HUMAN RIGHTS COMMITTEE

Van Duzen v. Canada

Communication No. R.12/50

7 April 1982

VIEWS

Submitted by: Gordon C. Van Duzen (represented by Professor H. R. S. Ryan)

Alleged victim: Gordon C. Van Duzen

State party concerned: Canada

Date of communication: 18 May 1979 (date of Initial letter)

Date of decision On admissibility: 25 July 1980

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1982,

Having concluded its consideration of communication No. R.12/50 submitted to the Committee by Gordon C. Van Duzen under the Optional Protocol to the International Covenant on Human Rights,

Having taken into account all written Information made available to it by the author of the communication and by the State party concerned,

Adopts the following:

VIEWS UNDER ARTICLE 5 (4) OF THE OPTIONAL PROTOCOL

1. The author of this communication (Initial letter dated 18 May 1979 and further letters of 17 April 1980, 2 June and II June 1981) Is Gordon C. Van Duzen, a Canadian citizen, who is represented before the Committee by Professor H. R. S. Ryan.

2.1 The author alleges that he is the victim of a breach by Canada of article 15 (1) of the

International Covenant on Civil and Political Rights. The relevant facts, which are not in dispute, are as follows:

2.2 On 17 November 1967 and 12 June 1968, respectively, the author was sentenced upon conviction of different offences to a three year and a 10-year prison term. The latter term was to be served concurrently with the former, so that the combined terms were to expire on 11 June 1978. On 31 May 1971, the author was released on parole under the Parole Act 1970, then in force. On 13 December 1974, while still on parole, the author was convicted of the indictable offence of breaking and entering and, on 23 December 1974, sentenced to imprisonment for a term of three years. By application, of section 17 of the Parole Act 1970 his parole was treated as forfeited on 13 December 1974. As a consequence, the author's combined terms have been calculated to expire on 4 January 1985. a/ In 1977 several sections of the Parole Act 1970, among them section 17, were repealed. New provisions came into force on 15 October 1977 (Criminal Law Amendment Act 1977).

2.3 According to the author the combined effect of the new law was that forfeiture of parole was abolished and the penalty lot committing an Indictable offence while on parole was made lighter, provided the indictable offence was committed on or alter 15 October 1977, because, inter alia, pursuant to the new provisions, time spent on parole after 15 October 1977 and before suspension of parole, was credited as time spent under sentence. Therefore, a parolee whose parole was revoked alter that date was not required to spend an equivalent time in custody under the previous sentence.

2.4 The author alleges that, by not making the "lighter penalty" retroactively applicable to persons who have committed indictable offences while on parole before 15 October 1977, the Parliament of Canada has enacted a law which deprives him of the benefit of article 15 of the Covenant and thereby failed to perform its duty, under article 2 of the Covenant, to ensure to all Individuals within Its territory and subject to its jurisdiction the rights recognized in the Covenant and to take the necessary steps to adopt such legislative measures as may be necessary to give effect to those rights.

3.1 As regards the admissibility of the communication the author claimed that in the present state oi the law in Canada the benefit of article 15 of the Covenant could only be afforded to him through the royal prerogative of mercy, exercised by the Governor-General of Canada on the advice of the Privy Council lot Canada. A petition submitted by the author in this connexion was rejected on 19 January 1979 denying the validity of the author's claim. It was explained that the relevant provisions in article 15 of the Covenant applied only where the penalty for an offence had been reduced by law, and since there was no suggestion that the penalties attributable to the offences for which the author was incarcerated had been reduced, alter he committed them, the said provision was not applicable in his case.

3.2 The author maintained that, as a result, domestic remedies had been exhausted. He also stated that he had not applied to any other International body. He requested the Committee to rind that he was entitled to receive credit, as partial completion of his combined terms of Imprisonment, for the time spent by him on parole, namely 1,292 days, between 31 May 1971 and 13 December 1974.

