

HUMAN RIGHTS COMMITTEE

L.G. v. Mauritius

Communication No. 354/1989 */

31 October 1990

CCPR/C/40/D/354/1989 */

ADMISSIBILITY

Submitted by: L.G. [name deleted]

Alleged victim: The author

State party concerned: Mauritius

Date of communication: 17 February 1989 (date of initial letter)

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

Meeting on 31 October 1990,

Adopts the following:

Decision on admissibility 1/ 2/

1. The author of the communication (initial submission dated 17 February 1989 and subsequent submissions) is L.G., a Mauritian citizen and former barrister. He claims to be the victim of a violation of articles 1, 2, 3, 14, 15 and 26 of the International Covenant on Civil and Political Rights by Mauritius.

The facts as submitted:

2.1 On 16 February 1979, the author was arrested in connection with the possession of parts of the proceeds from a robbery at a casino, perpetrated on the night of 21 January 1979. On 29 January 1979, a self-confessed participant in the robbery retained the services of the author and remitted two sums of money to him, first 3000 rupees representing the author's legal fees and then 7000 rupees to be put aside for the eventuality of retaining the services of senior counsel. Several days before

the author's arrest, his client's wife requested the author to return the 7000 rupees, allegedly because the client was ill and needed the money for medical expenses; she was accompanied by two plainclothes policemen who posed as relatives of the client. The author asked to personally meet his client, and a meeting was arranged at the client's house where, in the presence of the undercover agents, the author returned the 7000 rupees to his client. Upon leaving the house, he was arrested in a nearby street, and charged with possession of stolen money.

2.2 The author claims that he was framed by the police, who were in exclusive charge of the investigation related to the robbery. He alleges that there was strong evidence that a number of individuals of Chinese origin were directly associated with the crime but that all the participants of Chinese origin except one either denied their participation in the hold-up or were never questioned by the police about it. He further indicates that the police, instead of completing its investigations within a short period of time, engaged in "secret dealing" with those participants in the hold-up who were of Chinese origin.

2.3 During the trial the author's client appeared as the prosecution's principal witness, testifying that he had given the author the 7000 rupees for safekeeping. On 12 August 1979, the court of first instance, in a two to one majority decision, convicted the author. He appealed, but on 5 August 1980, the Supreme Court confirmed the judgment of first instance. The author envisaged a further appeal to the Judicial Committee of the Privy Council but claims that this was bound to fail due to the fact that the grounds of appeal were limited to the court record and the issues of law were not of fundamental importance; moreover, he submits that the Privy Council very rarely intervenes on issues of fact. This information was imparted to him by an English professor whose services he had retained; as a result, the author chose not to proceed with his petition, and on 20 December 1980, the Privy Council dismissed his appeal for "non-prosecution", that is, failure to pursue the case.

2.4 Late in 1980, the author came across fresh evidence which led him to believe that the police inquiry had been "partial, discriminatory and deliberately selective". On 17 March 1981, however, he was summoned to appear before the full bench of the Supreme Court under Section 2 of the Legal Practitioners (Disciplinary Proceeding) Ordinance and advised to remove his name from the roll of practicing barristers. The author subsequently requested his removal from the Roll of Barristers so as to prevent the continuation of disciplinary proceedings against him. In 1983 and 1986, he submitted petitions for pardon to the Commission on the Prerogative of Mercy; both were rejected. Since 1981, he has unsuccessfully sought to obtain the assistance of the Mauritius Bar Council in his efforts to be readmitted to the roll of practicing barristers. In 1986, he contemplated a formal motion before the Supreme Court but was advised to contact the Attorney General's office instead, since a letter from the Attorney General would be sufficient for him to resume his practice. He wrote to the Attorney General but did not receive any reply.

2.5. Early in 1989, the author wrote to the Chief Justice, who recommended to him to apply for reinstatement under the Law Practitioner's Act 1984; the author did so. On 17 November 1989, the Chief Justice declined to issue the order for his re-instatement on the ground of the author's previous conviction.

