

JUDICIAL HARASSMENT AGAINST LABOR RIGHTS ACTIVISTS: AN ANALYSIS



THE FREEDOM FUND



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The Human Rights and Development Foundation (HRDF) is a frontline NGO with a mandate to promote and protect the human rights of migrant workers and their family members in Thailand through providing legal aid and advocating for the rule of law. Headquartered in Bangkok, HRDF has field offices in three locations in Thailand with significant numbers of migrant workers: Mahachai (Samut Sakorn Province), Mae Sot (Tak Province), and Chiang Mai. HRDF's Anti-Labour Trafficking Project provides legal representation to victims of labour trafficking across the country.

For more information, please visit: <http://hrdfoundation.org/>

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01

Introduction

Over the last few years Thailand has seen an emerging trend of lawsuits being filed against victims of human rights violations, community activists, political activists, human rights defenders and journalists.

What is the basis of such lawsuits?

Mostly, these have been defamation lawsuits filed against victims voicing complaints about rights violations, political activists criticising state actions, human rights defenders discussing violations in their advocacy and campaign interventions, and journalists reporting on human rights issues.

Who has filed such lawsuits? And with what purpose?

Needless to say, such lawsuits have been filed by the alleged perpetrators, or entities who have been accused of being responsible for such violations.



Lop
Buri

The sole aim of such lawsuits is to turn the tables on victims and human rights defenders, putting them in defensive mode so that instead of focusing their efforts on seeking justice and accountability, they are forced to focus on arranging legal defense for the cases against them. Another purpose of such lawsuits is to create what is known as the “chilling effect” wherein victims, activists, human rights defenders and the media become frozen by the fear of repercussion, and thus refrain from taking action against violations suffered by themselves and others.

This phenomenon is not unique to Thailand. It is a legal tactic that has been used by the powerful in many parts of the world, including Canada, Ecuador, Philippines, India, South Africa and the USA. A specific term, “Strategic Lawsuits Against Public Participation,” or SLAPP, has been coined to capture the various facets of this tactic.

The present report examines the use of SLAPPs in Thailand to silence advocacy for the rights of migrant workers in supply chains, and to restrict victims’ access to justice by making legal processes more difficult and onerous. The report specifically focuses on the SLAPPs filed by the Thammakaset Company Limited (hereinafter referred to as Thammakaset). In doing so, it first examines the meaning of SLAPP and its different dimensions. Next, it analyzes the string of SLAPP cases filed by Thammakaset and their impact on advocacy for the rights of migrant workers. The report concludes with recommendations to address the issue.

02

What are SLAPPs?

The term SLAPP, “Strategic Lawsuits Against Public Participation,” was first coined by Professors George W. Pring and Penelope Canan in their book “SLAPPs: Getting Sued for Speaking Out” published in 1996.²

² ‘SLAPPs and FoAA rights’, INFO NOTE, Ms. Annalisa Ciampi, United Nations Special Rapporteur on the Right to Freedom of Assembly and Association.

SLAPP generally refers to,

“A lawsuit filed by powerful subjects (e.g. a corporation, a public official, a high profile business person) against non-government individuals, or organisations who express a critical position on a substantive issue of some political interest or social significance.”³

Some characteristics of SLAPPs are:

SLAPPs do not consist only of civil lawsuits. They may also be of a criminal nature.

The purpose of SLAPPs is to intimidate and silence undesired voices from raising claims against injustice or bringing up critical issues of social or political importance for discussion before the public.

The strategies behind SLAPPs aim to embroil activists and others in litigations, imposing heavy burdens on their capacities to continue with the struggle to access justice, and engage in campaign, advocacy or human rights reporting work. Such strategies typically involve abuses of the law.

³ ‘SLAPP: the background of Strategic Lawsuits Against Public Participation’, by European Centre for Press and Media Freedom (ECPMF), available at:

<https://www.ecpmf.eu/news/legal/slapp-the-background-of-strategic-lawsuits-against-public-participation>

There is a wide disparity in power and resources between those who initiate SLAPPs and those who are targeted. The entities who initiate SLAPPs are well aware of this power imbalance (economic or political) and their ability to impose heavy burdens on the other parties.

The objectives of SLAPPs do not depend upon the success of the litigation in court. The actors who initiate SLAPPs may be well aware that the allegations made by them are groundless or exaggerated. Rather, their objectives are to create fear in the minds of others and prevent them from raising similar claims, or to drain the limited resources of the defendants. Thus, even if a SLAPP gets dismissed by the Court during the preliminary hearings, the objectives have still been achieved as the accused may have had to spend considerable time and monetary resources to prepare their legal defense.

Factors such as availability of legal aid, elasticity of legal provisions relating to defamation, existence of Anti-SLAPP laws and awarding of compensation for abuse of legal processes determine the extent to which it is easy to file SLAPPs in a country. Filing SLAPPs is a more common trend in countries where the environment allows them to flourish.

When reviewed in accordance with these characteristics, the 14 SLAPPs filed by Thammakaset cease to be a narrative about one rogue company, but rather become reflective of a legal system that allows for the filing of such lawsuits with impunity.