4. By its decision of 7 August 1979 the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

5. By a note dated 24 March 1980 the State party objected to the admissibility of the communication on the ground that the communication was incompatible with the provisions of the Covenant and as such inadmissible under article 3 of the Optional Protocol to the Covenant. The State party submitted, in particular, that the word "penalty" in article 15 of the Covenant referred to the punishment or sanction decreed by law for a particular offence at the time of its commission. Therefore, in respect of a particular criminal act, a breach of the right to a lesser penalty could only occur when there was a reduction of the punishment which could be imposed by a court. Parole was the authority granted by law for an inmate to be at liberty during his term of imprisonment; it did not reduce the punishment which, according to law, could be imposed for a given offence, but rather dealt with the way a sentence would be served. The State party further maintained that the relevant provisions of the Criminal Law Amendment Act 1977 did not reduce the penalty which the law decreed for any given criminal offence and that, therefore, the new provisions did not result in a 'lighter penalty" within the meaning of article 15 of the Covenant.

6.1 On 17 April 1980, comments on behalf of the author or the communication were submitted in reply to the State party's submission or 24 March 1980. They refuted the State party's contention that the granting of parole did not come within the legal term of "penalty" and that the provisions of the Criminal Law Amendment Act 1977 did not result in a "lighter penalty". Discussing a wide range of meanings or the word "penalty", the submission referred to several laws enacted in Canada which, by way of legal interpretations and judicial decisions, Old not permit the State party's conclusion that a punishment not imposed by a court is not a penalty. The author further claimed that, according to Canadian Court rulings in specific cases, it was not unjustifiable to conclude that automatic deprivation of "statutory remission" (application of forfeiture of parole) by operation of law, although without any court order, was a penalty and that therefore the provisions of the Criminal Law Amendment Act 1977, If applied to his case, Would result In a lighter penalty.

6.2 Discussing applicable principles of Interpretation it was submitted that, in case of doubt, a presumption in favour of the liberty of the Individual should be applied to article 15 (1). As a Consequence, this provision - unlike the Canadian Interpretation Act, section 36 - was said not to be limited to a penalty imposed or adjudged after the change in the law. In this connexion it was argued that this meaning was assumed in reservations made by certain other States parties when they ratified the Covenant, and was also supported in the proceedings in the Third Committee of the General Assembly of the United Nations in 1960, in which Canada had participated.

7. By its decision of 25 July 1980 the Committee, after finding, Inter alia, that the Communication was not incompatible with the provisions of the Covenant, declared the communication admissible.

8.1 In its submission under article 4 (2) of the Optional Protocol, dated 18 February 1981, the State party sets out, inter alia, the law relating to the Canadian parole system and asserts that it is not in breach of Its obligations under the International Covenant on Civil and Political Rights. It contends:

(a) That article 15 of the International Covenant on Civil and Political Rights deals only with criminal penalties imposed by a criminal court for a particular criminal offence, pursuant to criminal proceedings;

(b) That the forfeiture of parole is not a criminal penalty within the meaning of article 15 of the Covenant;

(c) That by replacing forfeiture of parole by revocation of parole it did not substitute a "lighter penalty" for the "commission of an indictable offence while on parole".

8.2 The State party further elaborates on the definition of the word "penalty" as used in article 15 (1) of the Covenant.

8.3 The State party submits that there are various kinds of penalties: these may be criminal, civil or administrative. This distinction between criminal penalties and administrative or disciplinary ones, the State party argues, is generally accepted. Criminal penalties, it further submits, are sometimes referred to as "formal punishment" while the administrative penalties are referred to as "informal punishment".

8.4 The State party adds that the setting or context of article 15 of the Covenant is criminal law. The words "guilty", "criminal offence" and "offender" are evidence that when the word "penalty" is used in the context of article 15, what is meant is "criminal penalty". The State party finds unacceptable Mr. Van Duzen's proposition, that the word "penalty" in article 15 of the Covenant must be given a wide construction which would mean that article 15 would apply to administrative or disciplinary sanctions imposed by law as a consequence of criminal convictions.

