HUMAN RIGHTS COMMITTEE

J. E. S. B. v. Panama

Communication No. 443/1991

17 March 1994

CCPR/C/50/D/443/1991*

ADMISSIBILITY

Submitted by: J. E. S. B. (name deleted) (represented by counsel)

Alleged victim: The author

State party: Panama

Date of communication: 20 January 1991 (initial submission)

Documentation references: Prior decisions - Special Rapporteur's rule 91 decision, dated 17 December 1992 (not issued in document form)

Date of present decision: 17 March 1994

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The author of the communication is J. E. S. B., a Panamanian citizen currently under detention in Panama City, Republic of Panama. It is alleged that Mr. J. E. S. B. is unable to himself submit the communication. His counsel, a Panamanian attorney domiciled in France, claims that Mr. J. E. S. B. is a victim of violations by Panama of articles 9 and 14 of the International Covenant on Civil and Political Rights. Mr. J. E. S. B. has provided a power of attorney.

The facts as submitted by the author:

2.1 The author was a member of the "Partido Revolucionario Democratico" (Democratic Revolutionary Party), which was ousted from government as a result of the military intervention of United States troops in Panama on 20 December 1989.

2.2 During the invasion, Mr. J. E. S. B., together with two minor sons, sought asylum in the Embassy of the Holy See. He allegedly was taken prisoner by United States forces on 24 December 1989, after negotiations between the commander-in-chief of the U.S. forces and the Holy See envoy. He and his sons were transferred to the Fort Clayton military base as prisoners of war. On 29 December 1989, Mr. J. E. S. B. was once more handed over to the Holy See envoy. Seven hours later, however, he was rearrested by U.S. military officers and again interned at Fort Clayton. From there, he was transferred to the Modelo Prison in Panama City on the same day.

2.3 It is submitted that criminal proceedings were initiated against Mr. J. E. S. B. in the evening of 29 December 1989. According to counsel, these proceedings did not have a proper legal basis from the very beginning.

2.4 Mr. J. E. S. B. was charged with several offences against the public administration of Panama, which he allegedly had committed during his tenure as chief executive officer of the "Caja de Ahorros" (Savings Bank), which had been under his administrative responsibility. Under article 324 of the Panamanian Criminal Code, the offence with which Mr. J. E. S. B. was charged is punishable with a maximum of one year of imprisonment. Counsel observes that four other employees of the Caja de Ahorros carried direct responsibility for these offences. It is further claimed that Mr. J. E. S. B. had no direct influence on the fund management of the Bank. Counsel observes that none of the existing extenuating circumstances, in particular the author's ill health (Mr. J. E. S. B. had been diagnosed with prostate cancer), were taken into consideration and that, of all those involved, Mr. J. E. S. B. was the only one to have been detained.

2.5 As to the requirement of exhaustion of domestic remedies, counsel notes that Mr. J. E. S. B. filed a motion for habeas corpus in the Supreme Court of Panama on January 1990. The Court declared that it was not competent to decide and referred the case to the Second Superior Tribunal which, in a decision of 6 February 1990, declared that the order for the author's preventive custody, issued by the 7th District Attorney of Panama, had been lawful.

2.6 On 12 January 1990, the author also applied for release on bail to the criminal chamber of the Judge of the Eight Circuit (Ramo Penal); on 16 January 1990, this request was rejected. Mr. J. E. S. B. appealed to the Second Superior Tribunal, without success. On 6 February 1990, Mr. J. E. S. B. requested the 7th District Attorney to order his conditional release; this was also refused. Several subsequent requests for bail were similarly denied.

2.7 Counsel notes that Mr. J. E. S. B.'s doctor has informed the 7th District Attorney about his patient's ill health and the need to treat the author's prostate cancel and other related ailments in a specialized hospital. It appears that his letters were left unanswered. In a subsequent submission, dated 20 February 1992, the author's wife provides a detailed chronology of medical interventions and exams that the state of health of her husband necessitated between March 1990 and October 1991. In November 1991, the judicial authorities apparently agreed to transfer the author to the Santo Tomás hospital in Panama City, but the author's wife submits that this hospital is not equipped to treat her husband's ailments. It further appears that the cardiologist, urologist and allergy specialist (alergólogo) whose services Mr. J. E. S. B. had requested are not allowed to treat him.

