



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2729/2016^{*,**}

Draft recommendation on admissibility proposed by the Special Rapporteur on new communications and interim measures

<i>Communication submitted by:</i>	X (represented by counsel, Mr. Grégory Thuan)
<i>Alleged victims:</i>	X and Y
<i>State party:</i>	Netherlands
<i>Date of communication:</i>	1 February 2016 (initial submission)
<i>Date of decision:</i>	14 July 2016
<i>Subject matter:</i>	Right not to be subjected to arbitrary or unlawful interference with the family; right of children to protection; protection of the family
<i>Procedural issues:</i>	Consideration of the same matter by another procedure of international investigation; non-substantiation of claims
<i>Articles of the Covenant:</i>	17, 23 and 24
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (a)

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Sarah Cleveland, Mr. Ahmed Amin Fathalla, Mr. Yuji Iwasawa, Ms. Ivana Jelić, Mr. Duncan Laki Muhumuza, Ms. Photini Pazartzis, Mr. Mauro Politi, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujlall Seetulsingh, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Mr. Olivier de Frouville did not participate in the consideration of the communication.



1.1 The author of the communication dated 1 February 2016 is Mr. X, a French national domiciled in France. He submits the communication on his own behalf and on behalf of his son, Y, born on 27 January 2013 in the Netherlands. The author claims that they are victims of a violation by the Netherlands of their rights under articles 17, 23 and 24 of the International Covenant on Civil and Political Rights.

1.2 On 2 October 2015, the Committee, acting through the Special Rapporteur on new communications and interim measures, determined that observations from the State party were not needed to ascertain the admissibility of the present communication.

Facts as presented by the author

2.1 The birth of Y in 2013 was a planned and intentional result of a relationship between the author and Z, a Netherlands citizen. In October 2012, then five months pregnant, the mother told the author that she would not give her consent, which he needed to recognize his child and jointly exercise parental authority under the law of the Netherlands. The relationship between the author and Z ended definitively in December 2012, despite the wish of the author that it should continue. Z refused to have the author present at the birth of Y at her home in the Netherlands. She decided unilaterally to have only her name registered on Y's birth certificate on 30 January 2013. The author was therefore able only to make an antenatal and a postnatal recognition of paternity of his son in Pau, France, on 24 December 2012 and 5 March 2013.

2.2 In the course of 2013, he was able to see his son only once, three weeks after his birth, in February 2013. In May 2013, Z refused to allow him to visit and returned a package containing a hundred items of clothing for Y. Five contacts via Skype for a few minutes each took place between October and November 2013, but they were stopped because Y had been left alone in front of the screen.

2.3 On 10 September 2013, the author applied to the Court of Guelders, in Arnhem, requesting basically that it order Z to take a genetic test if she challenged his paternity; that the Court, in place of Z, grant him substitute authorization to recognize the child; and that it assign him joint parental authority, together with the right of access and the right to have the child to stay with him. On 10 December 2013, the Court appointed a special guardian for Y. On 16 December 2013, the guardian said that she was unable to advise the Court and requested a further investigation. In a judgment of 23 May 2014, the Court of Guelders dismissed the author's requests, recalling that the only issue addressed was whether, given the possible harm that could be caused to Y were recognition of paternity to be allowed, it would represent "a real risk to the child's development and psychosocial and emotional balance". The Court considered, pursuant to paragraph 3 of article 1:204 of the Netherlands Civil Code, that, in the light of the great fear that Z felt towards the author, granting him substitute authorization to recognize the child would be excessively detrimental to the interests of the mother and her good relationship with Y.

2.4 The author appealed on 21 August 2014. In a final judgment of 29 January 2015, the Arnhem Leeuwarden Court of Appeal confirmed the 23 May 2014 ruling. The Court first recalled that the question of whether recognition created a relationship of lawful descent between the author and Y was determined by the law of the State of which the father had nationality, namely, France. However, the Court considered that, pursuant to the Civil Code, the law of the State of which the mother had nationality applied to the prior consent of the mother. It therefore considered that Netherlands law applied to the present case. On the merits, the Court considered that recognition of Y by the author would disproportionately risk harming the interests of Z and impairing Y's sociopsychological and emotional development. Among its reasons, the Court held that it was in the interest of Y to be brought up in a calm and stable environment, which would not be the case in the event of recognition of paternity.

