

HUMAN RIGHTS COMMITTEE

Mónaco v. Argentina

Communication No. 400/1990

3 April 1995

CCPR/C/53/D/400/1990 *

VIEWS

Submitted by: Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario [represented by counsel]

Victims: The author and her granddaughter

State party: Argentina

Date of communication: 2 April 1990 (initial submission)

Date of decision on admissibility: 8 July 1992

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

Meeting on 3 April 1995,

Having concluded its consideration of communication No. 400/1990 submitted to the Human Rights Committee by Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario, 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 authors of the communication, their counsel and the State party,

Adopts its

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

1. The author of the communication is Darwinia Rosa Mónaco de Gallicchio, an Argentine citizen born in 1925, currently residing in Buenos Aires. She presents the communication on her own behalf and on behalf of her granddaughter, Ximena Vicario, born in Argentina on 12 May 1976 and 14 years of age at the time of submission of the communication. She claims that they are victims of violations by Argentina of articles 2, 3, 7, 8, 9, 14, 16, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel. The Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986.

Facts as submitted by the author

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then ninemonth-old child to the Headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of anurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (histocompatibilidad) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (ocultamiento de menor) and forgery of documents, in violation of articles 5, 12, 293 and 146 of the Argentine Criminal Code.

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires. With this, the author submits, available and effective domestic remedies have been exhausted. She adds that it would be possible to file further appeals in civil proceedings, but submits that these would be unjustifiably prolonged, to the extent that Ximena Vicario might well reach the age of legal competence by the time of a final decision. Furthermore, until such time as legal proceedings in the case are completed, her granddaughter must continue to bear the name given to her by S.S.

Complaint

3.1 The author claims that the judicial decisions in the case violate article 14 (bis) of the Argentine Constitution, which guarantees the protection of the family, as well as articles 23 and 24 of the Covenant. It is further submitted that S.S.'s regular visits to the child entail some form of "psychoaffective" involuntary servitude in violation of article 15 of the Argentine Constitution and article 8 of the Covenant. The fact that the author is denied standing in the guardianship proceedings is deemed to constitute a violation of the principle of equality before the law, as guaranteed by article 16 of the Argentine Constitution and articles 14 and 26 of the Covenant.

3.2 The author also claims a violation of the rights of her granddaughter, who she contends is subjected to what may be termed psychological torture, in violation of article 7 of the Covenant, every time she is visited by S.S. Another alleged breach of the Covenant concerns article 16, under which every person has the right to recognition as a person before the law, with the right to an identity, a name and a family: that Ximena Vicario must continue to bear the name given to her by S.S. until legal proceedings are completed is said to constitute a violation of her right to an identity. Moreover, the uncertainty about her legal identity has prevented her from obtaining a passport under her real name.

3.3 The author submits that the forced acceptance of visits from S.S. violates her granddaughter's rights under article 17, which should protect Ximena Vicario from arbitrary interference with her privacy. Moreover, the author contends that her own right to privacy is violated by the visits of S.S., and by her exclusion from the judicial proceedings over the guardianship of Ximena Vicario. Article 23, which protects the integrity of the family and of children, allegedly is violated in that Ximena Vicario is constantly exposed to, and maintained in, an ambiguous psychological situation.

State party's observations and author's comments

4.1 The State party, after recapitulating the chronology of events, concedes that with the dismissal of the author's appeal on 29 December 1989, the author has, in principle, complied with the requirements of article 5, paragraph 2(b), of the Optional Protocol. Nevertheless, it draws attention to the inherent "provisional character" of judicial decisions in adoption and guardianship proceedings; such decisions may be, and frequently are, questioned either through the appearance of new circumstances and facts or the reevaluation of circumstances by the competent authorities seized of the matter.

4.2 In the author's case, the State party notes, new factual and legal circumstances have come to light which will require further judicial proceedings and decisions; the latter in turn may provide the author with an effective remedy. Thus, a complaint was filed on 13 February 1990 in the Federal Court of First Instance by the Federal Prosecutor charged with the investigation of the cases of the children of disappeared persons; the case was registered under case file A56/90. On 16 September 1990, the Prosecutor submitted a report from a professor of juvenile clinical psychology of the University of Buenos Aires, which addressed the impact of the visits from S.S. on the mental health of Ximena Vicario; the report recommended that the visiting rights regime should be reviewed.

4.3 The State party further indicates that before the civil courts in the province of Buenos Aires (Juzgado en lo Civil No. 10 del Departamento Judicial de Morón) an action initiated by the author had been pending, with a view to declaring the adoption of Ximena Vicario by S.S. invalid. On 9 August 1991, the Juzgado en lo Civil No. 10 held that Ximena Vicario's adoption and her birth inscription as R.P.S. were invalid. The decision is on appeal before the Supreme Court of the province of Buenos Aires.

4.4 Finally, the State party notes that criminal proceedings against S.S. remain pending, for the alleged offences of falsification of documents and kidnapping of a minor. A final decision in this matter has not been taken.

4.5 The State party concludes that, in the light of the provisional nature of decisions in guardianship proceedings, it is important to await the outcome of the various civil and criminal actions pending in the author's case and that of Ximena Vicario, as this may modify the author's and Ximena Vicario's situation. Accordingly, the State party requests the Committee to decide that it would be inappropriate to adjudicate the matter under consideration at this time.

