HUMAN RIGHTS COMMITTEE

Kall v. Poland

Communication No 552/1993**

14 July 1997

CCPR/C/60/D/552/1993*

VIEWS

Submitted by: Wieslaw Kall

Victim: The author

State party: Poland

Date of communication: 31 March 1993 (initial submission)

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

Meeting on 14 July 1997,

Having concluded its consideration of communication No. 552/1993 submitted to the Human Rights Committee by Mr. Wieslaw Kall under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 31 March 1993, is Wieslaw Kall, a Polish citizen, residing in Herby, Poland. He claims to be a victim of a violation of articles 2, paragraph 1, and 25 (c) of the International Covenant on Civil and Political Rights. The Covenant entered into force for Poland on 18 March 1977. The Optional Protocol entered into force for Poland on 7 February 1992.

Facts as submitted by the author

2.1 The author was employed in various positions in the Civic Militia of the Ministry of Internal Affairs for 19 years, and from 1982 to 1990 as a cadre officer of the political and educational section, at the senior inspector level. He stresses that the Civic Militia was not identical with the Security Police, and that he never wore the uniform of the Security Police but only that of the Civic Militia. On 2 July 1990, he was retroactively reclassified as a security police officer, and on 31 July 1990, he was dismissed from his post, pursuant to the 1990 Protection of State Office Act, which dissolved the Security Police and replaced it by a new department.

2.2 Under the Act, a special Committee was established to decide on the applications of former members of the Security Police for positions with the new department. The author claims that he should not have been subjected to "verification" proceedings, because he had never been a security officer. In view of his leftist opinions and membership in the Polish United Workers' Party, his application was dismissed by the Provincial Qualifying Committee in Czestochowa. The Committee considered that the author did not meet the requirements stipulated for officers of the Ministry of Internal Affairs. The author appealed to the Central Qualifying Committee in Warsaw, which quashed the decision, on 21 September 1990, and held that the author could apply for employment within the Ministry of Internal Affairs.

2.3 The author's subsequent application for re-employment at the Provincial Police in Czestochowa, however, was rejected on 24 October 1990. The author then complained to the Minister of Internal Affairs by letter of 11 March 1991. The Minister replied that the author had lawfully been dismissed from service, in the context of the reorganization of the department. In this connection, the Minister referred to regulation No. 53 of 2 July 1990, according to which officers who performed service on the Political and Educational Board were considered to be members of the Security Police.

2.4 On 16 December 1991, the author applied to the Administrative Court alleging unjustified dismissal and error in subjecting him to verification proceedings. On 6 March 1992, the Court dismissed his application, considering that it was not within its competence to hear appeals from Provincial Qualifying Committees.

The complaint

3. The author claims that he was dismissed without justification. He claims that his reclassification as a member of the Security Police was only implemented to facilitate his dismissal, as the law did not stipulate the termination of contracts of officers working in the Civic Militia. Moreover, he claims that he was subsequently denied access to public service only because of his political opinions, since he has been an active member of the Polish United Workers' Party and refused to hand back his membership card during the period of political changes within the Ministry. He claims that this constitutes discrimination in contravention of article 25 (c) of the Covenant.

The Committee's admissibility decision

4. On 25 October 1993, the communication was transmitted to the State party under rule 91 of the rules of procedure of the Human Rights Committee. No submission under rule 91 was received from the State party, despite a reminder addressed to it on 7 December 1994. By letter of 11 May 1995, the author confirmed that his situation remains unchanged.

5.1 At its fifty-fourth session, the Committee considered the admissibility of the communication. The Committee noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication.

5.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement. With respect to the exhaustion of domestic remedies, the Committee found that the author met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The Committee observed that the author alleged that he was denied access, on general terms of equality, to public service in his country, a claim which is admissible ratione materiae, in particular under article 25 (c) of the Covenant.

6. On 5 July 1995, the Human Rights Committee declared the communication admissible.

State party's submission and the author's comments thereon

7.1 By submission of 11 March 1996, the State party apologizes for its failure to provide observations in time on the admissibility of the communication. According to the State party, the delay was attributable to extensive consultations concerning the matter. The State party undertakes to cooperate fully with the Committee in the consideration of communications submitted under the Optional Protocol.