03

A

Background

of SLAPPs

filed by

Thamma-

kaset

A series of lawsuits has been filed by Thammakaset against migrant labourers, activists, journalists and human rights experts since 2016. Despite the concerted advocacy of leading civil society groups,⁴ supporting actions from businesses,⁵ public condemnation by UN agencies,⁶ and threats from the USA to withdraw preferential schemes,⁷ Thammakaset continues to file additional cases against workers and human rights defenders who publicly express support to defendants of the SLAPP lawsuits. The most recent case was filed at the end of March 2020.⁸

⁴ <https://www.fortifyrights.org/tha-inv-2019-02-14/>

⁵ <https://www.amfori.org/sites/default/files/letter%20to%20Thai%20Embassy%20July%202017.pdf> ; https://investor.thaiunion.com/news.html/id/537187/group/newsroom_press

⁶ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25714&LangID=E>

⁷ <https://afcio.org/2019/10/28/egregious-worker-rights-violations-cause-thailand-lose-trade-benefits>

⁸ As of 1 May 2020. To follow up-to-date information on the Thammakaset lawsuits, please check <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch#ancre4>

This spate of lawsuits started when one of the 14 workers from Thammakaset Farm 2 came upon a Migrant Workers Rights Network (MWRN) Facebook post about migrant workers from Myanmar receiving a huge settlement after they had raised a complaint about being overworked and underpaid by a tuna factory in Thailand.⁹

The workers obtained MWRN contact numbers from their Facebook page and called to enquire whether or not their working conditions in the Thammakaset farm were illegal, and whether or not their salaries were too low.¹⁰

Upon finding out that their working conditions were in violation of the Labour Protection Act of 1998, the 14 workers heeded the advice of MWRN and presented their grievances before Thammakaset and local authorities.¹¹ As they did not receive a favourable response, they proceeded to file complaints with the available mechanisms, setting off a chain of events that led to the filing of numerous SLAPPs by Thammakaset.

⁹ 'Facebook post inspires landmark case for migrant workers in Thailand', Reuters, Sept 2016, available at: <https://www.reuters.com/article/us-thailand-labour-rights/facebook-post-inspires-landmark-case-for-migrant-workers-in-thailand-idUSKCN11L00F>

¹⁰ 'Labour Rights Violations in the Thai Poultry Industry Within the Supply Chains of Japanese Companies', Report, Human Rights Now, 2019, page 22

¹¹ *ibid*, page 35

Some important events in this chain are:



June 13th 2016

The 14 workers filed a complaint with the Department of Labour Protection and Welfare (DLPW) in Lopburi Province with the assistance of MWRN. The DLPW went to inspect the farm and collected testimonies from both the employers and the workers.



In the same month, June 2016

The Betagro Group to which the Thammakaset farm supplied chickens, issued a statement that they had stopped business operations with the company until there was a resolution of the labour conflict.¹²



July 6th 2016

The 14 workers submitted a complaint before the National Human Rights Commission of Thailand (NHRCT) alleging that they had been subjected to gruelling work conditions such as forced labour, illegal overtime, no weekend breaks or annual leave, underpaid wages, restricted freedom of movement and confiscation of worker passports.¹³

¹² *ibid*, FN 3

¹³ National Human Rights Commission of Thailand, Examination Report no. 114/EB 2259 (2016)



August 1st 2016

The DLPW in Lopburi Province issued an order requiring the company to pay 1.7 million THB to the 14 workers because of its failure to provide minimum wages, daily wages, wages on working holidays, overtime pay, and holiday leave pay.¹⁴



August 31st 2016

The NHRCT presented its findings in its Examination Report.¹⁵ The findings included that the workers had been underpaid, deprived of holidays and rest days, forced to work overtime, and that their salaries had been unlawfully deducted. However, the NHRCT concluded that they had not been subjected to forced labour. The reasoning behind this conclusion is discussed later in the report.



September 1st 2016

The 14 workers filed an appeal against the DLPW order in the Saraburi Provincial Labour Court, seeking compensation of approximately 44 million THB for alleged violations of the Labour Protection Act and damages for forced labour. Thammakaset and Betagro were made joint defendants.

¹⁴ *ibid*, FN 4, page 36

¹⁵ *ibid*, FN 7



September 2nd 2016

Betagro released a statement:

The investigations by the Lopburi Labour Protection and Welfare Office and the Office of the Human Rights Commission identified no signs of illegal detention of workers, nor were there any seizures of passports as alleged. In addition, no human rights violations or violations of anti-human trafficking laws were found in the investigations.¹⁶



March 17th 2017

The Labour Court in Saraburi dismissed the workers' appeal against the DLPW order. The Court based its decisions on the findings of the NHRCT regarding forced labour.

Throughout this chain of events, some human rights organisations initiated advocacy campaigns on issues regarding unfair working conditions in supply chains. In response, Thammakaset started filing SLAPPs against the workers who filed complaints, human rights defenders, the media and others who supported the campaigns.

¹⁶ *ibid*, FN 4, page 44

04

Chronology

of SLAPPs

filed by

Thamma-

kaset

**1st
SLAPP:**

June 21st 2016

Thammakaset filed a complaint with the police against two of the 14 workers, accusing them of stealing the time cards that were shown to the DLPW labour inspector during their inspection on June 13th, 2016. The police initially made a recommendation to proceed with prosecution in the case. Then, the lawyer team sent a petition to the prosecutor who subsequently asked the police to review their decision. On the 31st of October, the police and the public prosecutor recommended non-prosecution as they believed that the workers were acting in good faith.

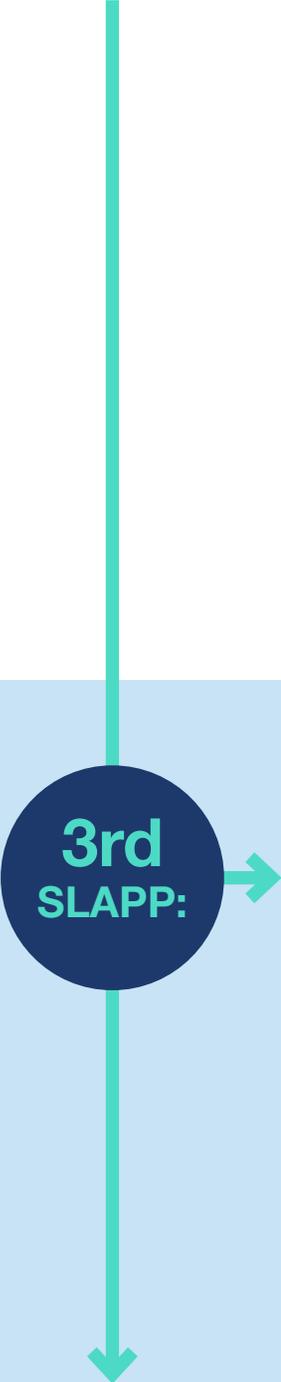
**2nd
SLAPP:**

October 6th 2016

Following the NHRCT's findings dismissing forced labour conditions on the Thammakaset farm, Thammakaset filed a criminal case before the Don Muang Kwaeng Court, accusing the 14 workers of defamation and submitting false information to authorities (the National Human Rights Commission of Thailand). On July 11th, 2018, nearly two years from the date of filing the complaint, the Court dismissed the case for the reason that information had been submitted to the NHRCT in good faith and in order to protect the workers' legitimate interests. Thammakaset filed an appeal against the verdict. However, the appeals were dismissed by both the trial court (Don Muang Kwaeng Court) and the appeals court.