4.6 In respect of the alleged violations of the Argentine Constitution, the State party affirms that it is beyond the Committee's competence to evaluate the compatibility of judicial decisions with domestic law, and that this part of the communication should be declared inadmissible.

5.1 In her comments, the author contends that no new circumstances have arisen that would justify a modification of her initial claims submitted to the Committee. Thus, her granddaughter continues to receive regular visits from S.S., and the civil and criminal proceedings against the latter have not shown any notable progress. The author points out that by the spring of 1991, the criminal proceedings in case A-62/84 had been pending for over six years at first instance; as any judgement could be appealed to the Court of Appeal and the Supreme Court, the author surmises that Ximena Vicario would reach legal age (18 years) without a final solution to her, and the author's, plight. Therefore, the judicial process should be deemed to have been "unreasonably prolonged".

5.2 The author contends that the Supreme Court's decision denying her standing in the judicial proceedings binds all other Argentine tribunals and therefore extends the violations suffered by her to all grandparents and parents of disappeared children in Argentina. In support of her contention, she cites a recent judgement of the Court of Appeal of La Plata, concerning a case similar to hers. These judgements, in her opinion, have nothing "provisional" about them. In fact, the psychological state of Ximena Vicario is said to have deteriorated to such an extent that, on an unspecified date, a judge denied S.S. the month of summer vacation with Ximena Vicario she had requested; however, the judge authorized S.S. to spend a week with Ximena Vicario in April 1991. The author concludes that she should be deemed to have complied with the admissibility criteria of the Optional Protocol.

Committee's decision on admissibility

6.1 During its forty-fifth session the Committee considered the admissibility of the communication. The Committee took note of the State party's observations, according to which several judicial actions which potentially might provide the author with a satisfactory remedy were pending. It noted, however, that the author had availed herself of domestic appeals procedures, including an appeal to the Supreme Court of Argentina, and that her appeals had been unsuccessful. In the circumstances, the author was not required, for purposes of article 5, paragraph 2(b), of the Optional Protocol, to repetition the Argentine courts if new circumstances arose in the dispute over the guardianship of Ximena Vicario.

6.2 In respect of the author's claims under articles 2, 3, 7, 8 and 14, the Committee found that the author had failed to substantiate her claims, for purposes of admissibility.

7. On 8 July 1992 the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 16, 17, 23, 24 and 26 of the Covenant.

Author's and State party's further submissions on the merits

8.1 By note verbale of 7 September 1992, the State party forwarded the text of the decision adopted on 11 August 1992 by the Cámara de Apelación en lo Civil y Comercial Sala II del Departamento Judicial de Morón, according to which the nullity of Ximena Vicario's adoption was affirmed.

8.2 By note verbale of 6 July 1994 the State party informed the Committee that S.S. had appealed the nullity of the adoption before the Supreme Court of the Province of Buenos Aires and that Ximena Vicario had been heard by the court.

8.3 With regard to the visiting rights initially granted to S.S. in 1989, the State party indicates that these were terminated in 1991, in conformity with the express wishes of Ximena Vicario, then a minor.

8.4 With regard to the guardianship of Ximena Vicario, which had been granted to her grandmother on 29 December 1988, the Buenos Aires Juzgado Nacional de Primera Instancia en lo Criminal y Correccional terminated the regime by decision of 15 June 1994, bearing in mind that Ms. Vicario had reached the age of 18 years.

8.5 In 1993 the Federal Court issued Ximena Vicario identity papers under that name.

8.6 As to the criminal proceedings against S.S., an appeal is currently pending.

8.7 In the light of the above, the State party contends that the facts of the case do not reveal any violation of articles 16, 17, 23, 24 or 26 of the Covenant.

9.1 In her submission of 10 February 1993, the author expressed her concern over the appeal lodged by S.S. against the nullity of the adoption and contends that this uncertainty constitutes a considerable burden to herself and to Ximena Vicario.

9.2 In her submission of 3 February 1995, the author states that the Supreme Court of the Province of Buenos Aires has issued a final judgement confirming the nullity of the adoption.

Committee's Views on the merits

10.1 The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol. It bases its Views on the following considerations.

10.2 With regard to an alleged violation of article 16 of the Covenant, the Committee finds that the facts before it do not sustain a finding that the State party has denied Ximena Vicario recognition as a person before the law. In fact, the courts of the State party have endeavoured to establish her identity and issued her identity papers accordingly.

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986,¹ and the Committee is not in a position ratione temporis to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes.

Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24,² in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

10.6 As to an alleged violation of article 26 of the Covenant, the Committee concludes that the facts before it do not provide sufficient basis for a finding that either Ms. Vicario or her grandmother were victims of prohibited discrimination.

11.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

11.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the

Committee's Views.

12. With reference to the violations of the Covenant which occurred prior to 8 November 1986, the Committee encourages the State party to persevere in its efforts to investigate the disappearance of children, determine their true identity, issue to them identity papers and passports under their real names, and grant appropriate redress to them and their families in an expeditious manner.

[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.]

Footnotes

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

1/ See the Committee's decision on admissibility concerning communication No. 275/1988, S.E. v. Argentina , declared inadmissible *ratione temporis* on 26 March 1990, para. 5.3.

2/ General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989.