HUMAN RIGHTS COMMITTEE

Van Puyvelde v. France

Communication No 1049/2002 *

26 March 2003

CCPR/C/77/D/1049/2002

ADMISSIBILITY

Submitted by: Philippe Van Puyvelde

Victim: The author

State party: France

Date of communication: 31 December 2001 (initial submission)

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

Meeting on 26 March 2003,

Adopts the following:

Decision on admissibility

1. The author is Mr. Philippe Van Puyvelde, a French citizen born on 20 March 1960 in Bergerac, France. He claims to be the victim of violations by France of, inter alia, articles 14, 15, 16, 17 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2.1 The author mentions four cases before a family court judge and two criminal cases involving him.

Cases before the family court judge

2.2 In a judgement dated 11 March 1997, the family court judge of the Carcassonne regional court dissolved the marriage between Ms. F. Zink and the author, with fault ascribed exclusively to the author, and ruled that the children's habitual place of residence should be the mother's home. The judge also ordered the author to pay maintenance of 400 francs a month towards the upkeep and education of the two children, noting that the author "does not object to this extremely reasonable request [from the mother], which should therefore be granted".

2.3 The author appealed against the judgement, which was upheld by the Montpellier appeal court on 30 October 1997.

2.4 Once the divorce had been granted, various proceedings were conducted to deal with measures concerning the children (parental authority and maintenance).

Application by the author to have the children's habitual place of residence changed (file No. 98/00312)

2.5 On 23 February 1998, the author applied to the family court judge to have his home declared the children's place of residence.

2.6 The author was assisted by a lawyer assigned to him under the legal aid scheme.

2.7 In an order dated 2 July 1998, the family court judge appointed a psychologist to look into the matter. The psychologist concluded that the interests of the children were best served by maintaining the current situation. In an order dated 2 November 1998, the family court judge dismissed the author's application.

Application by the author to have the maintenance order rescinded or modified (file No. 2000/00904)

2.8 On 2 May 2000, the author brought proceedings against Ms. F. Zink with a view to having the maintenance order rescinded on the grounds of persistent insolvency and the criminal proceedings against him for wilful desertion of his family.

2.9 The two parties attended a hearing on 6 July 2000. The author was assisted by a lawyer assigned to him under the legal aid scheme.

2.10 In an order dated 15 September 2000, the family court judge dismissed the author's request on the grounds that: (a) the author had never paid what was merely a token amount of maintenance, despite claiming to be a responsible father; (b) his fear of being punished for wilful desertion of his family did not constitute grounds for rescinding the maintenance order, as the author had been taking a calculated risk since 1997 in flouting the law and not requesting any change in his maintenance obligations, and he alone should suffer the consequences; (c) while the author's financial situation was modest, the fact remained that his children's essential needs had not diminished since 1997 and that he had produced no evidence that he had been very active since

then in looking for a job which paid at least the statutory minimum wage and which would enable him to fulfil his maintenance obligations; and (d) under the law, parents with parental authority had rights and duties with respect to custody, supervision, education and, first and foremost, maintenance. The law attached particular importance to the duty to provide maintenance: article 373 of the Civil Code actually specified that fathers or mothers who, inter alia, had been found guilty of wilful desertion in one of its various forms were forbidden from exercising, or were temporarily stripped of, parental authority until at least six months had passed since they had resumed compliance with their obligations.

Application by the author's ex-wife to have the visiting rights and staying access modified (file No. 2001/00925)

2.11 On 18 June 2001, Ms. F. Zink applied to the family court judge to have the father's visiting rights and staying access modified.

2.12 The parties were assisted by a lawyer in the course of these proceedings.

2.13 On 18 September 2001, the family court judge modified the father's staying access and visiting rights. The judge also dismissed the author's application to have the maintenance order rescinded, pointing out that there had been no change in circumstances since the previous decision.

Criminal cases

2.14 The author mentions two criminal cases against him for wilful desertion of his family.

First set of proceedings for wilful desertion (file No. 99/00046)

2.15 On 8 February 1998, Ms. F. Zink lodged a complaint against the author for non-compliance with the maintenance order of 11 March 1997.