8.5 The State party furthermore refers to a series of Canadian court decisions on the nature and effects of parole, its suspension or revocation. It also argues, quoting various authorities, that the Canadian process of sentencing permits flexibility with respect to forfeiture of parole. It points out that the last sentence of three years (plus forfeiture of parole) when the statutory maximum is 14 years, makes it possible to argue, in view of Mr. Van Duzen's criminal record, that the judge did take into consideration his forfeiture of parole. Also the role of the National Parole Board is discussed in this context.

8.6 The State party agrees with the alleged principle of interpretation referred to in paragraph 6.2 above, but is unable to find any ambiguity in article 15 of the Covenant because it is clearly restricted, it submits, to the field of criminal law. Therefore, the State party submits, the author cannot benefit from the presumption in favour of liberty.

8.7 In the light of the above, the State party submits that the Human Rights Committee ought

to dismiss Mr. Van Duzen's communication. Article 15, it submits, deals with criminal penalties, while the process of parole is purely administrative, and therefore the Criminal Law Amendments Act 1977 cannot be regarded as providing a lighter penalty within the ambit of article 15.

9.1 On 2 June 1981 the author through his representative submitted observations under rule 93 (3) of the Committee's provisional rules of procedure in response to the State party's submission of 18 February 1981 under article 4 (2) of the Optional Protocol.

9.2 The author observes that in article 15 (1) the word "criminal" is associated with "offence" and not with "penalty". The State party's attempt to narrow the meaning of "penalty" is not supported by the words of the article. It is submitted that if the offence is criminal within the meaning of the article, any penalty for the offence is a penalty within the meaning of the article. The State party admits that forfeiture and revocation of parole were penalties and that revocation continues to be a penalty, but tries to divide penalties into categories tor which it has no authority in the words of the article, in precedent or in reason.

9.3 The author maintains in his submission that the word "penalty" is not confined to a "criminal penalty", as defined by the State party, and is consistent not only with the language of article 15 (1) but also with judicial and other usage in the English-speaking world.

9.4 The penalty of forfeiture or revocation of parole, he states, is an integral part of the penal process resulting from conviction and imposition of a sentence of imprisonment and enforced by the agencies executing that sentence. The Penitentiary Service, the National Parole Board and the National Parole Service are all under the jurisdiction of the Solicitor-General of Canada, and the Penitentiary Service and the National Parole Service are branches of the Correctional Service of Canada, under the jurisdiction and administrative direction and control of the Commissioner of Corrections.

9.5 As the Government has emphasized, the author states, parole affects the mode of undergoing a sentence of imprisonment imposed for the offence. Forfeiture and revocation of parole were, before 15 October 1977, penalties for breach of conditions of parole. Revocation of parole continues to be such a penalty. The State party's argument is that a penalty within the meaning of article 15 (1) is only a so-called "criminal penalty" imposed by a criminal court for a particular criminal offence, pursuant to criminal proceedings. It must surely be agreed that a term of imprisonment is such a penalty. A penalty is not exhausted when it is pronounced. It continues in operation until it has been completely executed. Being at large on parole is therefore a mode of undergoing a criminal penalty. Forfeiture and revocation of parole and their consequences were penalties for breach of conditions of a mode of undergoing a criminal penalty. Even it the State party's definition of "penalty" within the meaning of article 15 (1) were correct, which is not admitted, forfeiture and revocation of parole would be criminal penalties within that interpretation of the article. The attempted distinction put forward by the Government between an administrative and a criminal penalty is without foundation in this context. In this connexion, attention is drawn to the statement of Mr. Justice LeDain, in the Canadian Federal Court of Appeal, in his reasons for judgement in Re Zong and Commissioner of Penitentiaries (1976)

1 C.F. 657, at 579-80, cited in the reply, where he said that forfeiture of parole was a penalty tor the act of committing an Indictable offence while on parole.

9.6 The author further maintains that the distinction between formal punishment, which is administered through the courts, and informal punishment which is used extensively in a wide variety of Inter personal and Institutional contexts, misses the point of this communication. The penalty here at Issue clearly entails "punishment tor crime". The distinction does not depend on the agency that administers or imposes the penalty. The nature of the penalty, Its relation to the offence, and its consequences are the critical factors, not the agency that imposes it.