Thus, the decision made on July 11th, 2018, was rendered as final in this case.

This verdict is crucial as the Court, while evaluating the evidence brought before it, came to the conclusions that Thammakaset did not pay minimum wages (contrary to the findings of the NHRCT), had confiscated the workers' ID documents and imposed working hours longer than what is permitted by law. It also dismissed Thammakaset's testimonies as groundless, contradictory, and unconvincing.¹⁷



**3rd
SLAPP:**

November 4th 2016

Thammakaset filed a case in the South Bangkok Criminal Court accusing Andy Hall, an international human rights researcher and advocate, for defamation under the Criminal Code and the Computer Crimes Act of 2007. The complaint was based on the fact that Andy Hall had made at least 20 Twitter and Facebook posts on the labour dispute from June to October of 2016.

¹⁷ See Annex II

**4th
SLAPP:**

Despite the public prosecutor's recommendation for non-prosecution, Thammakaset, on October 24th, 2017, reopened the complaint regarding the theft of time cards before the Lopburi Provincial Court, accusing the two workers and the coordinator of MWRN of theft and causing injury to Thammakaset. After four hearings during the preliminary examination, on September 3rd, 2018, the Court decided not to indict giving the reason that the accused did not intend to keep the time cards, but had taken them to show as evidence to the Labour Inspector, something that Thammakaset was obliged to do as well. Thammakaset filed an appeal against the decision. The appeals court reaffirmed the decision of the lower court in July 2019.

**5th
SLAPP:**

October 8th 2018

Thammakaset filed a criminal defamation case against one of the workers (Mr. Nan Win) for his comments during a panel discussion held by the Foreign Correspondents Club of Thailand (FCCT), and in a video produced by an international NGO, Fortify Rights, on the ongoing labour dispute. The verdict is pending.



**6th
SLAPP:**

October 12th 2018

Thammakaset filed a case of criminal defamation against Ms. Sutharee Wannasiri, a human rights expert, for her Twitter posts in October 2017, which included a retweet of the video clip produced by Fortify Rights featuring the interview of Mr. Nan Win. The Court merged this case with the case against Mr. Nan Win. The trial is ongoing. At the preliminary hearing on January 25th, 2019, the Court reasoned that the DLPW, the NHRCT and the Labour Court had concluded that no grave labour violations had occurred. Based on this, the Court concluded that Thammakaset had filed the case in good faith, and that parts of Ms. Sutharee's statements may not be true and thus should be investigated further.



**7th
SLAPP:**

October 26th 2018

Thammakaset filed a civil case of defamation against Ms. Sutharee Wannasiri, based on the same facts against which the criminal defamation case was filed. Thammakaset called for damages of 5 million THB, removal of the offensive content, a public apology as well as reimbursement of court fees and lawyer costs. Following court mediation, Thammakaset decided to drop the case on August 28th, 2019.

**8th
SLAPP:**

September 14th 2017

Ms. Suchanee Rungmueanpon, a former reporter of Voice TV, retweeted a message from Andy Hall with a comment that the Court had ordered the company to pay compensation to the 14 migrant workers for “using slave labour.” In 2018, Thammakaset filed a criminal defamation case against her before the Lopburi police. After enquiry on October 16th, 2018, the police and the public prosecutor recommended an order of non-prosecution.

**9th
SLAPP:**

Despite the recommendation for non-prosecution, on March 1st, 2019, Thammakaset pursued the complaint against Ms. Suchanee by filing a case of defamation under the Criminal Code before the Lopburi Provincial Court. On December 24th, 2019, the Court convicted and sentenced her to two years of imprisonment. The Court considered her posts to be defamatory as she had used the phrase ‘slave labour’, even though the phrase was not mentioned in the court order that she had tweeted about. The Court observed that Ms. Suchanee had made the Twitter post without checking for accuracy of the content, and without thinking about the damage that it could cause the company. She was released on 75,000 THB bail.

**10th
SLAPP:**

In 2019

Thammakaset filed a case of criminal defamation against one of the 14 workers, Mr. Tun Tun Win, before the South Bangkok Criminal Court for sharing a statement on social media. The case is ongoing.

**11th
SLAPP:**

May 1st 2019

Thammakaset filed a third case against Mr. Nan Win before the Saraburi Provincial Court, accusing him of perjury while giving evidence before the Court during the hearing on the dispute between the company and the 14 workers. The case is under trial.

**12th
SLAPP:**

Ms. Ngamsuk Ruttanasatian, a lecturer at Mahidol University, had shared a statement on Facebook calling for the dropping of lawsuits filed by Thammakaset against Mr. Nan Win and Ms. Sutharee. In response to this, Thammakaset filed a case of criminal defamation against her. In September 2019, the Court decided not to indict, and to dismiss the case.

**13th
SLAPP:**

October 25th 2019

Thammakaset filed a case of criminal defamation against Ms. Angkana Neelapaijit, former Commissioner of the National Human Rights Commission of Thailand, on the grounds that she had shared two posts on social media in December 2018, and June 2019, containing links to the video produced by Fortify Rights, and a press statement issued by 16 organisations on the series of lawsuits filed by the company against human rights defenders.

