**HUMAN RIGHTS COMMITTEE**

**S. H. B. v. Canada**

**Communication No. 192/1985**

**24 March 1987**

**ADMISSIBILITY**

*Submitted by: S. H. B. (name deleted) on 13 August 1985*

*Alleged victim: The author*

*State party: Canada*

*Declared inadmissible: 24 March 1987 (twenty-ninth session)*

## Decision on Admissiblity

1. The author of the communication (initial letter of 13 August 1985 and subsequent letters of 19 December 1985, 25 March and 10 June 1986) is S. H. B., a Canadian naturalized citizen born in Egypt in 1942, at present practicing medicine in the Province of Alberta. He submits the communication in his own name and on behalf on his son A. B., born in April 1976 in Canada. He alleges violations of articles 2, 3, 7, 8, 14, 15, 23 and 26 of the International Covenant on Civil and Political Rights by federal and provincial authorities in Canada.

2.1. The author states that he was married to J. M. B., a Canadian nurse, on 20 January 1976, because of her advanced pregnancy; their son A. was born less than three months later. As a result of marital disagreements and the husband's allegation of "mental cruelty", the spouses were separated by a separation agreement of December 1977, and divorced in June 1982. The author's communication concerns alleged violations of his rights under the Covenant during the divorce proceedings, in particular in connection with the lower court's decision to grant custody of the child to the mother under the Canadian Divorce Act, to award her alimony and child support in the amount of $800 per month and to divide matrimonial property on the basis of a retroactive application of the new Matrimonial Property Act of the Province of Alberta. Such dispositions allegedly constituted a gross abuse of judicial discretion by the judge concerned of the Trial Division of the Court of Queen's Bench of Alberta.

2.2. In particular, the author claims to be a victim of violations of:

(a) Article 2 of the Covenant, because "Canada failed to ensure that there is an effective remedy to the violation of my human rights, notwithstanding that the violations have been committed by persons acting in an official capacity' ';

(b) Article 3, because "the Government of Canada and the Government of Alberta failed to take appropriate steps to prevent discrimination based on sex in the implementation of laws governing child custody and division of matrimonial property";

(c) Article 7, because the Matrimonial Property A which gives judges "absolute and unchallengeable discretionary powers" exposed him to "cruel, inhuman and degrading treatment" by subjecting him "to t whims of the judge, and his prejudices";

(d) Article 8, paragraph 2, of the Covenant, because "I am, in effect, held in servitude for an indefinite period of time to my ex-spouse. I am forced to provie luxury to my ex-spouse, without any provisions whatsoever for the discontinuation of this state < servitude";

(e) Article 14, because he was tried "before tribunal, whose competence and impartiality are in vel grave doubt";

(f) Article 15, because of the retroactive application to him of the Matrimonial Property Act;

(g) Article 23, paragraph 4, because Canada has failed to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage during marriage, and at its dissolution", as manifested by a "systematic denial of fathers' rights by the courts of Canada generally, and Alberta specially";

(h) Article 26, because "there exists in Canada,: present, a rampant and blatant discrimination again men at the dissolution of marriage".

2.3. The author further argues that the granting c unrestricted and unchallengeable discretionary power to judges in matters of division of matrimonial property and awarding of child custody goes literally against the essence of justice. "If the purpose of all laws is to protect one human from the arbitrary will of another, the idea of awarding a judge unrestricted and unchallengeable discretionary powers amounts to suspension of the rule of law in favour of the rule of the individual. The unrestricted discretionary powers c judges is literally against the intent and the purposes o the entire International Covenant on Civil and Politic~ Rights, and is indeed unconstitutional according to the Canadian Charter of Rights." In his own case he claim that the trial judge "has been sexist and racist" possibly because the author is of Egyptian origin and hi ex-wife was born and raised in the trial judge's home town.

2.4. With regard to the exhaustion of domestic remedies, the author states that he has appealed to the, Supreme Court of Alberta, but that the court of appeals refused to investigate the trial judge's use of discretion and that no written reasons were given for refusing to consider the appeal. The author has also addressee himself to the Chief Justice of Alberta, the Judicia Council, the Minister of Justice of Canada, the Minister of Justice of

Alberta, and the Provincial Ombudsman of Alberta, without success, because the judge's powe of discretion is considered beyond challenge and thus no investigations were conducted. The author indicate: that he could still make an appeal to the Supreme Court of Canada, but explains that this would not be a practical option because the main issue is the judge's use of discretion and the current law provides that the judge has absolute discretion in matters of awarding child custody and division of matrimonial property, and thus the Supreme Court could not overturn the lower court's decision without a legislative change. Moreover, even if the issue could be examined by the Supreme Court of Canada, the backlog of cases is such that review of his case would be impossible within a reasonable time.

