

HUMAN RIGHTS COMMITTEE

Nicolov v. Bulgaria

Communication No 824/1998

24 March 2000

CCPR/C/68/D/824/1998

ADMISSIBILITY

Submitted by: Mr. N. M. Nicolov

Alleged victim: The author

State party: Bulgaria

Date of communication: 14 January 1997 (initial submission)

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

Meeting on 24 March 2000

Adopts the following:

Decision on admissibility

1. The author of the communication is Nicolai Milanov Nicolov, a citizen of Bulgaria. He claims to be a victim of violations by Bulgaria of articles 14, paragraph 1, 25 (c) and 26 of the International Covenant on Civil and Political Rights. The International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Bulgaria respectively on 23 March 1976 and 26 March 1992.

The facts as submitted by the author

2.1 In March 1990, the author was appointed as District attorney in the town of Zlatograd in Bulgaria. In November 1992, following a decision by the High Judicial Council,¹ he was reassigned as District attorney in the town of Sliven. The author held this position until 10 November 1993 when, by decision of the High Judicial Council, he was transferred to what he denotes as "a minor

position" ("an ordinary attorney") in the Regional attorney's office in Sliven. In November 1993, he claims that "mafia-connected" officials of the Head Attorney's Office of Bulgaria, and of the subordinate Regional Attorney's Office of Sliven, initiated an invasion of his office where all his personal and official documentation was removed. From this point onwards, he was neither allowed to enter his office nor to practice as an attorney.

2.2 It is further submitted that on 8 February 1995, by decision of the High Judicial Council, he was dismissed from his position in the civil service. The decision was based on article 131, paragraph 1 and 4, of Law on the Judiciary and article 129(3) of the Bulgarian Constitution which, inter alia, allows dismissal of prosecutors with more than three years in the service on the grounds of a "lasting actual disability to perform his functions over more than one year".

2.3 After the High Judicial Council's decision, the author petitioned the High Judicial Council to issue a ruling in accordance with article 120 of the Constitution of Bulgaria, which would give the author the right to function in his position as district attorney until the case had been reviewed by the Supreme Court. On 22 February 1995, the High Judicial Council refused to issue such a ruling.

2.4 According to article 120 of the Constitution, the decisions of administrative bodies can be brought before the courts for judicial review. The author lodged such an appeal against the decisions of the High Judicial Council to the Supreme Court, basing it on several grounds. He argued, inter alia, that

- there was no legal basis for the dismissal
- several members of the High Judicial Council were partial as they were on bad terms with him because he did not agree to act in violation of his official duties and to service the interests of the Mafia group which has had a hold on the members of the High Judicial Council since 1992, and that it was only due to the votes of these members that the required majority for his dismissal was ensured
- the two lawyers he had assigned to represent him were not allowed to take part in the hearings, in violation of his right to representation under the Bulgarian Constitution.

2.5 On 15 October 1996, the five-member Supreme Court dismissed the author's appeal. The author states that there is no other authority in Bulgaria to which the Supreme Court's judgement can be appealed.

The complaint

3.1 The author alleges that article 14, paragraph 1, was violated in the proceedings before the Supreme Court on the grounds that the Court was not an "independent and impartial tribunal" and that it did not ensure equality of the parties. The author submits that the five-member Supreme Court that tried the case "was completely dependent on the other litigant". He submits that under article 129 of the Constitution and the Law on the Judiciary, all judges of the Supreme Court are "appointed, promoted, reduced in rank, moved and dismissed by the High Judicial Council", and that the Chairperson of the Supreme Court, under the same regulations, is a member of the High Judicial

Council. The author states that it is obvious that the Justices who tried his case were dependent on the High Judicial Council as far as their careers were concerned, "i.e. if any of them had not fulfilled the will of the majority of the High Judicial Council he would have risked to be dismissed, moved, reduced in rank or at least penalised on invented or insinuated grounds. It is well known that there is not a Supreme Court judge who would risk a conflict with the High Judicial Council, giving a legal and impartial judgement on a case."

3.2 With regard to the Court's alleged failure to ensure equality of the parties, the author makes reference to the Court's assessment of his case. It is submitted that the Court, due to its partiality, violated both municipal and international law. It is alleged that article 129, paragraph 3 of the Constitution (as cited supra), on which the dismissal was based, requires that one has had a lasting actual disability of more than one year. The author states that he has never been ill for more than one year, and that his accumulated sick leave was 337 days in the period the High Judicial Council based its decision on, i.e. less than one year. He further claims that in the Supreme Court's judgement it is wrongfully stated that it had been ascertained through the proper channels that he had been unable to perform his duties for more than a year. According to the author, this was never ascertained by a competent, medical authority.