**14th
SLAPP:**

December 6th 2019

Thammakaset filed a case of defamation in the South Bangkok Criminal Court against Ms. Puttanee Kangkun, a human rights expert working with Fortify Rights, for her 14 posts on social media expressing support for other human rights defenders sued by Thammakaset.

**15th
SLAPP:**

March 30th 2020

Thammakaset filed a criminal defamation complaint with the Bangkok South Criminal Court against Ms. Thanaporn Saleephol, former Communications Associate at Fortify Rights, for her five social media posts expressing support for Ms. Angkhana Neelaphaijit (13th SLAPP) and Ms. Puttanee Kangkun (14th SLAPP).

05

Does the Legal

Environment

in Thailand

Provide Fertile

Ground for

SLAPPs?

As observed before, the fact that Thammakaset could file at least as many as 15 SLAPPs against 22 defendants in a span of four years is indicative of problems within the legal system that allow for the filing of such lawsuits with impunity.

This section discusses a few such problems: the ability to file private complaints with impunity, the offence of defamation as recognised in criminal law, and the lack of understanding concerning violations such as forced labour, the work of human rights defenders and the context of migrant workers.

These problems act upon each other to create a fertile environment for SLAPPs.

For example, the judiciary has held that the criminal offence of defamation does not constitute a violation of the right to freedom of speech and expression, and that defamation law, both in principle and practice, is consistent with the International Covenant on Civil and Political Rights (ICCPR) as it provides safeguards related to acting in good faith, and the expression of truth or fair comment on any person

or thing subjected to public criticism.¹⁸ However, when there is ambiguity concerning violations, the work of human rights defenders, or the context of migrant workers, then victims' efforts to seek justice, advocacy interventions of human rights defenders calling for change, or reporting by journalists to highlight human rights concerns can be interpreted by Courts as acting in 'bad faith'.

How these problems contribute to creating an environment in which SLAPPs can be filed with impunity is discussed further in the following paragraphs.

The Ability of Private Entities to file Criminal Complaints with Impunity

As can be seen from the list of SLAPPs, Thammakaset has adopted the strategy of filing private complaints before the criminal court. Such complaints have been filed despite the fact that the police and public prosecutor recommended non-prosecution.

In response to concerns expressed by human rights organisations, the National Legislative Assembly in Thailand made an amendment to Section 161/1 of the Criminal Procedure Code in December 2018. The amended section, which came into effect on March 21st, 2019, allows the Court to dismiss a private complaint if it appears to the Court that the case has been filed in bad faith, is based on false

¹⁸ 'Thailand's Response to the Joint Communication from HRC Special Procedures', Permanent Mission of Thailand to the United Nations and other International Organisations in Geneva, 23rd May 2019; <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34700>

information, or if it is intended to harass or take advantage of the persons against whom the case is filed.

An amendment was also made to Section 165 (2) of the Criminal Procedure Code (effective from February 20th, 2019) regarding preliminary hearings conducted by the Court in cases involving private complaints. The amendment allows the defendant to produce evidence (witnesses, documentary evidence or material evidence) to show that the complaint against him/her is not based on reasonable grounds.

In theory, these amendments should help provide protection against SLAPPs.

However, experience shows otherwise. Before the court can dismiss a private complaint, it needs to hold a preliminary examination. Such examinations can involve several days of hearings before the Court, spanning across several months. For example, in the 4th SLAPP, the preliminary involved four rounds of hearings conducted in Lopburi before the case was dismissed for trial. This meant that the workers and the MWRN coordinator had to travel back and forth to the province, which is a few hours away from their place of residence, several times. As mentioned, one of the purposes of SLAPP is to cause undue harassment to the victims and activists. Preliminary examinations to dismiss SLAPP complaints cause physical, emotional, and financial harassment to those who are targeted.

The defence teams requested that the cases of Mr. Nan Win (5th SLAPP), Ms. Sutharee (6th SLAPP), Ms. Suchanee (8th SLAPP) and Ms. Ngamsuk (12th SLAPP) be dismissed. However, only the case against Ms. Ngamsuk was dismissed, while the others were committed to trial.

Also, as no punitive costs were imposed in the case of Ms. Ngamsuk, the company has proceeded to file similar complaints against other human rights defenders and experts.

Defamation, a Criminal Offence

Section 326 of the Penal Code of Thailand defines the offence of defamation. Section 329 enumerates some instances in which an expression of opinion or statement in good faith would not be considered defamation. These include expressions made for the protection of legitimate interests, expressions made by an official in the exercise of his/her functions, expressions of fair comment on a person or thing subjected to public criticism, and expressions of fair reporting on the public proceedings of a Court or a meeting.

Upon reading Section 329, it appears evident that defamation cases brought against victims, human rights defenders, journalists and others would fall under one of these exceptions, and thus that the Court would not hold the accused guilty.

But, as the case against Ms. Suchanee (9th SLAPP) reveals, when there is a difference of opinion between human rights defenders and the State regarding the scope of violations at the centre of a controversy, such as forced labour in the case of Thammakaset, then the defense of “a statement made in good faith” provided under Section 329 does not provide an adequate safeguard.

This fact was made clear by the Court in the merged defamation case against Mr. Nan Win and Ms. Sutharee in which the International Commission of Jurists (ICJ) and the Lawyers' Rights Watch Canada (LRWC), acting as amicus curia, argued that that the criminal offence of defamation was in contravention to Thailand's international human rights obligations as it curbed human rights defenders' rights to freedom of expression and access to information.¹⁹ The Court dismissed these arguments, stating that the lawsuits had been filed by the company in good faith.²⁰ Specifically, the Court stated,

“... the plaintiff filed the lawsuit after the NHRCT's decision. Thus, the lawsuit does not constitute harassment; it does not intend to delay a complaint; it does not impose burden (on the other party) by filing the case in a distant district; it does not claim for a large amount of damages. So, it is in the plaintiff's authority to file the case.”