7.2 The State party provides information concerning the legal background of the facts of the communication. It explains that, following profound political transformation towards restoring representative democracy, it was necessary to reorganize the Ministry of Internal Affairs, in particular its political service sector. Parliament thus adopted a Police Act and a Protection of State Office Act, both of 6 April 1990. The Protection of State Office Act provided for the dissolution of the Security Police and the ex lege dismissal of its officers. The Police Act provided for the dissolution of the Civic Militia, but provided that its officers became ex lege officials of the Police. However, article 149 (2) makes exception for those Militia officers who until 31 July 1989 were Security Police officers posted in the Militia. These officers were ex lege dismissed from their post. The changes became effective on 1 August 1990.

7.3 Under article 132 (2) of the Protection of State Office Act, the Council of Ministers issued ordinance No. 69 of 21 May 1990, providing for "verification proceedings" of the ex lege dismissed officers before a Qualifying Committee. An appeal was provided from

negative assessments by the Regional Qualifying Committees to the Central Qualifying Committee. Upon application, the Committees examined whether the applicant fulfilled the requirements for officers of the Ministry of Internal Affairs as well as whether (s)he was a person of a high moral character. Those positively assessed were free to apply for a post within the Ministry.[1] The State party explains that the reorganization of the Ministry led to a substantial reduction of posts and a positive verification assessment was merely a condition necessary to apply for employment but did not guarantee placement.

7.4 On 2 July 1990, the Minister of Internal Affairs issued an order confirming which categories of posts were recognized as forming part of the Security Police. According to the order, officers employed until 31 July 1989 on posts of, inter alia, Head and Deputy Head of the Political and Educational Board were considered officers of the Security Police.

7.5 The State party further points out that employment under the Police Act and the Protection of the State Office Act is not regulated by the Labour Code, but by the Code of Administrative Procedure, an appointment being based on a special nomination and not on a labour contract. Interested parties can thus appeal decisions concerning their employment to the higher administrative authority. A decision on either admission or non-admission to the service of the Ministry of Internal Affairs may be appealed in highest instance to the High Administrative Court.

8.1 As regards the author's case, the State party points out that he started his public service in September 1971 in the Civic Militia, attended the Militia College from 1972 to 1977 and then served at the Regional Militia Headquarters at Czestochowa. On 16 January 1982, he became Deputy Head of the Regional Office of Internal Affairs in Lubliniec, responsible for the Political and Educational Board. Since 1 February 1990 he had served as senior inspector at the Regional Office of Internal Affairs at Czestochowa.

8.2 On 17 July 1990, the author submitted his application to the Regional Qualifying Board in Czestochowa with a request for employment in the police. According to the State party, this already shows that the author considered himself a Security Police officer, since if he had just been a member of the militia he would have had his employment automatically extended. The Regional Qualifying Committee issued a negative assessment of the author's case. However, on appeal, the Central Qualifying Committee quashed the assessment and stated that the author was eligible for employment in the Police or in other units of the Ministry of Internal Affairs.

8.3 Consequently, on 3 October 1990, the author submitted his application for employment to the Regional Police Headquarters in Czestochowa. On 24 October 1990, the Regional Police Commander informed him that "he did not avail himself" of his employment offer. The State party points out that the author could have appealed this refusal to nominate him to the Police Chief Commander. The author failed to do so, but instead, on 11 March 1991, complained to the Minister of Internal Affairs that he had been unjustly subjected to the "verification procedure". The Minister replied that the procedure had been legal and that his dismissal could not be reviewed. Further, on 16 December 1991, the author complained to the High Administrative Court to request a change of the assessment done by the Regional

Qualifying Committee. On 6 March 1992, the Court rejected the author's claim, since it was incompetent to hear complaints against the Qualifying Committees as they were not administrative organs.

9.1 The State party requests the Committee to reconsider its decision declaring the communication admissible. The State party submits that the Covenant entered into force for Poland on 18 March 1977 and its Optional Protocol on 7 February 1992 and thus contends that the Committee can only consider communications concerning alleged violations of human rights which occurred after the Protocol's entry into force for Poland. Since the author's verification procedure was terminated on 21 September 1990 with the decision by the Central Qualifying Committee that he was eligible for employment in the Ministry, and the author was refused employment on 24 October 1990, the State party argues that his communication is inadmissible ratione temporis. In this connection, the State party explains that the author could have appealed the refusal of employment within 14 days to a higher authority. Since he failed to do so, the decision of 24 October 1990 became final. The State party argues that the author's complaints to the Minister and to the High Administrative Court should not be taken into account, since they were not legal remedies to be exhausted.

