HUMAN RIGHTS COMMITTEE

C. F. et al. v.Canada

Communication No. 113/1981

12 April 1985

ADMISSIBILITY

Submitted by: C. F. et al. (name deleted) on 10 December 1981

Alleged victims: The authors

State party: Canada

Declared admissible: 25 July 1983 (nineteenth session)

Declared inadmissible: 12 April 1985 (twenty-fourth session) setting aside the earlier decision on admissibility

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

Meeting on 12 April 1985,

Setting aside an earlier decision on admissibility, now adopts the following:

Decision on Admissibility

1. The authors of the communication (initial letter of 10 December 1981 and further letter of 3 June 1983) are C.F.M. L. and J.-L. L., three Canadian citizens detainee at the time of submission in different federal penitentiaries in the province of Quebec, Canada, alleging a breach by Canada of article 25 (b), and article 2, paragraphs I and 3 (b), of the International Covenant on Civil and Political Rights, relating to the general provincial elections held in Quebec on 13 April 1981. The object of the communication is to vindicate their right to vote in the Quebec provincial general elections held on 13 April 1981 and to ensure that prisoners can exercise their right to vote in any elections which may be held in he future, whether federal or provincial.

2.The facts of the case were set out in detail in the Committee's decision of 25 July 1983 by which it declared the communication to be admissible. In the following, only a summary account will be

given.

3.1. On 19 August 1976, the International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Canada. In order to bring the Quebec Election Act into conformity with the provisions of article 25 of the Covenant, several amendments to the act were adopted by the National Assembly of Quebec on 13 December 1979, establishing, inter alia, the right of every inmate to vote in general elections in Quebec and adding special provisions relating to voting Procedures for inmates (arts. 51-64 of the Election Act, 1979). article 64 of this Act provided in particular that . "to allow inmates to exercise their right to vote, the Director General of Elections may make any agreement he considers expedient with the warden of any house of detention established under an Act of Parliament of Canada or of the Legislature". In view of the upcoming general provincial elections in Quebec on 13 April 1981, the Director General of Elections, of Quebec, on 11 March 1981, concluded an agreement pursuant to article 64 of the Election Act with representatives of the wardens of the provincial detention centre of Quebec concerning the voting of the detainees of provincial detention centres.

3.2. To enable the voting of detainees of federal penitentiaries in Quebec at general elections, an agreement similar to the one concluded between the wardens of provincial detention centres and the Director General of Elections of Quebec was required between the Solicitor General of Canada, as head of the federal penitentiary system, and the appropriate provincial Authorities, in the specific case the Director General of Elections of Quebec. The Director General of Elections of Quebec therefore contacted the Solicitor General's Office suggesting the conclusion of an administrative agreement concerning the voting of inmates of federal penitentiaries in the province of Quebec. In a letter dated 4 March 198 1, the Solicitor General of Canada informed the Director General of Elections of Quebec, his decision not to conclude, for the time being, such an administrative agreement which would permit detainees in federal penitentiaries to vote in general provincial elections. He argued that that matter still required further study.

3.3. Prompted by this negative decision of the Solicitor General of Canada, the authors, on 26 March 1981, filed a request for a temporary injunction ("requete et injonction provisoire interlocutoire et pour une audience urgente"), on their own behalf and as authorized representatives of co-detainees, with the Federal Court of Canada, division of first instance, asserting that under the Election Act of Quebec they were fully entitled to vote in the forthcoming general election in Quebec. They claimed that the decision of the Solicitor General of Canada not to permit inmates of federal penitentiaries to vote in provincial general elections was discriminatory because it prevented them, as inmates of federal penitentiaries in Quebec, from casting their vote in the forthcoming general elections on 13 April 198 1, while inmates of provincial detention centres were allowed to do so. In substantiation of their claim they referred to domestic laws in Canada ("Code civil" of Quebec (art. 18) and "Charte des droits et liberates de la personne" (art. 22)), as well as to international instruments which Canada had ratified, specifically the International Covenant on Civil and Political Rights, which provide for the enjoyment of the right to vote without discrimination. They requested, inter alia, that their right to vote be recognized and the Solicitor General of Canada be advised to stop obstructing the exercise of the applicants' right to vote, seeking prompt action by the court to ensure that the administrative arrangements for their full participation in the general elections of 13 April 1981 could be made in time.