2.16 The author attended the hearing before the criminal court in Carcassonne on 28 October 1998, where he was assisted by a lawyer. The author repeated the statements he had made to officers of the gendarmerie on 25 February 1998, to the effect that the reason for his non-payment of maintenance was a lack of sufficient funds.

2.17 In a judgement dated 2 December 1998, the criminal court found the author guilty as charged and gave him a six-month suspended prison sentence with probation, as well as ordering him to pay the complainant 2,000 francs in damages.

2.18 On 2 December 1998, the author appealed against the judgement. The Public Prosecution Service filed a cross-appeal on the same date.

2.19 On 31 January 2000, the author was served with a summons to appear at a hearing in the Montpellier appeal court on 4 April 2000.

2.20 By letter of 1 March 2000, the author applied for an adjournment to give him time to prepare

his defence, arguing that he had dismissed the lawyer assigned to him under the legal aid scheme. The author did not attend the public hearing on 4 April 2000.

2.21 In a decision dated 9 May 2000, the Montpellier appeal court upheld the conviction and sentenced the author to six months' imprisonment, four of which were suspended, and a probationary period of two years, and ordered him to prove that he was contributing to family expenses or regularly paying the maintenance for which he was liable. The court also confirmed the civil arrangements contained in the judgement. It found the author's application for adjournment groundless, since the author had been given sufficient notice to allow him to take all necessary steps to prepare his defence, he had dismissed the lawyer assigned to him under the legal aid scheme and, as the complaint concerned non-payment of maintenance, he could have attended the hearing himself to produce any evidence he intended to use.

2.22 On 24 May 2000, the author appealed to the Court of Cassation through an advocate in council.

2.23 On 14 February 2001, the Court of Cassation dismissed the appeal.

Second set of proceedings for wilful desertion (file No. 00/01265)

2.24 On 29 December 1999, Ms. F. Zink lodged a complaint against the author for non-payment of maintenance.

2.25 At a public hearing before the Carcassonne criminal court on 5 May 2000, the author repeated the statements he had made to officers of the gendarmerie on 18 January 2000, to the effect that the reason for his non-payment of maintenance was a shortage of funds.

2.26 After hearing the parties, each of whom was assisted by a lawyer, the Carcassonne criminal court, in an adversary judgement on 5 May 2000, found the author guilty as charged and gave him a four-month suspended prison sentence with a probationary period of 18 months, and ordered him to pay his ex-wife maintenance and 2,000 francs in damages.

2.27 The author lodged an appeal on 15 May 2000. The Public Prosecution Service filed a cross-appeal.

2.28 The author was served with a summons to attend a public hearing in the Montpellier appeal court on 13 February 2001. In a letter dated 12 February 2001, the author asked the court to appoint a lawyer to defend him and said that he would be unable to attend the hearing on 13 February 2001. In an interlocutory decision dated 13 March 2001, the appeal court ordered that the trial hearing should be resumed on 18 September 2001, after the accused and the claimant for criminal indemnification had been summoned again and a lawyer had been assigned to the applicant by the President of the Bar. A lawyer was assigned to him on 10 July 2001.

2.29 The author did not attend the hearing in the Montpellier appeal court on 18 September 2001, but his lawyer addressed the court.

2.30 In a decision of 16 October 2001, the Montpellier appeal court upheld the judgement of 5 May 2000. The court stressed in particular the author's acknowledgement of the facts and his deliberate non-payment of maintenance, his only argument being that he had been unable to pay because his living costs, but not his income, had risen; yet he failed to indicate that he had applied to the family court for a reduction in maintenance.

2.31 The author has said he intends to appeal to the Court of Cassation. 1/

The complaint

3.1 The author claims that the State party has violated his rights under articles 14, 15, 16, 17 and 26, inter alia, of the International Covenant on Civil and Political Rights.

3.2 The author complains about the proceedings before the family court judge, claiming that the judge did not give him a fair hearing and failed to observe the rule that both parties should be heard, for example at a hearing on 6 July 2000 in the course of which the author says he was presented with arguments in chambers (file No. 2000/904).

3.3 The author criticizes the Montpellier appeal court for sentencing him to a prison term and increasing the sentence handed down by the criminal court when he had applied for an adjournment of the hearing to allow him to prepare his defence and when he had no assistance from a lawyer (file No. 99/00046).

