HUMAN RIGHTS COMMITTEE

Ben Said v. Norway

Communication No. 767/1997

29 March 2000

CCPR/C/68/D/767/1997

VIEWS

Submitted by: Zouhair Ben Said

Alleged victim: The author

State party: Norway

Date of communication: 28 October 1996 (initial submission)

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

Meeting on 29 March 2000

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Zouhair Ben Said, a Tunisian citizen. He claims to be a victim of a violation of his rights by Norway.

The facts as presented by the author

2.1 The author married a Norwegian citizen on 29 September 1976, in Tunisia. That same year the author obtained a residence permit and immigrated to Norway. In September 1977, a daughter was born, who received the Norwegian nationality in 1979. The author was granted a permanent residence permit. In 1982, a second child was born.

2.2 At the end of 1980 the author was sentenced to 5 years of imprisonment, because of a drug offence. In October 1982, the Norwegian authorities informed him that he would be expelled from

Norway after serving half of his sentence. The author appealed against this decision to the Ministry of Justice. His appeal was rejected on 22 November 1982. The author then, using a leave from prison, escaped Norway to go to France with his wife and children. From there, the author and his family moved to Tunisia, where they lived from February 1983 onwards.

2.3 In 1987, the author and his wife contacted a Norwegian lawyer, because they wanted to move back to Norway. According to the author, he was then informed that the Ministry of Justice would consider granting him a residence permit once he and his family would be back in Norway and he would have served the remainder of his sentence.

2.4 In November 1987, the family returned to Norway. While the author was serving his sentence, his wife filed for separation and sole custody of the children. In an oral settlement of 18 April 1988, the author and his wife agreed to separation. On 10 October 1988, the Court gave sole custody of the children to the mother and the author was given regular access. The author's wife changed the family name of the children to her own and had Norwegian passports issued for them on her name, in accordance with Norwegian rules governing custody. According to the author, he has filed a cassation appeal against the October 1988 judgment.[1]

2.5 On 16 May 1988, the Ministry of Justice annulled the previous expulsion order. In May 1989, the author was released from prison.

2.6 On 9 October 1989, the author's wife filed for denying the author access to the children. In January 1990, the Court provisionally provided limited access in the presence of a third person, an arrangement which was apparently not kept. On 17 January 1990, the author was refused a residence permit. By judgment of 7 May 1990, the Court revoked the author's visiting rights, because of the alleged risk that he would kidnap his children. Subsequently, the author's appeal against the denial of his residence permit was refused on 28 May 1990. He was ordered deported by the Ministry of Justice and on 14 June 1990, he was arrested and shortly thereafter returned to Tunisia, against his will. The author appealed the Court's decision revoking his visiting rights to the Eidsivating High Court. On 21 December 1990, his appeal was rejected because he was unable to provide security for the costs, a condition when plaintiffs reside abroad.

2.7 On 19 November 1991, the author by writ of summons demanded to be awarded custody and access. This was denied by the Court on 21 January 1992, after a hearing in the author's presence.

2.8 Visa applications by the author in order to visit his children were denied by the Norwegian authorities on several occasions from 1992 to 1994. On 26 February 1992 and on 18 October 1994, the author tried to enter Norway without a visa and was rejected on entry. On 19 October 1994, the author was ordered expelled for repeated violations of the Immigration Act. On 8 September 1995, he requested asylum in Norway, which was denied.

2.9 On 15 January 1996, the author filed an action with the Oslo City Court for custody and access to his children. On 22 March 1996, he applied for a visa to attend the Court hearing of his case, which was scheduled for 24 July 1996, for which he had received a convocation. Because he did not receive an answer in time, the hearing was postponed until 14 January 1997. On 20 August 1996, the Ministry of Justice refused the author a visa to enter the country, because of indications that he

would not voluntarily leave Norway after the hearing. Nevertheless, the author, who wanted to be present at the hearing, arrived at the airport of Oslo, where he was refused entry. He was not allowed to make any phone calls and in the morning of 14 January, he was handed a decision of deportation, put on a plane, and sent back to Tunisia. At the court hearing, he was represented by a lawyer. On 11 March 1997, the author's claim was heard and dismissed by the Court. On 22 October 1997, his appeal against the Court's decision was dismissed by the Borgarting High Court for failure to have it co-signed by a lawyer.