3.4. On 30 March 1981, the authors' request for an injunction was rejected by the federal court of first instance, for reasons of "form" and of "substance". In his opinion on the rejection of the request the judge stated, inter alia, that the "right to vote" of detainees in federal penitentiaries was not contested in the decision of the Solicitor General which concerned the "exercise" of this right during detention, a condition which normally affected the civil rights of a person in certain respects. He also pointed out that the Quebec Election Act, "dans sa forme et dans son esprit") acknowledged the necessity of an agreement ("entente") in order to allow inmates the exercise of the right to vote; such agreement could not be forced upon the Federal Government by provincial authorities.

3.5. The authors indicate that they did not appear this decision before the Federal Court of Appeal. They claim that in the circumstances of their specific case, an appeal would have proven totally useless and futile, because the deadline for effective participation in the general elections in Quebec on 13 April 1981 expired the very day of the court of first instance's decision.

4.1. By a note dated 30 August 1982, the State party objected to the admissibility of the communication on the grounds that the authors had failed to exhaust domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol; and that the communication was without object or moot and therefore inadmissible under article I of the Optional Protocol.

4.2. As regards the non-exhaustion of domestic remedies, the State party argues that the authors, by seeking an interlocutory decision against the Solicitor General's negative reply, had chosen an inappropriate remedy and that instead they should have applied for a declaratory judgement as to their right to vote. The State party claims that such a declaration would have been an "effective and sufficient" remedy according to international jurisprudence and Canadian legal practice. The State party admits that it could be argued that there was not sufficient time to get a declaratory judgement before the Quebec provincial elections of 1981 were held and that therefore a declaration was not an effective remedy in regard to the present communication. The State party, however, argues that the real object of the communication is to assert the right of inmates in federal penitentiaries in relation to future elections (see para.1 above) and therefore concludes that it was not "too late" for the authors to seek a declaration of their rights in the domestic courts to achieve this object of their claim. Consequently, domestic remedies had not been exhausted.

4.3. The State party also argues that the authors, after the entry into force of the Canadian Charter of Rights and Freedoms on 17 April 1982, should have sought the remedy granted in section 24 (1) of the Charter whenever one of its substantive provisions is alleged to have been violated. Since the Charter recognizes the right to vote (sect. 3), the authors would have obtained full redress in respect of any future elections.

5. 1. On 7 June 1983, the authors of the communication forwarded their comments in reply to the State party's submission under rule 91 of the provisional rules of procedure. They refute the State party's contention that the communication is inadmissible on grounds of non-exhaustion of domestic remedies and mootness of the object of the communication.

5.2. As regards the first, the authors maintain that the period available was not long enough to allow them to have recourse to the remedy of a declaratory judgement before the elections of 13 April 1981. They submit that, after the elections ' in the state of the law as it was before the adoption of

section 3 of the Constitution Act of 1982, an action for a declaratory judgement did not constitute an effective and sufficient domestic remedy ensuring respect for their right to vote. They refer in this connection to Canadian jurisprudence in the case of John Ernest McCann et al. v. The Queen and Dragan Cernetic, head of a penitentiary institution in British Columbia, (1976) IC.F.570, concerning inmates' claims that they had been subjected to cruel and unusual punishment or treatment in a special unit of the prison. They argue that a declaratory judgement delivered by Judge Heald at first instance of the Federal Court of Canada on 30 December 1975 in favour of the inmates' claims did not relieve the prison situation, nor did it affect the treatment of prisoners in other Canadian institutions in the future. The authors conclude that this case shows that a declaratory judgement would be pointless in their case, which is similar, because execution of such judgement would depend entirely on the decisions of the Solicitor General.

5.3. Referring to the State party's argument that, since 17 April 1982, a remedy is available to the authors under sections 3 and 24 a/ of the Canadian Charter of Rights and Freedoms, the authors point out that, while "section 3 of the Charter recognizes the right of every Canadian citizen to vote, it is to be noted that the remedy provided for in section 24 is available to the victims of a violation for the purpose of obtaining redress". They stress "that this remedy would be available to them only if they were victims in the future of a further violation of their right to vote", adding that "the purpose of the present communication is to prevent such an occurrence, and there does not at present exist a domestic remedy that is effective and sufficient from the point of view of paragraph 2 (b) of article 5 of the Optional Protocol".