3.4 The author also criticizes the French authorities for convicting him when it was simply impossible for him to pay. He claims to be the victim of an omission that does not constitute a criminal offence.

3.5 The author also considers that his legal status was not recognized and that the judgements against him constitute an attack on his reputation and honour.

3.6 The author claims to have exhausted domestic remedies. He adds that on 16 March 1995 he submitted a complaint to the European Commission of Human Rights, which declared it inadmissible on 28 February 1996. 2/ The author states that the Commission did not deal with the question of maintenance.

The State party's observations on admissibility

4.1 In its observations on admissibility dated 15 May 2002, the State party begins by pointing out that the complaint taken by the author to the European Commission of Human Rights was found to be inadmissible.

4.2 Moreover, the State party finds the author's communication vague in respect of the alleged violations of the Covenant. The State party points out that, while the author cites articles "14, 15, 16, 17 and 26 (the list is non-exhaustive)" as articles that were violated, he does not specify precisely what his complaints are against the French authorities. Nevertheless, the State party

believes that, on the basis of the facts submitted by the author, the complaints of violations of article 14, paragraphs 1 and 3 (d), and of article 15 of the Covenant can be considered.

4.3 The State party emphasizes that, firstly, the complaint based on article 15 of the Covenant is incompatible ratione materiae with the provisions of this article.

4.4 The State party explains that article 227 (3) of the French Penal Code stipulates that:

> "Failure by a person to comply with a judicial decision or a court-ratified agreement that requires that person to pay, for the benefit of a minor, legitimate, natural or adopted child, a descendant, an ascendant or a spouse, a pension, contribution, grant or any other form of payment due in accordance with one of the family obligations stipulated in titles V, VI, VII and VIII of Book One of the Civil Code, by allowing two months to pass without fully discharging this obligation, is punishable by two years' imprisonment and a fine of 100,000 francs."

4.5 Thus, a parent who fails to pay maintenance for which he or she is liable following a divorce faces criminal prosecution for the offence of wilful desertion. This offence is in the Penal Code and is perfectly applicable to the author's situation. According to the State party, the author has indeed been sentenced by the criminal courts for acts - failure to pay maintenance - that constitute criminal offences within the meaning of article 15 of the Covenant.

4.6 Secondly, the State party maintains that the claims made by the author are inadmissible because domestic remedies have not been exhausted.

4.7 With regard to the claim that the proceedings in the family court were unfair, the State party points out that the author is complaining that his evidence was not taken into account in this court, his children were not given a hearing and he was ordered to pay maintenance even though he has no income.

4.8 As far as the divorce proceedings are concerned, the author did not appeal to the Court of Cassation against the Montpellier appeal court's decision of 30 October 1997.

4.9 Likewise, as far as the post-divorce proceedings are concerned, the author did not appeal against the orders of the family court judge. Under the terms of article 187 of the new Code of Civil Procedure, an appeal against the decisions of a family court judge must be lodged within 15 days of notification of a decision.

4.10 The author did not appeal against the order of 2 November 1998 whereby the family court judge dismissed his application to have the residence of his two minor children changed (file No. 98/00312).

4.11 Nor did the author appeal against the order of 15 September 2000 whereby the family court judge dismissed his application to have the maintenance order against him rescinded or modified (file No. 2000/00904).

4.12 Lastly, the author did not lodge an appeal against the order of 18 September 2001 whereby the family court judge modified the author's visiting rights, ordered a social inquiry report and dismissed the author's application to have the maintenance order rescinded (file No. 2001/00925).

4.13 The State party adds that, in an order dated 29 March 2002, the judge in matrimonial causes withdrew the author's right to visit his children or have them stay with him. The author did not appeal against this order either.

4.14 The State party therefore believes that the author has not given the judicial authorities the opportunity to provide a remedy for the complaints he has now brought before the Committee. According to the State party, the author could, in fact, have challenged not only the decisions of the family court judge, for example those concerning the amount of maintenance, but also the procedure followed by the judge, including the procedure for exchanging documents and hearing the children.

4.15 With regard to the complaint about the unfairness of the criminal proceedings for wilful desertion (file No. 99/00046), the State party believes it should be pointed out that it was the author himself who dismissed the lawyer assigned to him under the legal aid scheme to assist him in the appeal process. Nevertheless, the author lodged an appeal to the Court of Cassation against the appeal court's decision and he was represented by an advocate in council assigned to him under the legal aid scheme.