The complaint

3. The author claims that he is a victim of discrimination, and that other Europeans are not treated in the same way. He also claims that he is a victim of a violation of the right to fair trial.

The State party's admissibility submission and the author's comments

4. The State party submits that it is unclear what the author claims has been in breach of the Covenant. It understands that the complaint relates mainly to the denial of residence permit and visa in the author's case. In this connection, the State party points out that all administrative decisions concerning residence permits and visa can be brought before the courts for judicial review. The courts' review encompasses the question of whether the decision was in accordance with international law. According to the State party, the author's rights to petition for judicial review are not affected by the fact that he resides in Tunisia.

5.1 In his comments, the author submits that the decision to refuse him a residence permit was taken on the pretext that he had been refused access to his children. In this context, he refers to an exchange of correspondence between his ex-wife's lawyer and the Ministry of Justice. He contends that a permanent residence permit cannot be revoked simply upon request of his ex-wife. He claims that his de facto expulsion from Norway was abusive, and that an appeal was not effective, as shown by his deportation, while the administrative appeal was still pending.

5.2 He further suggests that the Norwegian authorities are using immigration procedures against him to prevent him access to court in his case of visiting rights and custody over his children.

5.3 He further denies that he ever entered Norway illegally, because he always presented himself to the airport police in order to obtain a legal entry permit, which was then refused, and that he never left the international zone of the airport.

5.4 The author further points out that the Ministry of Justice, which is the appeal instance for decisions taken by the Directorate of Immigration, always takes its decisions at the last minute or even too late.

5.5 The author claims that the Court's decision of 11 March 1997, refusing him access to his child, is unacceptable because he was prevented from personally attending the hearing scheduled for 14 January 1997, but kept against his will at the Oslo airport, despite a convocation from the court to attend the hearing.

5.6 The author further claims that it is illegal that the State party has issued passports for his children under their mother's name. He states that his children always had a Tunisian passport under his family name.

5.7 In respect of the State party's claim that he has failed to exhaust all domestic remedies, the author states that he has done what was in his power to do, and that ten years of interventions and appeals have remained without success. He states that he does not have the means to pay for any further court actions, and that he is not prepared to lose another ten years by trying in vain to obtain redress. He adds that good contact between him and his ex-wife and children has been re-established.

5.8 The author demands that the deportation order of 28 May 1990 be annulled, as well as all decisions based on this order, that the judgement denying him access to his children be rejected, that the expulsion order against him be lifted and that he be paid compensation for moral and material damages.

The Committee's admissibility decision

6.1 During its 63rd session the Committee considered the admissibility of the present communication.

6.2 The Committee took note of the State party's argument that the communication was inadmissible for non-exhaustion of domestic remedies. The Committee noted that with respect to the denial of a residence permit to the author and with respect to the expulsion order of 1994, the author had made no efforts to appeal these matters to the courts, and concluded that this aspect of the communication was therefore inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.3 A separate issue arose, however, in relation to the author's claim that he was not allowed to attend in person the hearing before the Oslo City Court, scheduled for 14 January 1997. The Committee noted that the author appealed the Court's decision following the hearing, also on the ground that the hearing had been unfair because he was not present in person, and that the appeal was rejected because it was not co-signed by a lawyer. The Committee took note of the author's arguments that he had no means left to go to court. In the circumstances, the Committee found that the author had made a reasonable effort to exhaust available domestic remedies and that the requirement of article 5, paragraph 2(b), did not prevent it from examining the author's claim.

