relationships

The Joint Allegation Letter highlights the rights of the migrant woman to freedom of movement and work. It must be appreciated that the rights based approach does not provide an escape route from the complexities of life and transport a person into an abstract state of freedom. Social and emotional realities of individuals and families must be engaged and grappled with to reap the rewards of freedom and actualize selfhood and rights. *Rights without relationships are as illusory as relationships without rights.*

That perfect administrative mechanism; which is tamper proof and closed to abuse by corrupt public officers and corrupt employment agents has not been devised yet. **On the other hand the M/FEPW would welcome all critical and constructive feedback on implementation in order that the objectives of safe, planned and family friendly migration can be more fully realized.** It is a matter of surprise that the Joint Allegation Letter should cast the bona fide and principled efforts of the SLBFE to establish a family support mechanism in a wholly negative light. This is perhaps the consequence of the preference of logic and rationality to the light of experience and a subjectively informed, grounded approach to rights. Article 1 of the Universal Declaration of Human Rights 1948 indicates in no uncertain terms where the starting point and foundations of rights lie; in a spirit of brotherhood which entails the hard duties of communication, empathy and understanding. Without social work – rights would have no leg to stand upon.

Thus freedoms, rights, duties and powers are not rational and static concepts but inherently dynamic, human and emotionally shaped forms of action. They do acquire a more concrete shape and form within the formal, legal and institutional sphere. However all of life is not determined by formal rights. The further we move away from the legal, formal and institutional realms in to the social realm it is relationships that define the content of rights – not the other way about.

An approach to human rights that treats human beings as discrete entities with equally discrete and separate rights flies in the face of multiple identities and relations that individuals possess. Apart from the nature, depth and breadth of human rights shown in Article 1 of the Universal Declaration of Human Rights there is direct support for a more holistic and communitarian conception of a human being in the human rights law developed in Europe in terms of Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950. This refers to the duty on the part of European states to respect the family life of all persons within their territories when taking any governmental action. This recognizes that at the spiritual, emotional and social levels close family members are deeply *connected* and that such connections cannot be ignored, but must in fact be accommodated when taking decisions affecting the family unit.

12. Can the state enact a special administrative measure for female migrant domestic workers?

It is submitted that people can be grouped for special measures in terms of leading fundamental rights decisions pronounced by the Supreme Court of Sri Lanka.

In *Palihawadana v. Attorney General* (1979) FRD (1) 1 at p 8 Sharvananda J. followed the Indian Supreme Court and accepted that the fundamental right to equal protection of the law prohibits hostile discrimination but that it does not rule out *reasonable classification*.

The state can make a reasonable classification subject to two conditions:

1. The classification must be founded upon intelligible differentia which distinguishes persons and things grouped together from others left out.
2. That differentia must have a reasonable relation to the object sought to be achieved by the relevant measure.

In applying this test to the relevant circular the following factors would be relevant.

- I. That mothers constitute a high percentage of migrating domestic workers
- II. That credible research has shown that the decision to migrate is taken in moments of crisis and vulnerability, in a majority of migrant female domestic workers, encouraged by a substantial non deductible up front incentive payments.
- III. That the maternal presence, care and affection is subjectively critical for child care and family functioning in Sri Lankan society even though the objective ideal stipulates the need to work towards gender parity and equal responsibility of spouses for child care
- IV. That in terms of section 5(2) of the ICCPR Act No. 56 of 2007 "In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be of paramount importance"
- V. That the progressive reduction of the maternal burden and equalizing of responsibilities must in the first instance be supported by enabling social processes which involve both spouses and relevant service providers in a social dialogue
- VI. That the migrant worker herself has the right to be supported to make an informed, safe and planned decision to migrate for a better exercise of her right.

- VII. In a situation needing to mitigate between the rights of children and those of parents /adults , the rights of children should take precedence.

As compared to maternal absence, paternal absences are not unusual or rare in the life of Sri Lankan children⁹ and they are comparatively less disruptive. Consequently having the objects of family preservation, child well being and protection in view and also considering the benefits to the migrant in making an informed decision to migrate the required connection between differentia and the objects of the circular would seem to be established.

This reasoning is confirmed by the following observations made by Justice Mark Fernando in *Ramupillai v. Festus Perera* (1991) 1 SLR 11:

If in relation to a legitimate object, their race makes persons of one race a distinct "class" they may be differently treated. The same is true of sex, religion and political opinion. Even where race would not normally afford a permissible basis of classification on proof of special circumstances differential treatment would be justified. (Emphasis added)

13. In respect of the allegation that this circular seems to apply only to Licensed Foreign Employment Agents thus leaving the domestic agents , it is necessary to clarify that in Sri Lanka it is a criminal offence for anyone other than a person with a valid Licence issued by the SLBFE , to facilitate or recruit a Sri Lankan for employment abroad. Any complaint received in this regard will be firmly dealt either by the Sri Lanka Police or SLBFE.
14. For the aforesaid reasons It may be concluded that the relevant circular is neither an act of discrimination against women, nor a restriction of their freedom of movement and right to work but a reasonable classification to promote a more balanced view of all rights involved in the decision to migrate taking account of the need to safeguard the family unit as the fundamental unit of society. It is to be concerned as one of the most proactive interventions made to safeguard the rights of the Children in a most vulnerable social stratum.