HUMAN RIGHTS COMMITTEE

Venier and Nicholas v. France

Communication Nos. 690/1996 & 691/1996

11 July 1997

CCPR/C/60/D/690/1996 & 691/1996 *

DEAL JOINTLY & ADMISSIBILITY

Submitted by: Marc Venier and Paul Nicholas [represented by François Roux, lawyer in France]

Victims: The authors

State party: France

Dates of communications: 14 and 17 November 1995, respectively (initial submissions)

Documentation references: List - CCPR/C/CL/R.63/Add.2
Prior decisions - Special Rapporteur's rule 91 decisions, both transmitted to the State party on 9 April 1996 (not issued in document form)

Date of present decision: 11 July 1997

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

A. Decision to deal jointly with two communications

The Human Rights Committee,

Considering that communications Nos. 690/1996 and 691/1996, refer to closely related issues affecting the authors,

Considering further that it is appropriate to deal jointly with the two communications,

1. Decides, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with these two communications,

2. Further decides that this decision shall be communicated to the State party and the authors of the communications and to their counsel.

B. Decision on admissibility

1. The authors of the communications, dated 14 and 17 November 1995, are Paul Nicholas and Marc Venier, French citizens born in 1968 and 1967, respectively, and currently domiciled at Gabarret, France and Audincourt, France, respectively. They claim to be victims of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. The authors are represented by counsel, who has provided two duly signed powers of attorney.

The facts as submitted by the authors

2.1 The authors, recognized conscientious objectors, began their civilian service duties on 23 June 1988 (Mr. Nicholas) and 16 November 1989 (Mr. Venier). After approximately one year of service, the authors notified the authorities that they intended to cease performing their civilian service duties, and did so on 1 July 1989 and 1 February 1991, respectively. The authors invoked the allegedly discriminatory character of article 116 (6) of the National Service Code (Code du service national), pursuant to which conscientious objectors had been required to carry out civilian national service duties for a period of 24 months, whereas military service had not exceeded 12 months.

2.2 The authors were charged before the Criminal Court (Tribunal Correctionnel) of Paris and the Criminal Court of Orléans, respectively, with desertion in peacetime, pursuant to articles 398 and 399 of the Code of Military Justice. On 4 July 1991, the Criminal Court of Paris found Mr. Nicholas guilty as charged and sentenced him to one year's imprisonment; and 17 June 1992 the Criminal Court of Orléans found Mr. Venier also guilty and sentenced him to 10 months' imprisonment, rejecting the arguments of the defence, which had invoked articles 9, 10 and 14 of the European Convention on Human Rights and articles 18 and 19 of the Covenant.

2.3 On appeal by Mr. Nicholas, the Paris Court of Appeal confirmed the guilty verdict but modified the sentence in a default judgement, giving the author a one-year suspended prison sentence. On 8 February 1993, the Court of Appeal of Orléans confirmed the Criminal Court's decision concerning Mr. Venier but reduced the sentence to eight months' imprisonment (of which six months were suspended) and reclassified the offence to that of insubordination of peacetime (art. 397 of the Code of Military Justice). On 14 December 1994, the Court of Cassation rejected the authors' further appeals, holding that article 116 (6) of the National Service Code was not discriminatory and did not violate articles 9, 10 and 14 of the European Convention on Human Rights. With that latter decision, all available remedies have been exhausted.

The complaints

3.1 According to the authors, both article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months of civilian service for conscientious objectors) and

article L. 2 of the National Service Code in its version of January 1992 (as amended by Act No. 92-9 of 4 January 1992), which sets the duration of civilian service for conscientious objectors at 20 months, violates articles 18, 19 and 26, juncto article 8, of the Covenant in that they double the duration of service for conscientious objectors in comparison with that for persons performing military service.

3.2 The authors acknowledge that in case No. 295/1988,[1] the Committee had held that an extended length of alternative service was neither unreasonable nor punitive, and had found no violation of the Covenant. However, they invoke and quote at length from the individual opinions appended to the Committee's views by three of its members, who had concluded that the challenged legislation was not based on either reasonable or objective criteria, such as a more severe type of service or the need for special training in order to perform the longer service. The authors fully endorse the conclusions of those three members of the Committee.

3.3 The authors observe that articles L. 116 (2) to L. 116 (4) of the National Service Code provide for a rigorous test of the sincerity of the convictions of a conscientious objector. Each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he refuses, an appeal to the Administrative Tribunal is possible under article L. 116 (3). In such circumstances, the authors argue, it cannot be assumed that the length of civilian service was fixed purely for reasons of administrative convenience, since anyone agreeing to perform civilian service twice (or almost) as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have a punitive character, which is not based on reasonable or objective criteria.