4.16 However, the author invoked only one ground for his appeal, namely the insufficient reasons given for the sentence handed down by the appeal court. The State party points out that at no time did the author raise before the Court of Cassation the subject of any violation of the rights to a defence referred to in the complaint before the Committee, either in respect of domestic law or article 14, paragraph 3, of the Covenant.

4.17 The State party draws attention to the Committee's jurisprudence, wherein it is stated that "while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee" (communication No. 661/1995, Triboulet v. France). It also points out that the Committee had considered a communication inadmissible on the grounds that "before the Court of Cassation …… the author did not …… invoke the essence of the right protected by article 15 of the Covenant; accordingly, the highest domestic tribunal never was confronted with the author's argument ……" (communication No. 584/1994, Valentijn v. France).

4.18 The State party believes that, mutatis mutandis, the same principle should apply to the case in point. By not giving the Court of Cassation a chance to remedy the alleged violation, the author has not fulfilled his obligation to exhaust domestic remedies; hence the complaint is inadmissible.

4.19 Thirdly, the State party emphasizes that the author's other allegations are too vague to allow it to determine which complaints could be considered in relation to the provisions of the Covenant. The State party therefore requests the Committee to apply its jurisprudence and declare the

communication inadmissible in accordance with article 2 of the Optional Protocol, insofar as the author has not substantiated his allegations for the purposes of admissibility.

Author's comments on the State party's submissions on admissibility

5.1 In a letter dated 8 August 2002, the author claims to be the victim of a plot and oppression by lawyers and by the entire French judicial system. He says that the French courts have sided with his wife and tried to ruin him by insisting that he should pay maintenance to her. The author says that he has systematically exhausted all domestic remedies. However, he produces no documents to support his claims and adds nothing new to his original complaint. On the contrary, he even states that he did not appeal to the Court of Cassation against the Montpellier appeal court's ruling of 30 October 1997. Moreover, he says that he does not wish to comment on the State party's observations with regard to the inadmissibility of either the claim of unfairness in the criminal proceedings for wilful desertion (file No. 99/00046), on the grounds of non-exhaustion of domestic remedies, or the claims of violations of articles 16, 17 and 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 article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the alleged violations of articles 15, 16, 17 and 26 of the Covenant, the Committee considers that the author has not substantiated his allegations for the purposes of admissibility under article 2 of the Optional Protocol.

6.3 With regard to the alleged violations of article 14 of the Covenant, the Committee notes that the author has not exhausted domestic remedies in relation to the proceedings before the family court judge (divorce proceedings in connection with the order of 30 October 1997 and post-divorce proceedings in files Nos. 98/00312, 2000/00904 and 2001/00925), against which no appeal has been lodged, or in relation to the criminal proceedings for wilful desertion, either in the case of file No. 99/00046, in respect of which no violation of the rights protected by article 14 of the Covenant was raised in the appeal to the Court of Cassation, or in the case of file No. 00/01265, in respect of which the appeal to the Court of Cassation was submitted after the statutory deadline.

The Committee therefore declares these complaints inadmissible in the light of article 5, paragraph 2 (b), of the Optional Protocol.

7.1 The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in French, English and Spanish, the French 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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1/ According to the State party's observations dated 15 May 2002, the author lodged an appeal with the Court of Cassation on 16 November 2001. The appeal was found inadmissible by the Criminal Division of the Court of Cassation on 12 March 2002. Moreover, it appears from a letter sent by the author's lawyer and attached to the file that the deadline for lodging an appeal with the Court of Cassation had expired.

2/ The Commission found that: (1) the author's claims with regard to (a) the failure to respect family life by granting custody of the children to the mother (Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8), (b) inhuman treatment of the author (art. 3) and (c) the unfairness of the proceedings in the children's court (art. 6, para. 1) were ill-founded; (2) his claims with regard to the unlawfulness of the criminal charges brought against him for failure to hand over the children to the person with custody of them were groundless (art. 7); and (3) not all domestic remedies had been exhausted with regard to the complaint of a violation of the above-cited article 8.