9.2 The State party is of the opinion that there is no reason in the present case to resort to retroactive application of the Optional Protocol, as elaborated by the Committee's jurisprudence. The State party denies that the alleged violations have a continuing character, and refers to the Committee's decision in communication No. 520/1992 [2] that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of the previous violations of the State party.

9.3 As regards the exhaustion of domestic remedies, the State party refers to rule 90 (1) (f) of the Committee's rules of procedure that the Committee shall ascertain that the individual has exhausted all available domestic remedies. The State party refers to the legal background to the case and argues that the remedy available to the author for the refusal of employment was an appeal to the Police Chief Commander and, if necessary, subsequently to the High Administrative Court. The author chose not to avail himself of these remedies and instead submitted a complaint to the Minister of Internal Affairs. According to the State party, this complaint cannot be considered a remedy, since it did not concern the refusal of employment, but the qualifying procedure. Similarly, the appeal to the High Administrative Court concerning the qualification by the Regional Qualifying Committee was not the proper remedy to be exhausted by the author. The State party therefore argues that the communication is inadmissible for non-exhaustion of domestic remedies.

10.1 As regards the merits of the communication, the State party notes that the author claims that he was groundlessly denied employment in the new Police and that his classification as a former Security Police officer was but a pretext to dismiss him on the ground of his political opinions. The State party contends that the author has not substantiated that his party membership and political opinions were the reason for his dismissal or his denial of employment. The State party refers to the applicable legislation and notes that the author was dismissed ex lege from his post together with others holding similar posts. The State party emphasizes that it was a lawful and legitimate decision of Parliament to dissolve the Security

Police. It adds that the Minister's order of 2 July 1990 was no more than a specification of posts required under the legislation, and did not change the existing classification of posts.

10.2 The State party explains that both the Security Police and the Civic Militia were part of the Ministry of Internal Affairs. According to the State party, at regional and district levels of the administration for internal affairs special sections of the Security Police existed headed by an officer with rank of Deputy Head of Regional or District Office for Internal Affairs. The author held a post of Deputy Head of the Regional Office of Internal Affairs responsible for the Political and Educational Board. According to the State party, there is no doubt that this post was a component part of the Security Police. The Protection of State Office Act was thus correctly applied to him and consequently the author lost his post ex lege. The State party adds that the type of education or the uniform worn by officers are not decisive for their classification.

10.3 As regards the refusal to re-employ the author in the Police, the State party argues that decisions regarding employment remain largely within the discretion and appreciation of the employer. Further, the employer is dependent on the number of available vacant posts. The State party refers to the travaux préparatoires of article 25 (c) and notes that its intention was to prevent the monopolization of the State apparatus by privileged groups, but that it was agreed that States must have possibilities of establishing certain criteria of admitting its citizens to public service. The State party points out that in dissolving the Security Police, ethical and political reasons played a role. In this connection, it refers to the view expressed by the Committee of Experts of the Council of Europe that the selection of public servants for key administrative positions could be made according to political aspects.

10.4 The State party further notes that the rights in article 25 are not absolute, but allow reasonable restrictions compatible with the purpose of the law. The State party is of the opinion that organizational changes in the Police and the Protection of State Office, combined with the number of available posts, sufficiently justifies the reasons for denying the author employment in the Police. Moreover, the State party argues that article 25 (c) does not oblige the State to guarantee a post in public service. In the State party's view, the article obliges States to establish transparent guarantees, especially of a procedural nature, for equal opportunities of access to public service. The State party submits that Polish law has established these guarantees, as outlined above. The State party contends therefore that the author's right under article 25 (c) has not been violated.