6.1. On 25 July 1983, the Committee declared the communication to be admissible. At the same time, however, it drew the attention of the State party concerned o rule 93 (4) of the Committee's provisional rules of procedure according to which a decision that a communication is admissible 'May be reviewed in the light of any pertinent information received at a later stage.

6.2. With regard to article 5, paragraph 2 (b), of the Optional Protocol the Committee observed that, although the authors might not have been able to obtain a declaratory judgement before the elections of 13 April 1981, a subsequent judgement could nevertheless in principle have been an effective remedy in the meaning contemplated by article 2, paragraph 3, of the Covenant and article 5, paragraph 2 (b), of the Optional Protocol. The Covenant provides that a remedy shall be granted whenever a violation of one of the rights guaranteed by it has (occurred; consequently, it does not generally prescribe preventive protection, but confines itself to requiring effective redress ex post facto. However, the Committee was of the view that the Canadian Government had not shown that an action for a declaratory judgement would have constituted an effective remedy either with regard to the elections of 13 April 1981 or with regard to any future elections. On the basis of the Government's submission of 20 August 1982, it was not clear whether an action seeking to have declared unlawful I the refusal of the competent prison authorities to let the alleged victims participate in the elections of 13 April 1981 would have been admissible. On the other hand, talking into account the authors' submission received on 7 June 1983, the Committee expressed doubt a; to whether, and to what extent, executive authorities in Canada are bound to give effect to a declaratory judgement in similar circumstances arising in the future. Since it is incumbent on the State party concerned to prove the effectiveness of remedies which it claims have not been exhausted, the Committee concluded that article 5, paragraph 2 (b), of the Optional Protocol did not preclude the admissibility of the communication.

7.1. By a note dated 17 February 1984, the State party invoked rule 93 (4) of the Committee's provisional rules of procedure, which provides that "the Committee may review its decision that a communication is admissible in the light of any explanation or statements submitted by the State party pursuant to this rule". In doing so the State party specifically relied on that part of the Committee's decision on admissibility indicating the possibility of review.

7.2. Referring to the Committee's conclusion that the State party had not established that a declaratory judgement was an available domestic remedy in the circumstances of the case, the State party now submits, I . inter alia, that an act on seeking to have declared unlawful the refusal of the competent :prison authorities to let the alleged victims participate in the election of 13 April 1981 would have been admissible in the Federal Court, Trial Division.... In particular, Canada contends that the action would not have been dismissed on any of the following preliminary grounds:

> (i) that a declaration is not available against the Crown;
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> (ii) that it would pertain to events concluded in the past, in regard to which no practical remedy or consequential relief was any longer available; or
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> (iii) that it did not disclose a reasonable cause of action.

In regard to (i), it is well established in Canadian law that a declaration may be granted against the Crown (The King v. Bradley [19411 S.C. R. 270). The statutory basis for granting such a declaration is section 18 of the Federal Court Act, R.S.C. 1970 2nd Supp. c. 10, which reads as follows:

18. The Trial Division has exclusive original jurisdiction
"(a) to issue an injunction, writ of certiorari, writ of mandamus, or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

> "(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada to obtain relief against a federal board, commission or other tribunal."

Indeed, in McCann v. The Queen, the case cited by the authors of this communication, a declaration was granted against the Crown.

In regard to (ii), Canada notes that the fact that the declaration would pertain to events concluded in the past, in regard to which no practical remedy or consequential relief was any longer available, would not render an action for a declaration inadmissible. Again, the McCann case provides authority for this point. The plaintiffs in that case were no longer being held in solitary confinement units at the time that the court considered their case. Nevertheless, the declaration was not refused on the ground that it would be of no practical utility. Rather, Heald, J., noted that it would provide practical guidance for the future as to the acceptable nature of solitary confinement units. . . .

Similarly, in the present case, although it is too late to provide the authors of the communication with the opportunity to vote in the 1981 Quebec election, a declaration that the Solicitor General had acted illegally would certainly give him practical guidance as to the course he should take in regard

to future Quebec elections.

Canada also notes that in Solosky v. The Queen [1980], 1 S.C.R. 821, the Supreme Court of Canada indicated at 830 that so long as a "real issue" is involved, and particularly if it is an "important" one, the courts should not dismiss applications for declarations on the ground that they are lacking in practical effect and are of a hypothetical or academic nature. . . .