3. By its decision of 15 October 1985, the Working Group of the Human Rights Committee transmitted the communication to the State party concerned, under rule 91 of the Committee's provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the author to provide clarification of his allegation that appeal proceedings before the Supreme Court of Canada would be unduly prolonged and not constitute an effective remedy.

4.1. In his submission dated 19 December 1985, the author refers to the time factor and indicates that it took no less than four and a half years for his case to come to court. This period included a year of waiting before proceedings could start, and another year of waiting until the Amicus Curiae completed his report which was handed to him less than a week before the date of the trial, thus precluding any effective professional challenge to the conclusions of the report. It took approximately two more years of waiting until the Appellate Division of the Supreme Court of Alberta heard his case and dismissed it, without giving any written reasons. He further states that:

litigants in Canada do not have a right~o appeal to the Supreme Court of Canada. Appeals may be heard only after application for leave to appeal is made to, and granted by, the Supreme Court of Canada, which may refuse, without giving any reasons, to hear any appeal. This is more likely to happen when the Provincial Appeal Court decision is--as in my case--unanimous.. . I have it on good authority that, even if leave to appeal is granted by the Supreme Court of Canada, the waiting would be no less than two years and very likely, four years or more.

4.2. The author again draws attention to the factual situation, recalling that:

legal separation between my ex-spouse and myself occurred when my son, A. P. B., was approximately one and a half years old. At present, my son is very close to the age of 10 years. By the time the issue comes to the Supreme Court of Canada, my son will likely be approximately 14 years of age. My financial loss as a direct consequence of a miscarriage of justice can be measured in the hundreds of thousands of dollars. Clearly, another four years of delay is totally unacceptable by any reasonable standards. Allowing the violations to my human rights and those of my son to continue unabated For another four years is, in itself, a gross travesty of justice.

4.3. The author also refers to the case of the Alberta Union of Provincial Employees which, after losing two court battles in Alberta with regard to the right to strike, submitted its case to the International Labour Organization, a United Nations body. The Union took its case to the United Nations after losing two battles in Alberta and before reaching the Supreme Court of Canada. The fact that the case was accepted before it reached the Supreme Court of Canada clearly indicates a recognition of the fact that the delay encountered in attempting to go to the Supreme Court of Canada is unacceptable.

5.1. In its submission under rule 91, dated 25 February 1986, the State party describes the factual situation in detail and argues that the communication is inadmissible because of non-exhaustion of domestic remedies and also on the ground of non-substantiation of allegations.

5.2. With regard to the author's claim concerning custody, the State party points out that while he appealed to the Court of Appeal of Alberta on the issues of maintenance and division of matrimonial property, he did not appeal on the issue of custody, although he could have done so pursuant to the Alberta Judicature Act of !980. Moreover, the State contends that the author has not substantiated his allegation that the custody ruling entailed violations of articles 7, 14, 23 and 26 of the Covenant. The fact that women are more often awarded custody of children upon divorce is insufficient substantiation.

5.3. With regard to the claim that article 2, paragraphs 1 to 3, and article 3 of the Covenant have been violated, the State party submits that although these provisions are relevant to a determination of whether other articles of the Covenant have been violated, they are not capable of independent violation in their own right. .-

5.4. With regard to maintenance and division of property, the State party notes that the author has failed to seek leave to appeal the judgement of the Alberta Court of Appeal to the Supreme Court of Canada. It is submitted that leave to appeal in at least 18 maintenance and/or matrimonial property cases has been granted by the Supreme Court of Canada since 1975 and that in eight of these cases the appeal was allowed. Thus, "leave to appeal to the Supreme Court of Canada on these matters is an effective and sufficient domestic remedy, although of course the relative merits of the case will affect the likelihood of relief being granted. Certain delays are inevitably involved in invoking the appellate jurisdiction 'of the highest court of any country, but Canada submits that the time periods involved in proceedings before the Supreme Court of Canada are not untoward in this regard, and that they are least prejudicial in matters such as the present, involving solely financial and property interests."