6.4 The Committee considered that the author's claim that he was denied personal access to the Court in a hearing held on his initiative concerning the custody and visiting rights to his child, might raise issues under article 14, paragraph 1, and articles 17, 23 and 26, which should be considered on the merits.

7. Accordingly, on 21 July 1998, the Human Rights Committee decided that the communication was admissible.

State party's request for review of admissibility

8.1 By submission of 23 February 1999, the State party interprets the Committee's admissibility

decision to mean that all complaints directed by the author against the Norwegian immigration authorities have been declared inadmissible, including the refusal of granting him an entry visa to enable him to attend the Court hearing.

8.2 On the other hand, if the Committee intended its decision as encompassing the refusal of the entry visa to the author to attend the court hearing, the State party challenges the admissibility of this issue, and requests the Committee to revise its decision. In this context, the State party explains that at the pre-admissibility stage, the preparation of its reply to the author's communication was hindered by the unfocused nature of the original communication.

8.3 The State party explains the contents of the immigration law applicable in the author's case. A foreign national, who does not hold a residence permit, must be in possession of a visa to enter Norway. Such a visa must be issued in advance and the application must be presented from abroad. If there is reason to fear that the foreigner will exceed his stay or try to take up residence in Norway, a visa may be refused. A foreign national who tries to enter Norway not carrying a visa or residence permit can be rejected on entry or during the following seven days. Expulsion of a foreigner is ordered when the foreigner has grossly or repeatedly contravened one or more of the provisions of the Immigration Act or evades execution of any decision that he leave Norway. An expelled foreigner is precluded from further entry. Only by special permission can he be granted leave to enter the country.

8.4 Applications for visa are dealt with by the first administrative instance of the Directorate of Immigration. Administrative appeals are dealt with by the Ministry of Justice. The administrative decisions are subject to the supervision of the courts.

8.5 The State party submits that when dealing with the custody and access case, the Oslo City Court had no competence to order the author's access to Norway. That question was a matter for the immigration authorities. The admissibility of the matter of the author's access to the Court hearing can therefore not be dealt with by asking whether the author appealed against the Oslo City Court judgement in the child case. For an alien to be able to appear in person before the national courts, it is necessary to obtain a permit issued by the immigration authorities. If denied entry, the recourse is to bring that administrative decision before the Courts in the form of judicial review. In this context, the State party recalls that the author's expulsion from Norway had been ordered in 1994 for repeated violation of the Immigration Act and that this decision in principle prevents subsequent entry into Norway.

8.6 The State party refers to the developments in the author's case in 1996/1997 which show that he was aware of how the immigration system operates. As to the refusal of the visa, as a consequence of which the author was not able to attend the court hearing in the Oslo City Court, the State party recalls that the author applied for a visa on 22 March 1996, to attend the hearing scheduled for 24 July 1996. On 11 July 1996, the request was refused, because grounds existed to believe that the author would not leave Norway voluntarily after expiry of a visa. On 15 July 1996, the author appealed the refusal to the Ministry of Justice. The City Court was informed of the existence of the administrative appeal, and upon request from the author decided to postpone the hearing should the author not appear on 24 July 1996. On 20 August 1996, the Ministry upheld the refusal of a visa. The author was informed that he was entitled to legal representation for the court hearing. Upon

receipt of the Ministry's decision, the author failed to apply for judicial review.

8.7 On 28 September 1996, an advocate presented himself as legal counsel for the author in the child case and applied for, and was granted, free legal aid, on the ground that the author could not personally be present in court. Subsequently, a new court hearing was set for 14 January 1997. Only on 4 January 1997, the author renewed his application for a visa through the Norwegian Embassy in Tunis. The Directorate forwarded the request to the Ministry, as it was perceived as an application for reevaluation of the Ministry's decision of 20 August 1996. The Ministry received the request on 13 January 1997. At that time, the author had already arrived at the Oslo airport and he was refused an emergency visa. The author then issued a written authority to his lawyer to represent him in the court hearing. From the record of the hearing of 14 January 1997, it appears that the lawyer represented the author without requesting any further postponement.