In regard to (iii), the authors of the communication have submitted that "after the elections, in the state of the law as it was before the adoption of section 3 of the Constitution Act of 1982, an action for a declaratory judgement did not constitute an effective and sufficient domestic remedy ensuring respect for their right to vote". It is submitted on behalf of Canada that, although it is not possible to predict the outcome of an action for a declaration in the circumstances of this case, there would appear to be sufficient legal basis for the action that it would not be struck out by a court pursuant to Rule 419 (1) of the Federal Court Rules. . . .

As the Supreme Court of Canada has indicated in Attorney-General of Canada v. Inuit Tapirisat of Canada et al. [19801 2 S.C.R. 735 at 740:

> "On a motion to strike [pursuant to Rule 419 (1)] a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the Court is satisfied that 'the case is beyond doubt' . . .".

7.3. The State party further submits

that executive authorities are sufficiently bound to give effect to declaratory judgements in similar circumstances arising in the future for a declaration to constitute an effective and sufficient available domestic remedy in the circumstances of this case.

The legal status of a declaration in Canada is as follows. A declaration is a statement of the law made by a judicial tribunal with authority to determine the nature of such law; it forms a binding precedent and, moreover, renders any issue determined by it res judicata (Canadian Warehousing Association v. The Queen [1969] S.C.R. 176)....

Although a declaration does not pronounce any direct sanction against a defendant if he or she fails to respect it, it is nevertheless a legal remedy of practical effectiveness in Canada. Indeed, one of the principal criteria taken into account by the courts in determining whether they have jurisdiction to grant a declaration is whether it would serve some practical use . . . In particular, as pointed out by Canada in its previous submissions on the admissibility of this communication, it is an established practice in Canada that the Crown will treat a declaration as equivalent to a judgement of mandatory effect. As noted in The King v. Bradley [1941] S.C.R. 270 at 276, "The subject's right to relief is declared by the Court in full assurance that the Crown will give effect to the right so declared". . .

Indeed, it is therefore in regard to the Crown that declarations are regarded as especially useful and effective remedies. Thus, in Gruen Watch Co. v. A.G. of Canada [1950] O.R. 429, McRuer, C.J.H.C. said the following at 450:

> "This peculiar right of recourse to the Courts (the declaratory order) is a valuable safeguard for the subject against any arbitrary attempt to exercise administrative power not authorized by statute, and judges ought not to be reluctant to exercise the discretion in them where a declaration will afford some protection to the subject against the invasion of his rights by unlawful administrative action.,,

7.4. In response to the allegation of the authors that the declaration granted in the McCann case was not given practical effect by the Crown, and that therefore a declaration is not an effective remedy in Canada, at least in so far as it pertains to the Solicitor General, Canada makes the following observations:

> (i) In the McCann case, Heald, J., declined to grant a declaration that the Penitentiary Service Regulation authorizing the imposition of solitary confinement was invalid pursuant to the Canadian Bill of Rights as authorizing cruel and unusual punishment. Rather, he found that the particular conditions in the specific solitary confinement units in which the plaintiffs had been held were contrary to the Canadian Bill of Rights. Therefore, the fact that there are still solitary confinement units of a different character in other federal penitentiaries does not indicate that the Crown does not respect the rights set forth in declarations. Indeed, it notes that the reason the correction unit in which the plaintiffs had been held was closed for four months (as indicated in the submission of the authors of the communication) was to correct conditions so as to ensure that they complied with the declaration granted in the McCann case.
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> (ii) There were many factors that Heald, J., took into account in determining chat [he conditions in the solitary confinement units in which the plaintiffs had been held constituted cruel and unusual punishment, including such matters as the size of the cells, their inadequate ventilation, the insufficient time available to inmates for outdoor exercise, and more guards being involved in "skin frisks" than was necessary (at 601-04). These are all factors which involve a matter of degree, and it is therefore inevitable that controversy will arise as to whether subsequent conditions in these units changed sufficiently for there to have been compliance with the declaration. This complicating factor would not arise in regard to the issue of whether there had been compliance with a declaration that prison inmates had been improperly denied the means of exercising their right to vote in a Quebec general election.