However, as discussed before, the act of filing a SLAPP case alone causes harassment as it forces the targets to focus on the litigation by arranging legal defense, and attending case meetings and court hearings. Such litigations also send a message to others that they should remain silent, or else prepare to face similar litigations.

Thus, it is necessary to establish mechanisms that can help identify SLAPP cases so that they can be dismissed at the preliminary stages.

¹⁹ https://www.icj.org/wp-content/uploads/2019/01/Thailand-Nan-Win-Kratik_Amicus-Advocacy-legal-submission-2019-ENG.pdf

²⁰ Annex III

Gaps in Understanding Regarding Terms such as Forced Labour

What appears to be at the centre of the conflict with Thammakaset is the use of the term ‘forced labour’ or ‘slave labour’ by victims, activists, journalists and human rights defenders.

As mentioned earlier in this report, the workers alleged in their complaint before the National Human Rights Commission of Thailand (NHRCT) that they had been subjected to gruelling work conditions such as forced labour, illegal overtime, no weekend breaks or annual leave, underpaid wages, restricted freedom of movement and confiscation of worker passports.

While assessing the allegations of forced labour and restrictions on movement, the NHRCT enquired whether or not the Company had taken actions to “detain or obstruct” the employees and “limit freedom of movement.”²¹ Following this line of enquiry, the NHRCT found that one of the complainants had immigration stamps on his passport indicating that he had left Thailand while employed by the company, that workers could go outside the farm to make purchases, and that the fence in the farm was not high enough to prevent escape. In the light of these findings, the NHRCT concluded that the workers had not been subjected to forced labour.

However, the standards of assessment used by the NHRCT to verify claims of forced labour are very narrow. The definition of forced labour as provided under the Anti-Human Trafficking Act (2008) is as follows:

²¹ *ibid*, FN 4, page 37

“Compelling other persons to work or provide services by putting such person in fear of injury to life, body, liberty, reputation or property of such person or another person, by means of intimidation, use of force, or any other means causing such person to be in a state of being unable to resist.”

This definition conforms with ILO Convention 29, which defines forced labour as

“All work or services which are exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” (Article 2 (1), Thailand ratified the Convention in 1969)

In their testimony before human rights organisations, the workers shared that they feared losing pay if they quit before the employer allowed them. They also feared wage deductions for refusing to work night shifts. Further, as Thammakaset was in possession of their documents, the workers feared leaving the farm as they could be arrested for not carrying their identity documents with them.²² All of these are indications of forced labour as it is defined by the Anti-Human Trafficking Act. The Thailand Migration Report 2019,²³ compiled by various UN agencies, has also reiterated that wage deductions indicate slave labor.

Yet, the NHRCT’s findings indicating the lack of forced labour were endorsed by the Labour Court in Saraburi Province, and the appeal against the DLPW’s order, which provided compensation only on the basis of unpaid wages and not forced labour, was dismissed. The findings of the NHRCT have also been used by Thammakaset to file cases against

²² Ibid, FN 4, page 20

²³ ‘Thailand Migration Report 2019’, by International Organisation for Migration

workers (for providing false information to authorities as in the second and 11th SLAPP). And, as mentioned, the use of the phrase “slave labour” provided the basis for the Court to convict Ms. Suchanee, the former reporter of Voice TV, of defamation (9th SLAPP).

Thus, it could be said that Thammakaset was able to take advantage of the narrow definition of forced labour used by the NHRCT to suppress any further discussion on the subject. The fact that the judicial bodies endorsed such a definition instead of reinterpreting the term served to help Thammakaset fulfill its objectives.

Lack of Understanding Regarding Human Rights Monitoring in General, and the Monitoring of Supply Chains in Particular

Linked to the point made above, there appears to be little understanding amongst law enforcement and judiciary systems regarding the nature of human rights monitoring.

In May 2019, the Permanent Mission of Thailand to the United Nations, in response to communications from the Human Rights Council, reiterated the inconsistency of Thailand’s criminal defamation laws with international human rights standards, observing: ²⁴

²⁴ *ibid*, FN 11

“In a fast moving digital era where statements and news are spread swiftly, a danger of ‘chilling effects’ or ‘self-censorship’ as concerned may be caused or exacerbated by the defamation lawsuits. The judgement of Thai courts must also be carefully considered in such context of a danger to immunise human rights experts, CSOs, and professional media from liability for their use of distorted, false, ambiguous or half-truth statements, rhetorical hyperbole and vigorous epithet and their failure to comply with professional ethics to guard against the possibility that such statements could unfairly and seriously damage the reputation of others, including a businessman or the whole business sector leading to irreparable harms and even a total collapse of business.

The above remarks reflect a very negative and suspicious attitude towards the work of human rights experts, CSOs and professional media. An important component of human rights work is to investigate allegations of human rights violations, document findings and take action as necessary and appropriate, be it filing complaints via available judicial and non-judicial mechanisms, submitting petitions to international human rights organisations, or disseminating findings to stakeholders as part of advocacy campaigns. Human rights organisations play an important role in creating rights awareness amongst victims and decision makers, and in changing practices to ensure they respect rights.

In the Thammakaset cases, it is apparent that those tasked with monitoring the implementation of law have a narrow understanding of the term ‘forced labour’, and that this understanding is not in concordance with the definition of the term in the Anti Trafficking Act, or with that of various international laws regarding forced labour. In this context it falls upon human rights advocates to take necessary action to

strengthen awareness of forced labour, and to call out forced labour practices in order to stimulate change in employment practices.