The complaint:

3.1 The author claims that there was no basis for suspending him indefinitely from the exercise of his profession. He notes that Mauritian legislation makes no provisions for a retrial in cases in which there exists new material evidence, which was unknown to the accused prior to the trial. As all criminal investigations are conducted by the police who have overall responsibility for a case, the judicial authorities may only require supplementary information with respect to the investigation but have no control over it. Once an investigation is completed, it is submitted to the Crown Law Office. The author argues that at this juncture there exists a “no man’s land” bound to create situations in which the administration of justice may be jeopardized. He notes that the institution of the examining magistrate (Juge d’instruction) is unknown in Mauritius. For these reasons, the author considers that he was not afforded a fair trial and is thus the victim of a miscarriage of justice.

3.2 With respect to the requirement of exhaustion of domestic remedies, the author states that he did not pursue his appeal to the Judicial Committee of the Privy Council because of the prohibitive costs involved, and because it would not, in his opinion, have constituted an effective remedy, as the Privy Council does not entertain an appeal based on facts. He claims that after the decision of the Chief Justice not to grant his request for reinstatement, the only effective remedy for him would be the enactment of new legislation allowing for a retrial in cases in which new material evidence becomes available after the conclusion of the trial, or new legislation vesting disciplinary powers in the Mauritian Bar Council along the same lines as those vested in the British Bar Council. He concludes that he has exhausted available judicial remedies, and affirms that the prolongation of the pursuit of remedies is not solely attributable to him.

The State party’s observations:

4.1 The State party contends that the communication should be declared inadmissible pursuant to articles 2 and 5, paragraph 2(b), of the Optional Protocol. It argues that it is inadmissible on the ground of non-exhaustion of domestic remedies because the author, although availing himself of several non-judicial remedies, failed to pursue the avenue provided for under Mauritian law: to first apply to the Registrar for reinsertion of his name on the Roll of Barristers, and, in the event of a negative decision, to seek judicial review of the Registrar’s decision. The State party claims that the communication is also inadmissible because of the author’s failure to pursue his petition for leave to appeal to the Judicial Committee of the Privy Council.

4.2 The State party further affirms that the communication is inadmissible pursuant to article 2, of the Optional Protocol, since it does not disclose a claim under article 2 of the Optional Protocol. It notes that in as much as the author’s claim of a violation of article 14, on the ground that he had discovered new evidence not available to him during the trial, is concerned, the communication does not disclose in precise terms what this new evidence was. It contends that all the evidence referred to in the communication was available during the trial, and that the allegation of an “elaborate police frame up” amounts to no more than a personal conclusion drawn from evidence available at the time. Moreover, the State party observes, the Mauritian courts acted properly in deciding to rely on the evidence presented by the author’s own client and that of other witnesses, after having directed them properly on issues of law, and that the object of the communication would covert the Human Rights Committee into a Court of Appeal on findings of fact.

The issues before the Committee:

5.1 Before considering any claims contained in a communication, the Human Rights Committee must ascertain, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 In respect of the author's claim that Mauritian law does not provide for a retrial in cases in which fresh material evidence becomes available after the conclusion of the trial, the Committee notes that no substantiation of such fresh material evidence has been made. Therefore, the author has failed to advance a claim under the Covenant within the meaning of article 2 of the Optional Protocol.

5.3 As to the author's claim that he has been unjustly denied re-instatement on the Roll of Barristers and that no remedy lies for this, the Committee notes that the author failed to apply for judicial review of the Chief Justice's decision of 17 November 1989. Until he avails himself of the possibility of a judicial review, no issue under article 14 of the Covenant arises. The author's claim is thus incompatible with the provisions of the Covenant within the meaning of article 3 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible;
- (b) That this decision shall be transmitted to the State party and to the author.

[Done in English, French, Russian and Spanish, the English text being the original version]

*/ All persons handling this document are requested to respect and observe its confidential nature.

*/ Made public decision of the Human Rights Committee.

1/ Pursuant to rule 85 of the committee's rules of procedure, Mr. Rajsoomer Lallah did not participate in the examination of the communication or in the adoption of the Committee's decision

2/ The texts of four individual opinions are appended.