If a declaration were granted in this case, it would pertain to events in the past in regard to which there is no consequential relief or practical remedy presently available. However, the power of a declaration does not lie in any sanction it pronounces against the defendant, but rather, in the circumstances of this case, in the respect the Crown necessarily has for binding statements of the law made by the judiciary. It therefore by no means follows that such a declaration would be devoid of practical effect. Indeed. as indicated above. the declaration in the McCann case pertained to past events, but it was nevertheless granted by the court because of the practical guidance it would provide for conduct in the future . . . Similarly, in the Solosky case it was assumed by the Supreme Court of Canada that if a declaration relating to future events were granted against the Crown, it would be of practical effect. Certainly in the present case. Canada can assure the Human Rights Committee chat if a final declaratory judgement were granted that the Solicitor General had acted

illegally in not taking the steps necessary to permit inmates in federal penitentiaries to vote in the Quebec general election of 13 April 1981, such steps would be taken by him or her in regard to future Quebec general elections as a necessary consequence of the declaratory judgement.

7.5. The State party "reiterates its claim that the present communication is inadmissible because of the failure of its authors to exhaust all available domestic remedies, and requests the Human Rights Committee to reconsider its decision on the admissibility of this communication. There are in fact two remedies available to the authors that have not been exhausted by them:

> (i) The authors failed to seek a declaration that their rights had been Violated in Elie circumstances of the Quebec election of 13 April 1981. An action for such a declaration would be admissible in the Canadian courts and if granted would have a practical effect on the future course of conduct of Canadian authorities.
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> (ii) The authors failed to seek a declaration to the effect that in upcoming Quebec elections it would be contrary to section 3 of the Canadian Charter of Rights and Freedoms for the Solicitor General not to cake the steps necessary to enable them to vote in such elections. Section 24 of the Charter has been so interpreted as to extend to prospective infringements or denials of Charter rights as well as to the past. It is therefore submitted that an action for such a declaration was available to the authors, and moreover would have constituted an acceptable ex post facto remedy for their complaint.

8. The State party also submits extensive explanations and statements on the substance of the matter, and argues that it has not violated its obligations pursuant to article 2 (1) and (3) (b) of the International Covenant on Civil and Political Rights to respect the rights set forth in article 25 (b) of the Covenant. In particular, Canada submits that the refusal of the Solicitor General to take steps to enable inmates in federal penitentiaries to vote in the Quebec general election of 13 April 1981, did not constitute an unreasonable restriction upon their rights as set forth in article 25 (b) for the following reasons:

> (i) Because of the substantial administrative problems involved in enabling inmates in federal penitentiaries to vote in general elections, it was not unreasonable to deprive them of the opportunity to vote in the Quebec election held on 13 April 1981.
>
> (ii) It is not unreasonable to withhold the right to vote in general elections from people who have engaged in criminal misconduct sufficiently serious to justify their detention in a federal penitentiary.

9 . The deadline for the presentation of the authors' comments on the State party's submission under article paragraph 2, expired on 10 July 1984, during the Committee's twenty-second session. Because of the complexity of the subject-matter, the Committee deferred review of the admissibility of the case until its twenty-third session and, again, until its twenty-fourth session. No comments have been received from the authors.

10.1. Pursuant to rule 93, paragraph 4, Of its provisional rules of procedure the Human Rights Committee has reviewed its decision on admissibility of 25 July 1983. On the basis of the additional

information provided by the Canadian Government, the Committee concludes that the authors could have obtained redress for the violation complained of by seeking a declaratory judgement. The Committee has stressed in other cases that remedies whose availability is not reasonably evident cannot be invoked by the Government to the detriment of the author in proceedings under the Optional Protocol. According to the detailed explanations contained in the submission of 17 February 1984, however, the legal position appears to be Sufficiently clear in that the specific remedy of a declaratory judgement was available and, if granted, would have been an effective remedy against the authorities concerned. In drawing this conclusion, the Committee also takes note of the fact that the authors were represented by legal counsel.

10.2. Given the availability of a declaratory judgement as demonstrated by the State party concerned, the Committee does not feel it necessary to deal with the question as to whether a domestic remedy such as the one provided for in section 24 (1) of the Canadian Charter of Rights and Freedoms, which was established after he submission of the communication to the Human Rights Committee, needs to be resorted to in order to comply with the requirements set forth in article 5, paragraph 2 (b), of the Optional Protocol.

11. In the light of the above considerations, the Committee finds that it is precluded under article 5, paragraph 2 (b), of the Optional Protocol from considering the merits of the case and decides:

(1) The decision of 25 July 1983 is set aside;

(2) The communication is inadmissible.

Notes:

a/ Section 24 (1) provides for remedies when a provision of the Charter is violated:

"Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."