8.8 According to the State party, the author and his counsel were aware that the only possible action against the refusal of the visa was to bring an application for judicial review. Such an application is not subject to leave by the courts. According to the State party, the administrative discretion is limited by the domestic doctrine of abuse of power as well as by human rights provisions. If a decision is untenable according to national law or convention law, it will be annulled by the court. Had the author brought the refusal of his visa in August 1996 for judicial review, the court would have been able to adjudicate in time before the hearing in the child case.

8.9 The State party challenges the Committee's reasoning in finding that the author had made a reasonable effort to exhaust domestic remedies by appealing the Oslo City Court judgement without having the appeal co-signed by a lawyer. It submits that the requirement that an appeal be co-signed by a lawyer does not place an unreasonable burden on appellants. In this context, the State party points out that it is in the interests of justice that appeals are clear and concise and that they fulfill the relevant requirements. According to the State party, this requirement was in concreto not an unreasonable burden for the author, since the expense of a lawyer checking his appeal would have been quite limited, and his expense in this connection would have been covered by free legal aid. The author was notified by the Court of Appeal on 13 August 1997 of the requirement and was given until 15 September to rectify his appeal. His former lawyer also received a copy. The author replied within the time limit, but did not comply with the requirement. The State party concludes that the author did not make a "reasonable effort" to have his appeal formally accepted.

8.10 In this context, the State party emphasizes the importance of the role of national courts in the protection of human rights, and argues that international supervision is secondary. In the present case, the national courts were not presented with the author's complaint that to deny him entry visa to attend the court hearing was contrary to international human rights law.

8.11 Accordingly, the State party requests the Committee to revise its decision on admissibility in accordance with rule 93(4) of the rules of procedure. The State party submits that the author's original communication to the Committee, presented a lot of different claims, and predated the court hearing of January 1997. The State party's arguments on the admissibility were therefore rather summary and did not address in detail the point later declared admissible by the Committee. In this context, the State party notes that the Committee never indicated before its decision on admissibility which of the various events and points mentioned by the author could be of particular interest.

The State party's submission on the merits

8.12 As to the question whether the January 1997 hearing before the Oslo City Court in the absence of the author was in violation of the Covenant, the State party submits that the author was represented by counsel since September 1996. The costs were covered by the State as free legal aid. The main hearing had already been rescheduled by the Court at an earlier occasion. In January, neither the author nor his counsel requested a further postponement of the hearing. In the circumstances, and considering that the child to which the author was seeking visiting rights was nearly 15 years old at the time, the State party submits that there was no reason for the Court to postpone the hearing proprio motu. The State party also points out that the author had given a written proxy to his counsel, which was submitted to the court. The State party recalls that it was not within the court's power to allow the author entry into Norway. For these reasons, the State party argues that the hearing before the court was fair and did not violate any of the articles of the Covenant.

8.13 In case the question whether the refusal of the visa constituted a violation of the Covenant has been declared admissible by the Committee, the State party notes that it is not clearly indicated in the Committee's decision in what way an issue arises under articles 14(1), 17, 23 and 26 of the Covenant. With regard to article 14(1), the State party reiterates that the hearing before the Oslo City Court was fair, and that it was outside the Court's competence to give the author access to Norway.

8.14 With regard to article 17(1), the State party recalls that the author had been divorced from his wife for a long time, and had practically no contact with his daughters for a number of years. If 17(1) were to come into play in the sense that through a court decision in his favour, the author could have re-established some contact with his daughter, the State party notes that the author was able to bring his case to court. The fact that he was not allowed entry into Norway in order to be present during the court case, can hardly be seen as a family matter, according to the State party.

8.15 With regard to article 23(4), the State party notes that the author's marriage was long since dissolved and not an issue during the court case. The State party cannot see how any issue arises under article 23(4) through the author's absence from the court hearing.