11.1 In his reply to the State party's submission, the author reiterates that he has never been a member of the Security Police but that he has always served in the structures of the Civic Militia. He maintains that there is no order in his personal file to show that he became a member of the Security Police. In the author's opinion the Minister's Order of 2 July 1990 was arbitrary and retroactively classified him as a Security Police officer. In this connection, the author points out that according to the circular of the Ministry of Internal Affairs, before the Order of 2 July 1990, the following posts were considered to belong to the Security Police: all those in Departments I and II, the Security Police staff operations group, Ministry advisers, intelligence and counter-intelligence secretariat, Deputy Chiefs of Provincial Security Police, and Chiefs and Senior Specialists for the Security Police in the Provincial

Offices of the Ministry of Internal Affairs. The author submits that it is clear from this that his post was not part of the Security Police.

11.2 The author refers to a report from the Ombudsman of 1993, where the Ombudsman found that the retroactive classification of officers as members of the Security Police had been illegal. He also refers to remarks made by Members of Parliament in 1996, that it had been a mistake if militiamen who had never been members of the Security Police had been forced to undergo the verification procedures.

11.3 The author does not challenge the State party's assertion that the Security Police was abolished lawfully. However, he claims that the verification procedures established by the Act and by the Minister's order were illegal and arbitrary.

11.4 As regards the exhaustion of domestic remedies, the author states that until now he has not received any legally binding documents which would ascertain on what grounds he was dismissed from service. He did not receive a dismissal order, nor was he instructed about the possibilities of appeal. He states that he submitted a complaint to the Minister of Internal Affairs, because he did not know to whom to turn, and expected the Minister to redirect his complaint to the appropriate authority, pursuant to article 65 of the Code of Administrative Proceedings. He further submits that he complained to the High Administrative Court as soon as he learned from the press that such a recourse was possible. Because of lack of legal advice, however, he filed the complaint against the Qualifying Committee's decision, not against the refusal to employ him.

11.5 As regards the verification procedure, the author states that he was given the choice between participating in it or being dismissed. He contests that by submitting himself to the verification procedure he showed that he considered himself a Security Police member. In this connection, he points out that on the form, where it said "application by a former Security Police functionary", he crossed out the words "Security Police" and replaced them with "Civic Militia".

11.6 As to the merits, the author states that he is convinced that if he had been a good Catholic, he would certainly be a police officer now. Since he was considered eligible by the Central Qualifying Committee, he does not see why he was not offered a job with the Police, if not for his service in the communist party and his political opinions. In this context, he states that a colleague was recommended by the Bishop of Czestochowa to the position of Police Regional Commander and was accepted.

Review of admissibility

12. The Committee notes the State party's claim that the communication is inadmissible ratione temporis and also for non-exhaustion of domestic remedies. The Committee has examined the relevant information made available by the State party. However, the Committee has also examined the information submitted by the author in this respect and concludes that the facts and arguments as advanced by the State party in support of its claim do not justify the revision of the Committee's decision on admissibility.

Examination of the merits

13.1 The question before the Committee is whether the author's dismissal, the verification proceedings and the subsequent failure to employ him in the Police Force violated his rights under article 25 (c) of the Covenant.

13.2 The Committee notes that article 25 (c) provides every citizen with the right and the opportunity, without any distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and without unreasonable restrictions to have access, on general terms of equality, to public service in his country. The Committee further observes, however, that this right does not entitle every citizen to obtain guaranteed employment in the public service.

13.3 The Committee notes that the author has claimed that he was unlawfully dismissed, since he was not a member of the Security Police. The Committee observes, however, that the author was retroactively reclassified as a Security Police officer on 2 July 1990; it was as a consequence of the dissolution of the Security Police effected by the Protection of State Office Act that the author's post as Security Police officer was eliminated, resulting in his dismissal on 31 July 1990. The Committee notes that the author was not singled out for retroactive reclassification of his post, but that posts of others in positions similar to the author in different regional districts were also retroactively reclassified in the same manner. The reclassification was part of a process of comprehensive reorganization of the Ministry of Internal Affairs, with a view to restoring democracy and the rule of law in the country.

13.4 The Committee notes that the termination of the author's post was the result of the dissolution of the Security Police by the Protection of State Office Act and by reason of the dissolution of the Security Police, the posts of all members of the Security Police were abolished without distinction or differentiation.

13.5 Moreover, as regards the author's complaint about the verification procedure to which he was subjected, the Committee notes that, on appeal, the author was found to be eligible for a post in the Police. Thus, the facts reveal that the author was not precluded from access to the public service at that stage.