2.5 In the meantime, the author brought an action for interim relief on 27 September 2013. In a ruling of 21 October 2013, the urgent applications judge dismissed the author's applications, except for the right to temporary contact, providing for the author and Y to see each other and speak once a week by Skype for at least 10 minutes, on Saturdays. On 7 November 2013, the author appealed, noting that he wanted to play an active role in his son's life and that mere indirect contact via Skype was manifestly inadequate and insufficient. Ruling on 25 March 2014, the Arnhem Court of Appeal reversed the contested interim judgment and declared the author's requests inadmissible on the ground that the author, having no personal connection with Y and having thus not developed a family life, did not meet the conditions laid down by the Civil Code. The Court considered that the requests were abundantly ill-founded on the grounds that there was no guarantee that Y would not become the subject of a non-return from abroad, given the attitude of the author (sending aggressive e-mails, multiple demands, recognition of Y in France, attempt to register Y at the French Embassy); that the child's safety was not sufficiently guaranteed at his father's residence if he were to visit and stay; and that the proposed right of access and right to have the child to stay would be "seriously detrimental" to Y.

2.6 The author claims to have exhausted all domestic remedies, despite the fact that he has not appealed on points of law against the Court of Appeal judgment of 29 January 2015. He considers that he was not obliged to exhaust such a remedy, in view of its inadequate and ineffective nature in cases relating to parental rights, in the light of the case law of the Committee and of the European Court of Human Rights.¹

2.7 On 28 July 2015, the author submitted an application to the European Court of Human Rights, which the Court, in a single-judge formation, declared inadmissible on 3 December 2015. The Court found that the conditions of admissibility laid down in articles 34 and 35 of the Convention had not been met.

2.8 During 2014, the author was able to see Y only three times, in February, September and October, at the home of Z under constant supervision of Z herself and of her parents. In 2015, Z refused all contact. The author has thus had no news of his child since October 2014.

The complaint

3.1 The author considers that the State party has violated its obligations under articles 17, 23 and 24 of the Covenant, in that the courts of the Netherlands did not take account of the best interests of Y in separating him from his father and in not allowing him to maintain regular personal relations with the latter. In particular, the domestic courts rejected his application for substitute recognition of paternity for frivolous and bizarre reasons. They did not take into account the serious and disproportionate consequences that their judgments would have on the establishment of a family relationship between Y and the author. The concept of the family under articles 17 and 23 of the Covenant is not limited to relations based on marriage and may include other de facto family ties when parties cohabit outside marriage. The non-recognition of the author's paternity of Y in the law of the Netherlands is a grave and serious interference with the right to respect for family life, and the consequences of such non-recognition amount to deprivation of all parental rights or parental authority. Moreover, the courts of the Netherlands have not taken account of the concept of the best interests of the child, focusing on the interests of Z to the detriment of those of Y.

¹ The author refers, inter alia, to communication No. 689/1996, *Maille v. France*, Views adopted on 10 July 2000, para. 6.2 (the Committee "observed that an appeal by the author to the Court of Cassation against the Court of Appeal's judgement of 23 January 1995 would undoubtedly have been rejected by the Court of Cassation, inasmuch as it had dismissed earlier similar appeals ...").

3.2 With regard to his claim under article 24 of the Covenant, the author argues that Y should be able to enjoy the right to maintain personal relations with both his parents. The courts of the Netherlands ought therefore to have guaranteed that there would be a link between Y and the author, in view of the fact that there are no exceptional circumstances justifying the termination of the bond between father and son.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has to ascertain, in accordance with article 5 (2) (a) of the Optional Protocol, whether the same matter is being examined under another procedure of international investigation or settlement. The Committee notes that, on 3 December 2015, a single-judge formation of the European Court of Human Rights found that the author's complaint, which had been filed against the Netherlands and which dealt with the same facts as those addressed in this communication, was inadmissible. Given that the complaint is no longer being examined by the European Court, the Committee considers that there are no obstacles to consideration of the communication under article 5 (2) (a) of the Optional Protocol.

4.3 The Committee notes the author's allegations that the rejection by the courts of the State party of his request for recognition of paternity has violated his and his son's rights under articles 17, 23 and 24 of the Covenant. According to the author, the courts have not taken into account his rights as a father and have undermined the possibility of him establishing a family relationship with Y. The Committee considers that these allegations relate essentially to the evaluation of the facts and evidence conducted by the domestic courts and the application of domestic legislation. The Committee recalls its constant case law that it is not a final instance competent to re-evaluate findings of fact or the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice.² In the present case, in view of the information in the case file, the Committee considers that the author has failed to substantiate for purposes of admissibility that the conduct of the domestic court amounted to arbitrariness or a denial of justice. Accordingly, these claims are inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision be communicated to the State party and to the author.

² See communication No. 1998/2010, *A.W.K. v. New Zealand*, inadmissibility decision adopted on 28 October 2014, para. 9.3; communication No. 541/1993, *Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2; communication No. 1528/2006, *Fernández Murcia v. Spain*, inadmissibility decision adopted on 1 April 2008, para. 4.3; and communication No. 1142/2002, *A.J.v.G. v. the Netherlands*, inadmissibility decision adopted on 27 March 2003, para. 5.5.