3.3 The author alleges a violation of his right to have access, on general terms of equality, to public service in his country, as provided for in article 25(c) of the Covenant. The author submits that since he did not agree to act in violation of his official duties in order to serve the above-mentioned "mafia group", he became subject to a series of repressive measures aiming to illegally dismiss him from his previous job and to deny him access to the civil service for the future. Reference is made to the actions, as described above, of the High Judicial Council and the Supreme Court. Furthermore, the author submits that after the Supreme Court's judgement the series of repressive measures from officials of the judiciary in Bulgaria went on not only with the aim to prevent him from becoming a civil servant again, but also by an attempt to have him disbarred and attempts at his physical liquidation. These alleged attempts are not specified.

3.4 Finally, the author alleges a violation of article 26 of the Covenant, on the ground that he was discriminated against because of his political and moral convictions. It is submitted that he was dismissed as a civil servant because he only served the Bulgarian State and the Bulgarian people, and refused to serve the interests of certain "mafia groups".

Submissions by the parties

4.1 In its submission of 13 November 1998, the State party challenges the admissibility of the communication. The State party submits that the communication is inadmissible both under article 3 as an abuse of the right to submission and under article 5, paragraph 2(a), of the Optional Protocol as the same complaint has been filed with the European Commission on Human Rights. With regard to the author's claims under article 14 it is further submitted that they are incompatible with the Covenant, and that the claim is inadmissible under article 3 of the Optional Protocol for that reason.

4.2 Under the claim that the communication is an abuse of the right to submission, the State party submits that the author has availed himself of "insulting and offensive language... as regards higher constitutional bodies and officials in the judiciary." The communication is said to be "full of

libellous allegations with respect to the High Judicial Council, the Main Prosecutor's Office and higher magistrates, and in particular as regards the Chairman of the Supreme Administrative Court, Mr. Vladislav Slavov and the Chairman of the Supreme Court of Cassation, Mr. Rumen Yanev."

4.3 With particular regard to the author's claim under article 25, the State party submits that the facts clearly show that the author has held positions as a district prosecutor in two different towns and as a prosecutor in the Regional Prosecutor's Office. Consequently, it is stated, "no discrimination in the meaning of article 25(c) of ICCPR has been exerted". With particular regard to the author's claim under article 26, the State party submits that the communication lacks "any proof for an alleged violation by Bulgaria... The dismissal procedure applied in Mr. Nicolov's case is fully in compliance with the provisions of the 1991 Constitution and the Law on the Judiciary. The facts of the case suggest that the applicant was treated equally before the law and was entitled to equal protection of the law without discrimination on any ground... The decision of the High Judicial Council, as well as the decision of the Supreme Court of the Republic of Bulgaria have also ruled in that sense. Consequently, it should be considered that the applicant has invoked non-existing violations."

4.4 As mentioned, the State party also invokes article 5, paragraph 2(a), and submits that on 7 November 1996 an identical complaint by the same author was filed against Bulgaria before the European Commission of Human Rights in Strasbourg, registered there as application No. 35222/97. According to the State party, on 26 May 1997 the case was considered incompatible ratione materiae with the provisions of the Convention and, accordingly, declared inadmissible under article 27, paragraph 2, of the European Convention.

4.5 With regard to the author's claim under article 14, the State party submits that article 14, paragraph 1, of the Covenant "has no application with respect to cases which refer to the discretionary powers of the public or judicial authorities." Since the judiciary under the 1991 Constitution is an independent power of state, legal disputes related to e.g. promotion or dismissal of judges, prosecutors and investigating magistrates is strictly governed by the Constitution and the Law on the Judiciary. Due to the "public nature of the dispute which refers to a position (service) within the judicial system", it is submitted that such disputes fall outside the scope of article 14, paragraph 1, of the Covenant. Consequently, the claim should be held inadmissible under article 3 of the Optional Protocol.

5.1 In his comments, the author argues for the admissibility of the communication. He submits that the communication is not an abuse of the right of submission. He reiterates that the real reason for his dismissal was his reluctance to serve the Mafia and that the dismissal was without legal basis, as he had not been unable to perform his duties for more than a year. In this regard, he argues that the High Judicial Council and the Supreme Court committed errors in law by calculating his sick leave from the first day he was ill until the last, without taking into account that there had been days in between on which he had been at work. He reiterates that his accumulated sick leave was 337 days, and, in any event, that the period which the authorities had based their decision was less than a year, as it only ran from 8 November 1993 until 5 November 1994.

5.2 The author further contests that he was "treated equally before the law". Again, he claims that he "was the subject of different repressions and discriminations", including being denied the constitutional right to a lawyer defending him before the High Judicial Council.

5.3 With regard to the alleged violation of article 14, the author argues that the State party must have misunderstood his claim when holding that the facts show that the author has held positions as a prosecutor, and that consequently there can have occurred no violation of article 25. The author explains that he does not deny having held these positions, but that his claim was based on that the dismissal in 1995 deprived him of equal access to public service.

5.4 Finally, the author contests both that the communication falls outside the scope of article 14 and that it is inadmissible because a similar complaint was lodged to the European Commission on Human Rights. With regard to the latter, the author argues that the European Convention on Human Rights does not include provisions similar to those contained in articles 25 and 26 of the International Covenant on Civil and Political Rights.