13.6 The question remains whether the fact that the author was not given a post in the Police constitutes sufficient evidence to conclude that he was refused because of his political opinions or whether said refusal was a consequence of the limited number of posts available. As reflected above, article 25 (c) does not entitle every citizen to employment within the public service, but to access on general terms of equality. The information before the Committee does not sustain a finding that this right was violated in the author's case.

14. The Committee concludes that the facts before it do not disclose a violation of any of the provisions of the Covenant.

*/ The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

**/ The text of an individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Christine Chanet, is appended to the present document.

1/ According to the State party, 10,349 of the former Security Police officers who applied for verification were positively assessed, while 3,595 received a negative assessment.

2/ E. and A.K. v. Hungary, declared inadmissible on 7 April 1994.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the annual report to the General Assembly.]

Appendix

Individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Christine Chanet *(dissenting)*

In this case, the author has argued a violation of article 25 (c) of the Covenant because he was unreasonably dismissed from the Civic Militia. The Committee has found that the State did not violate the Covenant. We cannot agree with this finding on the basis of the following facts and reasons:

1. A Polish law of 6 April 1990 dissolved the Security Police and de lege dismissed all its members. It is a fact that the dissolution of the Security Police was made because of ethical and political reasons, as stated by the State itself (para. 10.3). This law did not affect the author, since he was not a member of the Security Police.

By further Ordinance No. 69 of 21 May 1990 all members of the dissolved Security Police were subjected to a process of verification which, if approved, would enable them to apply for new jobs in units of the Ministry of Internal Affairs.

A subsequent Order of 2 July 1990 of the Minister of Internal Affairs gave a list of positions which would be considered to belong to the Security Police, among which the author's position was found. There was no domestic remedy to appeal that order (para. 8.3).

2. The State argues that the author was dismissed from his post ex lege, since there was no doubt that the author's post was a component part of the Security Police (paras. 10.1 and

10.2). However, the law was not enough to dismiss the author from his post, as a further Ministerial Order was needed. It is hardly conceivable, thus, that there was no doubt that the author belonged to the Security Police, what leads us to conclude that the author was not dismissed from his post ex lege.

This being the case, we must start from the premise that the author was dismissed by the Ministerial Order of 2 July 1990, and consequently it has to be examined whether the classification of the author s position as part of the Security Police was both a necessary and proportionate means for securing a legitimate objective, namely the re/establishment of internal law enforcement services free of the influence of the former regime, as the State party claims, or whether it was unlawful or arbitrary and or discriminatory, as the author claims. It is clear from the mere enunciation of the issue that there is a significant issue here, arising under article 25 (c) and that it was a question the author should have been able to raise through the exercise of a remedy allowing him to challenge the Order.

3. This leads to the examination of whether article 2.3 of the Covenant was complied with by Poland with regard to the author. Under article 2.3 of the Covenant States parties undertake to ensure that any person whose rights are violated shall have an effective remedy for that violation. The Committee has taken the view so far that this article cannot be found to have been violated by a State unless a corresponding violation of another right under the Covenant has been determined. We do not think this is the proper way to read article 2.3.

It has to be taken into account that article 2 is not directed to the Committee, but to the States; it spells out the obligations the States undertake to ensure that rights are enjoyed by the people under their jurisdiction. Read that way it does not seem to make sense that the Covenant should tell the States parties that only when the Committee has found that a violation has occurred they should have provided for a remedy. This interpretation of article 2.3 would render it useless. What article 2 intends is to set forth that whenever a human right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation. This interpretation is in accordance with the whole rationale underlying the Covenant, namely that it is for the States parties thereto to implement the Covenant and to provide suitable ways to remedy possible violations committed by States organs. It is a basic principle of international law that international supervision only comes into play when the State has failed in its duty to comply with its international obligations.

Consequently, since the author had no possibility to have his claim heard that he had been dismissed arbitrarily and on the basis of political considerations, a claim which on the face of it raised an issue on the merits, we are of the opinion that in this case his rights under article 2, paragraph 3, were violated.

Elizabeth Evatt [signed]

Cecilia Medina Quiroga [signed]

Christine Chanet [signed]

[Original: English]