Appendix

Individual opinion submitted by Ms. Christine Chanet and Mr. Bariame Ndiaye, pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare inadmissible communication No. 354/1989, L.G. v. Mauritius

[Original: French]

The authors of the present individual opinion endorse the Committee's decision to declare this communication inadmissible.

Nevertheless, they do not consider it possible to single out, as is done in paragraph 5.3 of the text of the decision, one provision of the Covenant among those referred to by the author of the communication in order to declare that the communication is incompatible with the provisions of the Covenant within the meaning of article 3 of the Optional Protocol.

When it considers a communication under the Optional Protocol, the Committee must ascertain whether the communication satisfies the requirements laid down successively in the provisions of the Optional Protocol.

In the case in question the complainant's allegations, both concerning the violations of which he claims to have been a victim and concerning the domestic remedies available to him to have those allegations accepted, are not sufficiently well substantiated to permit the conclusion that, in submitting his communication, L.G. met the conditions set out in article 2 of the Optional Protocol.

Christine CHANET
Birame NDIAYE

Individual opinion submitted by Mrs. Rosalyn Higgins and Mr. Amos Wako, pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare inadmissible communication No. 354/1989, L.G. v. Mauritius

[Original: English]

Article 14, paragraph 6, of the Covenant refers, *inter alia*, to what remedy is required when a person's conviction has been reversed or he has been pardoned on the basis of new or newly discovered facts.

Such reversal of conviction, or pardon, occurs in various ways in different jurisdictions. We wish to make it clear that the basis of the Committee's decision, as explained in paragraph 5.2, should not be read as a finding by the Committee that article 14, paragraph 6, necessarily requires an entitlement to retrial.

Rosalyn HIGGINS
Amos WAKO

Individual opinion submitted by Mr. Nisuke Ando, pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare inadmissible communication No. 354/1989, L.G. v. Mauritius

[Original: English]

I do not oppose the Committee's view that the author's claim that Mauritian law does not provide for a retrial in cases in which fresh material evidence becomes available after the conclusion of the trial has not been substantiated (paragraph 5.2).

However, had the claim been substantiated, the committee would have been required to determine the compatibility with the provision of article 14, paragraph 6, of a legal system under which no retrial is permissible and pardon remains the only recourse available for a convicted person, even if fresh evidence conclusively shows that the conviction was pronounced erroneously. In this connection, I would like to make the following observations.

Article 14, paragraph 6, provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered the punishment as a result of such a conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

It is possible to argue that this provision presupposes not only a legal system under which retrial is institutionalized, but also a legal system which does not allow for a retrial and under which pardon remains the only recourse available for the convicted person, even where new or newly discovered facts show conclusively that the conviction was arrived at erroneously, on the ground of the provision's wording "when his conviction has been reversed or he has been pardoned" (emphasis added).

While I do not intend to rule out this possibility, I feel obliged to express my concern about legal systems under which no retrial is permissible and pardon remains the only available recourse in such cases. For one thing, a retrial provides an opportunity for the judiciary to re-examine its own conviction and sentence in the light of fresh evidence and correct its errors. In my opinion, pardon being the prerogative of the executive, the institution of retrial is essential for the principle of independence of the judiciary. Furthermore, retrial ensures that the erroneously convicted person is given an opportunity to have his or her case re-examined in the light of fresh evidence, and to be declared innocent. If he or she is innocent, it would be difficult to justify why he or she should need to be pardoned pursuant to the prerogative of the executive.

Nisuke ANDO

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare inadmissible communication No. 354/1989, L.G. v. Mauritius

[Original: English]

I associate myself with the individual opinion submitted by Mrs. Rosalyn Higgins and Mr. Amos Wako, but I want to draw attention to the wording of article 14, paragraph 6, where it indicates the ground for a reversal of conviction of pardon, namely "that a new or newly discovered fact shows

conclusively that there has been a miscarriage of justice". Such a ground should according to my opinion justify a claim under article 14, paragraph 5, regarding the availability of review of conviction and sentence by a higher tribunal according to law. However, the Committee's decision, as explained in paragraph 5.2, makes it clear that the author has failed to advance such a claim.

Bertil WENNERGREN