

HUMAN RIGHTS COMMITTEE

Maloney v. Germany

Communication No. 755/1997**

29 July 1997

CCPR/C/60/D/755/1997 */

ADMISSIBILITY

Submitted by: Clarence T. Maloney

Victims: The author and his three children, Benedikt, Malika and Konstantin

State party: Germany

Date of communication: 15 March 1996 (initial submission)

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

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Clarence T. Maloney, an American citizen, born on 23 August 1934, living in India. He claims to be a victim of a violation of articles 17, 23 and 24 of the Covenant on Civil and Political Rights. He also submits the communication on behalf of his three children Benedikt (born 27 June 1981), Malika (born 15 February 1982) and Konstantin (born on 22 September 1987). The Optional Protocol entered into force for Germany on 25 November 1993¹.

The facts as submitted

2.1 The author married Barbara Sabass, a German citizen, in 1981. After having lived in Bangladesh for several years, they moved to Germany. In March 1989, the author's wife filed for divorce. The Family Court in Miesbach provisionally granted her the separation, temporary custody, alimony and child support. The author, who was out of the country at the time, states that the Court

never contacted him before taking its decision.

2.2 The author tried to obtain full or joint custody, but was informed that under German law joint custody is only possible when both parents agree. The author, who had not seen his children since Christmas 1988, requested visiting rights by application of 8 December 1989. By decision of 18 December 1989, the Miesbach Court denied the author visiting rights. It appears from the text of the judgement that criminal charges were pending against the author for having sexually abused his children Benedikt and Malika.

2.3 It appears from the documents in the case that, on 3 January 1990, the author was convicted for sexual abuse of his children Benedikt and Malika, as well as for failing to pay child support, and sentenced to a suspended sentence of eighteen months' imprisonment, with the probation period set at three years². On 10 February 1995, after the author had been arrested in January 1995 when entering Germany, the Court ordered him again to pay child support (which he apparently had failed to do since 27 January 1993) and prolonged the probation period to six years, until 27 April 1996. The author in his communication repeatedly states that he is not going to contribute child support when he is not allowed to see his children.

2.4 On 6 July 1994, after a procedure that took five years and three months, the Miesbach Court pronounced the divorce, and granted full custody to the mother of the children. The author was refused visiting rights. On appeal, the High Court (Oberlandesgericht) in Munich, by decision of 17 May 1995,³ confirmed the denial of visiting rights to the author. With this, the author submits, domestic remedies have been exhausted.

The complaint

3.1 The author claims that the complete denial of visiting rights, including the denial of the right to see his children in company of a third person, is in violation of article 23 of the Covenant. He also claims that the Family Court deliberately prolonged the proceedings to prevent him from appealing and from entering the country.

3.2 The author further claims a violation of article 17 of the Covenant, because of the groundless accusations that his ex-wife makes against him, that he is a sexual pervert and that he will abduct the children. In this context, he states that his ex-wife has been in psychotherapy for years, and that she has lost contact with most of her family and friends because of her character. According to the author, his ex-wife has influenced the children against him, using the technique of intensive suggestive questioning so that the children now believe and say that they have been sexually abused. In this context, the author refers to an expert opinion that there is no evidence that his daughter Malika was sexually abused.

3.3 The author also states that he has not been able to have contact with his children by mail or telephone, since their address has been withheld from him. When he found out an address in November 1995, his letters were intercepted. According to a letter written by the author's ex-wife to the High Court, complaining that the author tried to contact the children, the High Court has ruled that the father abstain from such contact. This is also said to be in violation of article 17 of the Covenant.

3.4 The author also claims a violation of article 24 of the Covenant, on behalf of his children, since Germany has failed to offer them protection and has supported the delusions of their mother against their father. In this context, he refers to indications that his son Benedikt has suicidal tendencies. He also complains that the children are now using the last name of their mother, although their lawful name is still Maloney, and that they have not been able to have contact with their half brothers and sisters in America or India. This is said to be a violation of article 24, as the State party failed to preserve the children's identity (surname) and culture (American and Indian background).

Issues and proceedings before the Committee

4.1 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.

4.2 The author claims violations of the Covenant because his ex-wife has made accusations of sexual perverseness against him and because he has been denied contact with his children. The Committee recalls that it is for the Courts of States parties and not for the Committee to evaluate facts and evidence of a particular case, unless it can be ascertained that the Court's decision was clearly arbitrary or amounted to a denial of justice. The Committee notes that the court decisions in the case show that the author was denied contact with his children on the ground of his conviction for sexual abuse of two of his children. In the circumstances, the Committee finds that the author has failed to substantiate, for purposes of admissibility, that the facts as presented by him constitute a violation of articles 17 and 23 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

4.3 As regards the author's claims on behalf of his children, the Committee notes that he has failed to take any steps to bring these claims before the Court which, it appears from the file, continues to have jurisdiction over them. This part of the communication is thus inadmissible for failure of exhaustion of domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

5. The Human Rights Committee therefore decides:

- (a) that the communication is inadmissible;
- (b) that this decision shall be communicated to the author and, for information, to the State party.

[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.]

*/ Made public by decision of the Human Rights Committee. IDEC755 cb

* 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. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Maxwell Yalden.

** Pursuant to rule 85 of the Committee's rules of procedure, Mr. Eckart Kelin did not participate in the examination of the case.

1/ When acceding to the Optional Protocol, the Federal Republic of Germany entered a reservation to the effect that

“The competence of the Committee shall not apply to communications [...] by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Republic of Germany, [....]”.

2/ A copy of the judgement of the Criminal Court is not provided by the author. The Miesbach Family Court, in its decision of July 1994, refers to the Criminal Court's judgement as a ground for refusing the author visiting rights.

3/ Copy of judgment is not provided.