8.16 According to the State party it is likewise hard to see what issue might arise under article 26. It is unknown to the State party what the author compares with when alleging that he is a victim of discrimination, other foreigners in similar positions, other foreigners from different geographical areas or his ex-wife. As a consequence, the State party is unable to address the issue other than by simply refuting the allegation.

8.17 The State party goes on to address the competing interests in the case between the author and the immigration policy. As to the author's interest in being personally present at the court hearing, the State party begins by recalling the history of the author's case. It recalls that the author and his wife separated in 1988 and that the author was denied access to the children by judgement of the court of 7 May 1990, after a hearing on 25 April 1990 at which the author was present. The author was outside Norway since June 1990, and had practically no contact with his daughters since then. As to the question whether it was strictly necessary for the author to be present during the Court hearing of January 1997, the State party points out that the daughter to whom the author requested

access was nearly 15 years old at the time of the hearing and that children become of age under Norwegian law when they are 18 years old. Further, to modify an earlier decision on access, special grounds must exist. Finally, according to Norwegian law, once the child has reached 12 years of age, considerable weight shall be given to the opinion of the child. In the present case, the child had informed the court that she objected to visits from her father. In the circumstances, the State party is of the opinion that it was not necessary for the author to be present in person at the court hearing. His direct testimony was not called for and he was represented by counsel paid through free legal aid.

8.18 As to the immigration policy interests, the State party points out that under international law States are free to prohibit or regulate immigration, and free to decide whether a foreigner should be allowed to continue his stay. By 1996/1997, the author had not had the right to stay in Norway for a number of years, and in fact was permanently excluded. He nevertheless continued to try to gain access to Norway in order to stay there permanently. In this context, the State party refers to the author's application of asylum in 1995. According to the State party, solid reasons therefore existed for fearing that the author would not leave Norway if allowed to enter on a time-limited visa.

8.19 With regard to the possible question why the author was not kept on in immigration custody, once he had been arrested on 12 January 1997, and allowed to attend the court hearing under police escort, the State party recalls that the author was well aware of the requirements for entry into Norway, and that he knew he would not be allowed in if he presented himself at the border without a visa. The State party argues that the granting of entry in a situation like the one created by the author in January 1997, would threaten the control system of visa applications which again would impair immigration control. The State party invokes a legitimate right in keeping immigration control systems and regulations intact. The State party concludes that the reasons for refusing the author entry were not arbitrary.

Author's comments on the State party's submission

9.1 In his comments, the author reiterates his previous allegations concerning events before 1996, denies that he has breached the Immigration Act, and claims that his expulsion in 1994 was unjust. He states that he has the right to show up at the airport of Oslo. He states that he has been continuously harassed by immigration officials ever since 1988. He challenges the judgement of 7 July 1990 of the Oslo City Court, and states that there was no reason to deny him visiting rights.

9.2 In respect to the denial of access in person to the Court hearing of January 1997, the author suggests that any further appeal concerning the refusal of his visa was no longer possible, because it was clear that the immigration authorities were biassed against him. He explains that he arrived at the Oslo airport on Sunday evening 12 January 1997. He was kept at the airport all day Monday 13 January. According to the author, he was not allowed to call the judge at the Oslo City Court. His lawyer visited him in the course of the Monday evening, and the author signed a power of attorney on the understanding that the judge would be informed of what had happened, and that he would send a fax to the Immigration authorities. The author, however, was returned to Tunisia by plane the next morning at 7 am, before the judge could have been contacted. The author concludes that he indeed had made every reasonable effort to exhaust domestic remedies, and that the Committee's decision on admissibility is thus correct.

9.3 The author submits that it has never been his intention to stay in Norway clandestinely, and that the suspicions of the immigration authorities in this respect are ridiculous.

Issues and proceedings before the Committee

10. The Committee has noted and considered the State party's request for a review of the Committee's admissibility decision in the case. The Committee observes that certain parts in the reasoning presented for such a review are related to those claims that had already been declared inadmissible by the Committee and that the remaining arguments by the State party shoud be dealt with as part of the merits of the case. Consequently, the Committee decides to proceed to a consideration of the merits.