Such action has resulted in positive changes to the fishing and seafood processing industry. In its Thailand mission report, the UN Working Group on Business and Human Rights noted with appreciation that,

“...the threat of ban on exports from consumers and large supermarket chains spurred the quick enactment of new laws and measures to stamp out forced labour in the fishing and seafood processing industry.”²⁵

Thus, instead of focusing attention on improving working conditions, Thammakaset is trying to draw a veil over allegations of forced labour through filing SLAPPs.

The Justic System’s Blindness to the Circumstances of Migrant Labour

The full impact of SLAPPs can only be understood when analysed in conjunction with the circumstances of migrant workers who live and work in Thailand.

Workers from neighbouring countries migrate to Thailand in search of work in order to improve their quality of life, and

²⁵ Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises on its Visit to Thailand, 21st May 2019, Page 11

that of their families. Mostly, the workers have very little knowledge about labour standards in Thailand, and have limited proficiency in the Thai language. Further, migrant workers are well aware that if they file complaints against their employers, they might have to leave their jobs and go back to their home countries. This places them in a very vulnerable situation, which employers often use for their own advantage.

Law enforcement agencies need to be more sensitive to the situation of migrant workers, otherwise they are likely to be victimised at multiple levels. For example, the complaint filed by Thammakaset against the two workers for allegedly stealing the time cards is in essence a reprisal action, and should be dismissed by the police as early as possible.

However, the police responded to the complaint by arresting and detaining the workers. The workers remained in custody until bail could be arranged. It took another four months before the police and public prosecutor recommended non-prosecution as the workers had acted in good faith.

Also, it is extremely difficult for migrant workers to keep track of hearing dates in a trial and to attend court hearings. For example, Mr. Tun Tun Win (10th SLAPP case) had submitted a bail amount of 50,000 THB.

However, as he was not aware of the first hearing and did not appear before the Court, the bail was seized, and the Court decided that grounds for the case had been established by Thammakaset, committing the case for trial.²⁶

²⁶ Fact Sheet, Thammakaset vs. Human Rights Defenders and Workers in Thailand, The Observatory for Protection of Human Rights Defenders, May 2019

Similarly, three criminal cases have been filed against Mr. Nan Win. He has had to arrange bail for each case. In order to arrange legal defense for the three cases, he has had to take leave from work, meaning that he has had to forego wages.

According to Human Rights and Development Foundation (HRDF) staff, most migrant workers in Thailand fear acts of reprisal such as those taken by Thammakaset, and thus are hesitant to claim their rights. Workers are afraid that they might lose their jobs if they file complaints. They are also afraid of being blacklisted by other local employers, and losing their job or residency permits which would render them vulnerable to deportation.

These vulnerabilities and hardships that migrant workers must endure when trying to access justice make it all the more important to ensure that they are not further victimised by SLAPPs.

Conclusion

The labour laws in Thailand respect and protect rights of all workers irrespective of their nationality. Employers are under obligation to respect these laws and provide workers with the proper legal entitlements.

Effective implementation of the labour protection laws hinges on participation from multiple parties (employers, employees, public authorities, CSOs or NGOs, academics, mass media and the public). Such participation can only flourish if there is respect for the rights to seek and to impart information, rights to freedom of association and peaceful assembly, rights to freedom of expression and opinion and rights to enforce rights and seek remedies. These rights are guaranteed by the International Covenant on Civil and Political Rights, a human rights treaty ratified by Thailand.

Thailand has shown leadership in implementing the UN Guiding Principles on Business and Human Rights by being the first country in Asia to adopt the National Action Plan on Business and Human Rights (NAP) in October 2019. Labour is one of the key priority areas identified in the NAP. Under the category of labour, the Action Plan for 2019-2022 includes reviewing laws and practices with respect to forced

labour. The successful implementation of this action plan will be impeded if there is no freedom to discuss challenges faced by migrant workers, and the gaps that exist between domestic laws and international standards, as well as their implementation in workplaces.

Thus, it is imperative that Thailand take targeted steps to reduce the menace of SLAPPs.



Some recommendations in regard to these steps are:

1. To establish a definition of SLAPPs in the law.
2. To create awareness among law enforcement agencies about SLAPPs so that they are able to identify such cases during their investigation processes.
3. To encourage public prosecutors to use the authority provided under Article 21 of the Public Prosecutors Act 2010 to dismiss SLAPPs.
4. To provide for punitive damages and other sanctions in order to deter the filing of SLAPPs.
5. To adopt a specific anti-SLAPP law.
6. To create respect for the work of human rights defenders.

Annex I

This report only gives updates up until 1 May 2020. Further update, please find at: <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch#ancre1>

	Nature of the Complaint	Facts Regarding the Accused	Forum and Date When the Case was Initiated	Case Status
1	Criminal defamation and submitting false information to authorities	14 migrant workers	On 6 October 2016, Thammakaset's complaint was filed before the Don Mueng Kwaeng Court	Thammakaset appealed the court verdict delivered on 11 October 2018. It was refused twice. The latter time was on 30 May 2019. The judgment is thus final.
2	Criminal complaint regarding defamation and entering false data into the computer system, an offence under the Computer Crimes Act	Andy Hall, an international human rights advocate. He had made Facebook and twitter posts on the complaints raised by the 14 migrant workers between June - October 2016.		

3	Criminal complaint for defamation	Nan Win, one of the 14 migrant workers. He shared information about working conditions during a panel discussion at the FCCT, and gave an interview for a video clip made by Fortify Rights, an INGO, on the issue.	The complaint was filed on 8 October 2018	Trial has been combined with that against Ms. Sutharee Wannasiri. Verdict is due on 8 June 2020
4	Criminal complaint for defamation	Ms. Sutharee Wannasiri. She made Twitter posts on the issue and retweeted the video clip featuring the interview of Nan Win.	On 12 October 2018, the company filed a criminal case of defamation	The verdict is due on June 8 June 2020
5	Civil case against defamation	Ms. Sutharee Wannasiri	On 26 October 2018, based on the same facts upon which the criminal complaint was filed, the company filed a case claiming damages of 5 million THB, removal of offensive content, a public apology and reimbursement of legal costs.	Following court mediation, Thammakaset decided to drop the case on August 28th, 2019.