3.4 In support of their contention, the authors invoke a judgement of the Italian Constitutional Court of July 1989, which held that the provision for non-military service lasting eight months longer than military service was incompatible with the Italian Constitution. They further point to a decision adopted by the European Parliament in 1967 which, on the basis of article 9 of the European Convention on Human Rights, suggested that the duration of alternative service should be the same as that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not have a punitive character and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R (87)8 of 9 April 1987). Finally, the authors note that the United Nations Commission on Human Rights has declared, in a resolution adopted on 5 March 1987 [2], that conscientious objection to military service should be regarded as a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In these circumstances, the authors submit that requiring them to perform civilian service that is twice as long as military service constitutes unlawful and prohibited discrimination on the basis of opinion, and that the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service constitutes a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party contends firstly that the communications are incompatible ratione materiae with

the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland) that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that domestic remedies have not been exhausted by the authors. In this connection, it submits that the authors of the communications have exhausted the judicial remedies open to them, but have not exhausted all administrative remedies. The argument put forward in this connection is that, by leaving their duty stations before having received replies from the military authorities concerning their requests for a reduction in the length of their service, the authors violated the provisions of the National Service Code, thus becoming liable to criminal prosecution, and did not wait for the military authorities to refuse their requests and then bring the matter before the Administrative Tribunal.

4.3 Third and last, the State party contends that the authors do not qualify as victims of a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, quoting the decision on communication No. 185/1984 cited above, that as the authors were "not prosecuted and sentenced because of [their] beliefs or opinions as such, but because [they] refused to perform military service", they cannot therefore claim to be victims of a violation of articles 18 and 19 of the Covenant.

4.4 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the authors complain of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria" (communication No. 196/1985, Gueve v. France). The State party argues in this connection that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army, and that a longer period of alternative civilian service constitutes a test of the sincerity of conscientious objectors, designed to prevent conscripts from claiming conscientious objector status for reasons of comfort, ease and security. The State party quotes the Committee's views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the eight-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the authors is based on the principle of equality, which requires different treatment of different situations.

4.5 For all of these reasons, the State party requests the Committee to declare the communications inadmissible.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the authors cite the Committee's General Comment No. 22 (48), where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service". According to the authors, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 The authors claim that the problem posed in their case lies not in the possible infringement of conscientious objectors' freedom of belief by French legislation, but in the conditions for the exercise of that freedom, since alternative civilian service is twice the length of military service, without this being justified by any provision to protect public order, in violation of article 18, paragraph 3, of the Covenant. The authors invoke in this context the Committee's General Comment No. 22 (48), which states that "limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. (...) Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner", and concludes that requiring conscientious objectors to perform alternative civilian service which is twice the length of military service constitutes a discriminatory restriction on the enjoyment of the rights set forth in article 18 of the Covenant.

5.3 As to the question of the exhaustion of domestic remedies, the authors state that domestic remedies in respect of the criminal proceedings brought against them have, in fact been exhausted since the Court of Cassation dismissed their appeals against the Court of Appeal judgements on 14 December 1994. With regard to the non-exhaustion of administrative remedies, the authors maintain that such remedies were not open to them inasmuch as, not having been notified of any administrative decision, they could not bring the matter before the Administrative Tribunal.

5.4 Concerning the alleged violation of article 26, the authors claim that requiring a period of civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the authors argue that there is no justification for making civilian service twice the length of military service; in fact, unlike in the Järvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L. 116 (2) and L. 116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces following an examination which may result in refusal. Nor is it justified in the general interest or as a test of the seriousness and sincerity of the beliefs of the conscientious objector. Indeed, the mere fact of taking special steps to test the sincerity and seriousness of the beliefs of conscientious objectors in itself constitutes discrimination based on the recognition of a difference

of treatment between conscripts. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground. In conclusion, the author considers that there is a difference of treatment for conscientious objectors which is not based on any reasonable and objective criterion and which therefore constitutes a violation of article 26 of the Covenant.

Issues and proceedings before the Committee

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

6.2 The Committee has taken note of the State party's arguments concerning the incompatibility of the communications ratione materiae with the provisions of the Covenant. In this regard, the Committee considers that the matter raised in the communications does not concern a violation of the right to conscientious objection as such.

6.3 Concerning the requirement of exhaustion of available domestic remedies, the Committee takes note of the fact that the authors have exhausted all the judicial remedies that were open to them. As to the argument of the State party that the authors have not exhausted all administrative remedies, the Committee notes that it does not appear from the State party's observations that any administrative decision was taken against the authors, and that consequently no administrative remedy was immediately available to them at the time of the interruption of their civilian service. Nevertheless, the Committee notes that by not waiting for the military authorities to respond to their decisions to interrupt their civilian service after one year, and by choosing to leave their posts after merely notifying those authorities, the authors voluntarily did not avail themselves or administrative remedies although, as the State party underlines in its observations, it was open to them to lodge an administrative appeal by virtue of the Council of State's Nicolo judgement of 20 October 1989 challenging the applicability of a law as being contrary to the State party's international commitments to protect human rights. Notwithstanding this argument, however, the Committee notes that administrative remedies are no longer available to the authors of the communications at this stage of the proceedings. The Committee therefore concludes that it is not prevented by article 5, paragraph 2 (b), of the Optional Protocol from dealing with the communications.

6.4 The Committee considers that the authors have sufficiently substantiated their claim, for the purposes of admissibility, that the communications may raise issues under provisions of the Covenant.

7. The Committee therefore decides:

(a) that the communications are admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party

shall requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments he may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) that this decision shall be communicated to the State party, to the authors and to their counsel.

[Done in English, French and Spanish, the English text being the original version.]

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* All persons handling this document are requested to respect and observe its confidential nature.

1/ Järvinen v. Finland, Views adopted on 25 July 1990, paras. 6.4 to 6.6.

2/ E/CN.4/1987/L.73 of 5 March 1987.