9.7 Forfeiture of parole, when in effect, was a lawful automatic consequence by operation of law of conviction of an Indictable offence In certain Circumstances, but this per se is not the subject of the complaint. The author states that ne would have no complaint under article 15 (1) about the forfeiture of his parole or the consequence of forfeiture of parole, as they applied to him, it the amendments of 1977 had not made lighter the penalty tor breach of conditions of parole without making the amendment retroactive.

9.8 Commenting on the State party's submissions as to the process of sentencing and the alleged flexibility both before and after the amendments of 1977, the author refers to statistics showing that despite the maximum fixed by law at 14 years, his Last sentence, which was a prison term of three years, is close to the normal upper end for such offences. He therefore considers the suggestion that the sentencing judge took his forfeiture of parole into account in reduction of his term to be without foundation. The author maintains that, although revocation of parole continues to be authorized not only on conviction for offences for which forfeiture would have automatically ensued before 15 October 1977, but also following conviction of other offences or for some other reason not constituting an offence, the consequences of revocation are less severe under the present law than they were before 15 October 1977.

9.9 Finally, the author's submission at 2 June 1981 provides Information that on 1 May 1981 he was again released under the Parole Act, under mandatory supervision, which is substantially equivalent to parole. It is argued, however, that as a result of the conditions or his release, he is not a free man and may be re-imprisoned at any time until late in 1984.b/ He claims to be entitled to be completely free alter 9 June 1981.

9.10 In additional observations, dated ll June 1981, the author further maintains that he was indeed subjected to the jurisdiction of a judicial authority in connexion with the forfeiture at his parole. He states that in accordance with the law in force, he was brought before a Provincial judge, on or about 13 January 1975 (at a time when he was already In custody following his conviction on 13 December 1974) who, in the exercise at his judicial functions, declared that the author's parole was forfeited and issued a warrant, pursuant to section 18 (2) of the Parole Act, for his recommitment to a penitentiary pursuant to section 21 at the Parole Act, then in force.

10.l The Human Rights Committee notes that the main point raised and declared admissible

in the present communication is whether the provision tot the retroactivity of a 'lighter penalty' in article 15 (l) of the Covenant is applicable in the circumstances or the present case. In this respect, the Committee recalls that the Canadian legislation removing the automatic forfeiture or parole for offences committed while on parole was made effective from 15 October 1977, at a time when the alleged victim was serving the sentence imposed on him under the earlier legislation. He now claims that under article 15 (l) he should benefit from this subsequent change In the law.

10.2 The Committee further notes that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts Or the Covenant are independent of any particular national system or law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning. The parties have made extensive submissions, in particular as regards the meaning of the word "penalty' and as regards relevant Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word "penalty" in Canadian law is not, as such, decisive. Whether the word "penalty" in article 15 (1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, "criminal" and "administrative", under the Covenant, must depend on other factors. Apart from the text of article 15 (1), regard must be had, inter alia, to its object and purpose.

10.3 However, in the opinion of the Committee, it is not necessary for the purposes of the present case to go further into the very complex issues raised concerning the interpretation and application of article 15 (1). In this respect regard must be had to the fact that the author has subsequently been released, and that this happened even before the date when he claims he should be free. Whether or not this claim should be regarded as justified under the Covenant, the Committee considers that, although his release is subject to some conditions, for practical purposes and without prejudice to the correct interpretation of article 15 (1), he has in fact obtained the benefit he has claimed. It is true that he has maintained his complaint and that his status upon release is not identical in law to the one he has claimed. However, in the view of the Committee, since the potential risk of re-imprisonment depends upon his own behaviour, this risk cannot, in the circumstances, represent any actual violation of the right invoked by him.

10.4 For the reasons set out in paragraph 10.3, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the present case does not disclose a violation of the Covenant.

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a/ This date appears from a correction submitted by the State party (19 February 1982), the Care having earlier been given by the parties as 19 December 1984.

b/ According to a correction submitted by the state party (19 February 1982), Mr. Van Duzen's combined terms nave been calculated to expire on 5 January 1985.