11.1 The Committee has considered the present communication in the light of all written information before it, in accordance with article 5, paragraph 1, of the Optional Protocol.

11.2 It has been confirmed by the author and the State party that the author appeared, on 12 January 1997 at the airport of Oslo, intending to participate in a court hearing at the Oslo City Court in a child custody and visiting rights case, scheduled for 14 January, to which he had received a convocation. It is likewise undisputed that the author was prevented by the administrative authorities of the State party from attending the hearing or from directly contacting the judge. He was, however, able to meet with his lawyer who participated in the hearing held on 14 January while the author had already been deported from Norway.

11.3 The right to a fair trial in a suit at law, guaranteed under article 14, paragraph 1, may require that an individual be able to participate in person in court proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien. In assessing whether the requirements of article 14, paragraph 1, were met in the present case, the Committee notes that the author's lawyer did not request a postponement of the hearing for the purpose of enabling the author to participate in person; nor did instructions to that effect appear in the signed authorisation given to the lawyer by the author at the airport and subsequently presented by the lawyer to the judge at the hearing of the child custody case. In these circumstances, the Committee is of the view that it did not constitute a violation by the State party of article 14, paragraph 1, that the Oslo City Court did not on its own initiative, postpone the hearing in the case until the author could be present in person.

11.4 As the author's appeal in the Borgarting High Court was dismissed through the application of a uniform procedural rule after the author had been given an opportunity to remedy the deficieny in question, the Committee cannot find that the dismissal of the appeal constituted a violation of the author's rights under article 14, paragraph 1, of the Covenant.

11.5 As the Committee has found that the conduct of the court dealing with the author's case did not constitute a violation of article 14, paragraph 1, it concludes that no separate issue arises under articles 17, 23 or 26.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not

disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

**The text of an individual opinion (dissenting) by members Bhagwati, Kretzmer, Medina and Lallah is appended to this document.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly]

Notes

1/ According to the State party, no appeal has been filed.

Individual opinion by Committee members P. Bhagwati, D. Kretzmer, C. Medina and R. Lallah (dissenting)

We are unable to agree with the approach adopted by the Committee in declining to review its decision on the admissibility of the communication. We must recall that, under Rule 93(4) of the Committee's rules of procedure, the Committee may review a decision on the admissibility of a communication in the light of any explanations or statements provided by the State party. In this particular case, the State party has requested such a review on the ground that domestic remedies had not been exhausted by the author. For this purpose, the State party has made extensive submissions regarding the circumstances in which the Oslo City Court dealt with the author's custody case, as well as the issues related to the denial of the author's applications to be allowed entry into Norway. The author was given an opportunity to address these submissions.

The essence of the author's claim is that he was denied the opportunity to appear in person before the Oslo City Court in January 1997, when that court dealt with the author's child custody case. All the allegations regarding violations of specific articles of the Covenant are related to this claim. We note that the author was represented by a lawyer in the proceedings before the Oslo City Court. The lawyer did not ask the court to refrain from dealing with the case until the author was present, or to grant an adjournment so as to allow him to apply for judicial review of the administrative decision denying the author entry into Norway for purpose of attending the court proceedings. Furthermore, the author was duly informed about the technical deficiency of his appeal against the decision of the Oslo City Court and he was given an opportunity to repair the said deficiency. We also note that the author had a legal aid lawyer at the time, and he has not refuted the State party's assertion that he

could easily have complied with the requirement that his appeal be cosigned by a lawyer.

In our opinion in these circumstances the Committee should revise its admissibility decision and hold the communication inadmissible for non-exhaustion of domestic remedies, under article 5(2)(b) of the Optional Protocol.

P. Bhagwati (signed)
D. Kretzmer (signed)
C. Medina Quiroga (signed)
R. Lallah (signed)

(Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.)