6.1 In its submission of 14 February 1999, the State party submits that the High Judicial Council's decision to dismiss the author, as affirmed by the Supreme Court, did not violate any of the author's Covenant rights. The State party submits that the proposal as well as the subsequent dismissal was based solely on article 129, paragraph 3, of the Constitution which exhaustively stipulates the criteria for the dismissal of prosecutors:

"Justices, prosecutors and investigating magistrates... shall be dismissed only upon retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime or upon lasting disability to perform their functions over more than a year."

6.2 According to the State party, this provision, correctly interpreted, is applicable to the author's case. It is submitted that the decision of the High Judicial Council was taken with the quorum required by law and by secret ballot in compliance with established procedure. In conclusion, the State party asserts that this was the sole basis for the decision and that the author's "political and moral convictions" did not play any role, nor is there any basis for the unsubstantiated claim that the author was "on bad terms" with several members of the council and that this had influenced the decision.

6.3 The State party further notes the author's claim that article 14, paragraph 1, of the Covenant was violated in the proceedings before the Supreme Court on the ground that the Court was not a "competent, independent and impartial tribunal". The State party submits that, contrary to the allegations of the author, the Court was an independent and impartial tribunal and the equality of the parties was ensured in the proceedings.

6.4 It is pointed out that the five-member Supreme Court met six times in order to decide the case. The State party states that the Court requested and considered all the evidence submitted by the author; it satisfied all the demands of the author, including allowing corrections in the minutes of the sessions; at all times the author and his legal counsel, Mr. Nikola Tsonkov, were present and participated actively in the proceedings.

6.5 The State party submits that the author's allegation that the Court had rendered its Judgment in conditions of complete dependence on the other litigant (i.e. the High Judicial Council) is baseless, as the Court is not hierarchically or in any other way dependent on the High Judicial Council. On the contrary, the Court exercises judicial control over the decisions of the High Judicial Council.

There are numerous cases in the case-law of the Court where it rescinded decisions of the High Judicial Council on grounds of their non-conformity with the law, including one in 1996 following an appeal by the same author in a different administrative case.

6.6 It is stated that in performing their functions, the judges are independent, as is also guaranteed by article 117 of the Constitution of the Republic of Bulgaria. Furthermore, the State party argues that the five judges in question, having served for more than three years in office, are unsubstitutable according to Article 129, paragraph 3 of the Constitution, which gives additional guarantees for their independence.

6.7 Furthermore, the State party notes that, according to the law, the author had the right to request the withdrawal of judges for whom there were grounds to believe that they would not be impartial. As evident from the minutes, at no time did the author or his legal counsel make such a request.

6.8 With regard to the alleged violation of article 25 (c), the State party submits that the dismissal was completely lawful, based on objective and reasonable criteria, and therefore in full compliance with article 25. The State party also points out that his dismissal from his previous position does not in any way preclude his right to be appointed to another position in the Bulgarian judicial system or in the civil service in general.

6.9 The State party further submits that the communication lacks any substantiation of the alleged violations of article 26. Again, the State party argues that the dismissal procedure was in full compliance with domestic law, and that the author was treated without any discrimination of any kind.

6.10 In conclusion, the State party submits that there are no grounds on which to accept the author's claims that he has been persecuted because of his moral and political convictions.

7.1 In his submission of June 1999, the author challenges the State party's submission and reiterates that his rights under articles 14, 25 and 26 were violated.

Issues and proceedings before the Committee

8.1 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.

8.2 The State party has submitted that the Committee is barred from considering the present communication under article 5, paragraph 2(a), of the Optional Protocol as an identical complaint has been filed with the European Commission on Human Rights. The Committee notes, however, that it is only where the same matter *is being* examined under another procedure of international investigation or settlement that the Committee lacks competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. The State party itself has stated that the European Commission on 26 May 1997 declared the author's application inadmissible, and article 5, paragraph 2(a), therefore does not prevent the Committee from considering the present communication.

8.3 The Committee notes that the author has claimed that his rights under article 14 were violated as the members of the High Judicial Council were biased against him and that the Supreme Court was not an independent tribunal. The author has not, however, substantiated these claims and the Committee finds that all claims under article 14 are inadmissible under article 2 of the Optional Protocol.

8.4 Similarly, with regard to the alleged violations of articles 25 and 26 of the Covenant, the Committee notes the State party's explanation and finds that also these claims are inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

*/ The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitáán de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

1/ The High Judicial Council is an administrative body which structure and functions are determined by articles 129-133 of the Constitution of the Republic of Bulgaria and by articles 16-34 of the Law on the Judiciary. Under article 129 of the Constitution, the High Judicial Council has the power to elect, promote, demote, reassign and dismiss justices, prosecutors and investigating magistrates. According to article 130, the membership of the High Judicial Council is limited to 25, three of whom are ex officio members. Of the remaining 22 members, half are elected by the national assembly and half by the judicial branch, all for terms of 5 years. According to the State party, "their impartiality is guaranteed by the method of election and the requirements for holding office."

[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 Committee's annual report to the General Assembly.]