6	Criminal complaint for defamation	Ms. Suchanee Rungmueanpon, former reporter for, Voice TV. She had retweeted a post made by Andy Hall (see case 2) with a comment that the Court had ordered the company to pay compensation for using slave labour.	The company first filed the case with the police. The prosecutor decided not to proceed with prosecution. Next, the company filed the case before the Court, which accepted the case and proceeded with the trial.	<p>The court held Ms. Suchanee guilty of defamation as the phrase used by her ('slave labour') was not mentioned in the court ruling attached to the post. Her post was considered damaging to the company.</p> <p>She was sentenced to two years in prison under Section 328 of the Criminal Code.</p> <p>Presently, she has been released on bail.</p>
7	Criminal case against defamation	Mr. Tun Tun Win, one of the 14 migrant workers. He had posted on social media.	On 18 May 2019, the company filed a defamation complaint before the South Bangkok Criminal Court.	Case is under trial. Tun Tun Win was granted bail but as he did not appear for the first hearing, his bail has been seized.

8	Criminal case against defamation	<p>Ms. Ngamsuk Ruttanasatian, lecturer of the Institute of Human Rights and Peace Studies (IHRP), Mahidol University. She had shared a statement on Facebook which called for the dropping of law suits filed by the company against Mr. Nan Win and Ms. Sutharee.</p>	<p>2019, the case was filed against her in the Criminal court.</p>	<p>Following preliminary hearings, the court decided not to indict the case on September 18th, 2019. Thammakaset made an appeal.</p>
		<p>Ms. Angkana Neelapaijit, former Commissioner, National Human Rights Commission of Thailand. The complaint was based on her sharing two posts on social media in December 2018 and June 2019, containing links to a press statement of 16 organisations. The statement contained a link to the short film in which the workers spoke about labour rights abuses.</p>		

9	Criminal case against defamation	Ms. Angkana Neelapaijit, former Commissioner, National Human Rights Commission of Thailand. The complaint was based on her sharing two posts on social media in December 2018 and June 2019, containing links to a press statement of 16 organisations. The statement contained a link to the short film in which the workers spoke about labour rights abuses.	25 October 2019, the company filed a criminal defamation case against her.	A conciliation conference is to be held in February 2020 to settle the dispute before the trial.
10	Criminal case against defamation	Ms. Puttanee Kangkun, Human Rights Specialist with Fortify Rights.	On 6 December 2019, the company filed a complaint in the Bangkok Southern Criminal Court for 14 social media posts made by her expressing support for other human rights defenders booked for defamation by the company.	

Annex II

Quotes from the Don Muang Kwaeng Court’s verdict delivered on 11 July 2018. The court decided that the 14 workers had legitimacy to submit the complaint to the NHRCT, and that they did so in good faith. The verdict also determined what evidence was admissible, rendering the following facts relevant:



Plaintiff : Thammakaset Farm

Defendants : 14 migrant workers

Remark : Some terms and sentences are simplified for the ease of translation. However, the accuracy of the essence is strictly observed. Pages of the verdict are identified for references.

A complete yet unofficial translation of this verdict can be found at:

<https://www.business-humanrights.org/sites/default/files/documents/Thammakaset%20Judgement%20English%20Translation%20Final.pdf>

On Imposing Illegal Working Hours

Page 10:

In regards to the reporting of false information to officials, issues to be determined are as follows: working hours, overtime, and the failure to provide weekly days off and annual holidays. The plaintiff claimed that he set working hours for employees

starting from 8:00 AM. The plaintiff, represented solely by Mr. Chanchai, testified without evidence and with no reference to the employment conditions between the plaintiff and the 14 defendants as supporting evidence.

Page 11:

According to the record of the testimony (of Mr. Chanchai to the labour inspectors) dated June 13th, 2559, the employees' work process consisted of the following: Before 8:00 AM, employees bathed and dressed in uniforms provided by the Plaintiff; the plaintiff required employees to arrive at the farm from approximately 7:30 AM to 7:45 AM on each day that looking after chickens was required...

As for the plaintiff's claim that all 14 defendants clocked themselves in upon arriving at the chicken unoccupied prior to 8:00 AM, apart

from the contrary statement of Mr. Chanchai mentioned previously, there is still no other supporting evidence. Therefore, the claim does not bear sufficient weight to be admissible. The relevant facts are that all 14 defendants had to clock in for work prior to 8:00 AM, and had a one hour break during the day. The plaintiff required that the defendants enter the chicken unoccupied by 7:30 AM, before which they had to go through the process of bathing and dressing in the uniform provided by the plaintiff, which is the reason that the 14 defendants had to clock in for work at 7:00 AM.

Page 12:

In regards to the plaintiff's claim regarding the period of time during which the lights are to be turned off: the 14 defendants are not able to perform work, but if the defendants who look after the chickens are to go into the chicken house to work as they desired special compensation, they were also allowed. This is contradictory information, and it holds true that the plaintiff accepts that work does in fact take place in the middle of the night.

(The Court referenced the testimony

of the Manager of B. Food Products International Co., LTD, who is tasked with providing information and overseeing the poultry production of the plaintiff. The Manager testified to the labour inspection officers that work during nighttime hours was required, as well as work during the times the chicken house left unoccupied. The court also referenced documents detailing the lighting program for the poultry farm, including the times at which the lights are turned on and off for the various ages of the chickens.)

Page 14:

In regards to the plaintiff's claim in the plaint that during designated times in which the chicken houses are to be unoccupied, the 14 defendants were permitted to take off work for one month, and the plaintiff counted those days-off as weekly days off, annual holiday, and traditional holidays: It is seen that the claim according to the plaintiff's aforementioned indictment contradicts the statement given by Mr. Chanchai to the labour inspectors mentioned above. The relevant facts are that the plaintiff

required all 14 defendants to work without weekly days off, annual holidays, or traditional holidays; the defendants who look after the chickens had to work during the nighttime at which time the lights were switched on, for which the clocking in to work after 19:00 and clocking out of work at 5:00 took place; and during designated times when the houses are left unoccupied from chicken, the 14 Defendants were only required to provide work during the daytime.