5.5. The State party also contends that the author has not substantiated his allegations concerning violations by Canada of the following provisions of the Covenant:

*(a) Article 7:* It is submitted that the author has not provided any substantiation of his claim to have been subjected to torture or cruel, inhuman or degrading treatment contrary to article 7 of the Covenant. In particular, it is contended that in order to substantiate this claim, it is not sufficient for the author to allege that he has been required to pay a total of $800 a month maintenance to his former wife and child, or that he was required to pay the lump sum of

$37,066 to his former wife upon divorce;

*(b) Article 8:* It is similarly submitted that the above allegation provides no substantiation of the claim that his right not to be held in servitude pursuant to article 8, paragraph 2, of the Covenant has been violated;

*(c) Article 14:* It is submitted that there has been no substantiation of the claim by the author that the trial judge was biased or incompetent in awarding $800 a month in maintenance to his former wife and child, or in granting his former wife a lump sum payment of $37,066 upon divorce. It is insufficient to allege that an unfavourable decision has been reached in order to substantiate a claim of bias or incompetence upon the part of a tribunal;

*(d) Article 15:* It is submitted that there has been no substantiation of the claim by the author that the application of the Matrimonial Property Act resulted in a violation of article 15 of the Covenant. Indeed, it is clear that the facts of this case fall outside the ambit of article 15, since it applies to the criminal rather than the civil process;

*(e) Article 23, paragraph 4:* It is submitted that there has been no substantiation of the author's claim that the maintenance and division of property awards violate article 23, paragraph 4, of the Covenant. In particular, it is submitted that it is necessary in these matters for judges to be granted a certain discretion, and that in any event the discretion is not an unfettered one in Canada;

*(f) Article 26:* It is submitted that there has been no substantiation of the allegation by the author that the maintenance and division of property award of the trial judge violated article 26 of the Covenant. In particular, no evidence has been provided of any discrimination on the basis of race or sex in the particular circumstances of the author's case.

6.1. In his comments of 25 March and 10 June 1986, the author states that if the Committee requires additional documentary substantiation, he will undertake to provide it. But, in the light of the extensive submissions and exhibits already presented, the author believes that sufficient substantiation has been provided to have the case declared admissible and to warrant further examination on the merits by the Committee. In particular, he argues that "the best substantiation of the allegations lies in the full text of the trial transcript, as well as other official documents, including the text of examination for discovery and four affidavits submitted to the Court of Queen's Bench of Alberta over the course of several years."

6.2. With regard to the allegations of violations by Canada of article 23, paragraph 4, and article 26 of the Covenant, the author states that, in addition to the evidence already provided, "there are numerous expert witnesses who would readily testify to the existence of rampant sexism, in my own case specifically, and in the implementation of child custody and division of matrimonial property laws, generally." Besides reiterating his allegations of "sexism and racism", the author submits ' 'that judges in Canada are protected from legal accountability, contrary to article 26." In this connection he cites a recent attempt to sue members of the Court of Appeal. The Master in Chambers dismissed the claim on the basis

that "judicial negligence does not constitute a cause of action at the common law".

6.3. With regard to the State party's contention that he has not exhausted domestic remedies with respect to the issue of custody, the author submits that "it has been the unanimous advice of several legal experts that the awarding of child custody is entirely within the discretion of the judge" and that therefore an appeal to the Court of Appeal would be totally futile. He could not, he argues, obtain a new evaluation of the facts by the Court of Appeal, and the only possibility of challenging the lower court's decision would be by establishing bias or misconduct on the part of the judge or of the Amicus Curiae. In pursuing this "unconventional means", he requested the Provincial Ombudsman in Alberta to conduct an investigation into the way the department of Amicus Curiae in Alberta is run. However, the author alleges that the Attorney-General of Alberta invoked technical objections, thus denying the ombudsman the opportunity to investigate the matter and to establish the author's allegations. He also reported the lower court judge to the Chief Justice of Alberta and to the Judicial Council. However, "the Judicial Council refused to conduct an investigation, thus effectively denying me the opportunity to prove my allegations of bias and denying me the means to ask for a new trial on the issue of custody." The author also forwards press reports showing that recently many other divorced fathers have unsuccessfully attempted to sue the Amicus Curiae, but that the Master in Chambers (who is not a judge) has blocked the legal action, "thus denying citizens of this province the fundamental constitutional right of having their cases determined in court."

6.4. The author concludes that domestic remedies, to the extent that they can be considered effective, have been exhausted. He further emphasizes the time factor "since the harm to my son continues until a solution is reached.' '

7.1. Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes in this respect, on the basis of the information available to it, that the author has failed to pursue remedies which the State party has submitted were available to him, namely, an appeal to the Court of Appeal on the issue of custody and an application for leave to appeal to the Supreme Court of Canada on the issues of maintenance and division of matrimonial property. The Committee has noted the author's belief that a further appeal on the issue of custody would be futile and that a procedure before the Supreme Court of Canada would entail a further delay. The Committee finds, however, that, in the particular circumstances disclosed by the communication, the author's doubts about the effectiveness of these remedies are not warranted and do not absolve him from exhausting them, as required by article 5, paragraph 2 (b), of the Optional Protocol. The Committee accordingly concludes that domestic remedies have not been exhausted.

8. The Human Rights Committee therefore decides:

(1) The communication is inadmissible;

(2) This decision shall be communicated to the author and to the State party.