On Violations of Minimum Wage Law

Page 16:

In regards to the disbursement of wages less than the minimum wage of 300 THB per pay as prescribed by law, the plaintiff, represented solely by Mr. Chanchai, testified that the plaintiff did in fact pay all 14 defendants 300 THB per day, under the agreement that each defendant would be charged monthly for the following expenses: 1,600 THB for accommodation, 400 THB for electricity, 200 THB for water utilities, and 80 THB for drinking water as referenced by the employees' pay stubs...

The date observed on the Defendants' pay stubs for May wages, June 6th, 2559, was the same date the witness and labour inspectors went to the plaintiff's farm to conduct inspection.

On June 13th, 2559, the witness and labour inspectors returned to the Plaintiff's farm to inspect the farm again. This shows that

the plaintiff had just produced the aforementioned pay stubs during the days before the labour inspectors would come back to do the inspection.

With regard to the issuance of pay stubs prior or subsequent to this date, since the 14 defendants had started their employment, the plaintiff did not present them to the court in order to support the plaintiff's claim that the defendants had agreed to wage deductions for the above expenses. It follows, therefore, that the sole pay stub from June 6th, 2559, does not provide sufficient evidence to the claim that the 14 defendants agreed to the aforementioned wage deductions with the employer.

Page 17:

From inspection of documents summarizing monthly wages provided by the employer it has been gathered that wages are divided into two categories: wages for labor, and wages for labor after deductions for accommodation expenses. Upon calculating wages for the number of days worked, and subtracting for accommodation, electricity, and water utilities in the

amounts specified by the employer, it appears that the leftover sum does not equal the amount for labor after deductions for accommodation expenses. Therefore, it is believed that the employer has paid employees less than the minimum wage, as evidenced by the amount shown in the pay stubs given to employees.

Page 18:

The National Human Rights Commission is of the opinion that the facts show that the plaintiff's payment of 300 THB in daily wages to the 14 defendants, after deductions for accommodation, electricity, water utilities, drinking water, and other unspecified expenses, amount to a total of 230 THB per day in actual paid wages, which is below the minimum wage.

Upon consideration of the report concerning this human rights violation, it can be observed that the reasoning and the supporting evidence are not clearly stated by the report.

On the Retention of Workers' Identification Documents

Page 19:

In regards to the plaintiff's claim that the plaintiff did not confiscate the passports or identification documents of any of the 14 defendants during their employment with the plaintiff, The plaintiff, represented solely by Mr.Chanchai, provided his testimony with no supporting evidence, and no associated staff members testified... Mr. Chanchai testified that the defendants had traveled back to their home country during their employment with the plaintiff, illustrating that the plaintiff did not

seize the defendants' documents. In response, the Defendants testified that they did in fact return to their home countries during their employment with the plaintiff, but that they had to ask for their passports from the plaintiff in advance, and that they were also not permitted to leave during the time that they were required to look after the chickens. This information does not support the claim that the Plaintiff did not retain the passports of the 14 defendants.

Page 20:

In regards to Mr. Chanchai's testimony that the reason the passports were returned to the workers is because they had been taken to pursue the work permit extension process, which the plaintiff arranged on the defendants' behalf: The documents were said to be returned to the defendants by the plaintiff upon the completion of this process. However, the plaintiff did not bring any of the individuals in the photos showing the returning of documents to the workers (the plaintiff's employees),

to testify to reaffirm the claim, nor did the plaintiff present documentary evidence showing that the plaintiff had pursued the work permit extension process for the defendants during the aforementioned time period. The evidence provided by the Plaintiff does not bear weight to be admissible that the Plaintiff did not retain the passports or identification documents of the 14 defendants during their time of employment.

Annex III

The Court's Opinion on the Case of Mr. Nan Win and Ms. Sutharee in Response to the Amicus Curia Brief of the ICJ and LRWC

In the order for preliminary examination, the court responded to the amicus brief and the defense lawyer's statement on SLAPP, which can be summed up as follows:

- 1** The Crime of Defamation as set out in Thailand's Penal Code is in accordance with the ICCPR because:
 - The sections are not so vague to be rendered incomprehensible by reasonable persons. It cannot be held that the stipulated sanction is disproportionate with the gravity of the offence as the impacts of defamation could be as severe as mob lynching, job loss, or irreparable harm.
 - No minimum sanction is prescribed. In a less serious crime, the Court would merely impose a fine or a suspended sentence. Besides, civil defamation does not provide sufficient grounds to protect decent persons.
 - Regarding the burden of proof, the Court maintained that the burden falls on the plaintiff to prove the elements of defamation crimes and to prove that the actions of the defendant do not qualify the waiving of punishment.
 - The Court also considers freedom of expression as enshrined in the Constitution (section 34), and that this liberty can be restricted for the purpose of protecting the rights and liberties of other persons.

2

Human rights defenders are protected under the same laws as ordinary persons. Human rights defenders should be knowledgeable and prudent in their operations, and be held accountable for their own actions.

3

Although the term “strategic lawsuits against public participation” (SLAPP) does not have a clear definition, it can be compared to the concept of an injured person in the Criminal Procedure Code, which states that if a lawsuit is filed in bad faith, the injured person would not be legitimate by law. For this particular case, the Court held that the plaintiff filed the lawsuit after the NHRCT’s decision. Thus, the lawsuit does not constitute harassment; it does not intend to delay a complaint; it does not impose burden (on the other party) by filing the case in a distant district; and it does not claim for a large amount of damages. Therefore, it is in the plaintiff’s authority to file the case.