The complaint:

3. It is submitted that the situation described above reveals violations by Panama of articles 9, paragraphs 3 and 4, and 14, paragraph 3(c), of the Covenant. Counsel considers that his client faces charges that are no more than a convenient cover-up for the political motivations behind his continued detention. He further complaints that after several years in detention, he has not been tried at first instance.

The state party's information and observations:

4.1 In its submission under rule 91, dated 11 February 1993, the State party submits that pursuant to the information received from different circuit courts, some six criminal cases against the author are currently pending, and all are currently in different stages of the procedure.

4.2 The State party notes that four cases against the author are pending before the Eighth Circuit (Ramo Penal) of the First Judicial District of Panama, where they comprise a total of 14 folders and approximately 5,700 pages of documentation. The plaintiffs are the Legal Representative of the Caja de Ahorros, the office of the Controller General, as well as individuals who act as internal and external auditors of the Bank. In the first case, the author's indictment was pronounced on 14 January 1992 and his pre-trial detention ordered. In the second case, an indictment was served on 25 June 1992, which was appealed by author's counsel. In the third case, filed on 14 January 1992, no indictment had been served as of 11 September 1992. In the fourth case, filed on 19 October 1992, a provisional decision in the author's favour suspending the procedure was taken on 27 October 1992.

4.3 The fifth case against the author is pending before the Seventh Circuit Court and was brought by the legal representative of the Caja de Ahorros. As of the beginning of February 1993, the legal qualification of the charges against Mr. J. E. S. B. remained under review. The final case is pending before the Second Superior Tribunal of the First Judicial District. This was initiated on 29 December 1990 and on 30 June 1992, a "mixed procedural decision" (... "se dictó un auto mixto") was adopted.

4.4 The State party observes that all the proceedings against the author follow their normal course, so that it is impossible to argue that available domestic remedies have been exhausted. It submits that, additionally, the procedures have been complicated by the fact that a considerable number of individuals have been accused together with the author in the above-mentioned cases: this has made investigations more complex and time-consuming and made the gathering of evidence against the accused more difficult.

4.5 After a general survey of Panamanian criminal procedure, the State party concludes that the proceedings against the author are currently in their "intermediate phase", which precedes the contradictory and public proceedings before the court of first instance.

4.6 The State party contends that contrary to the norm, the author was allowed to be treated by specialized medical personnel and doctors of his own choice in a private hospital. This was because the State-run hospital to which detainees and individuals under detention are normally referred was (or is) undergoing structural changes. Moreover, the State party notes that under applicable Panamanian law, the diagnoses made by the author's privately consulted doctors had to be

confirmed by tests carried out by the State-operated Institute of Legal Medicine.

4.7 Finally, the State party rejects as unfounded the allegation that the author can be assimilated to a political prisoner. It observes that at the time of the invasion of Panama by U.S. troops, the author was the director of a State-owned banking operation, a "civilian who supported the de facto military régime of General Manuel Antonio Noriega". The charges against him relate to maladministration and misappropriation of public funds and cannot be categorized as military offences. The State party notes in this context that a criminal case is also pending against author's counsel.

5.1 In his comments, counsel argues that the very fact that the State party's observations were formulated by the Presiding Judge of the Supreme Court of Panama himself (Magistrado Presidente de la Corte Suprema de Justicia) casts some doubts upon the independence and impartiality of the Panamanian judicial system. He considers it inappropriate for the magistrate of the State party's highest judicial instance to represent the Government before the Human Rights Committee. Counsel further objects to the fact that the State party's information and observations seek to vilify him as the author's representative, as they contain unjustified and out-of-context references to criminal charges filed against him.

5.2 Counsel contends that the State party's submission in no way explains or justifies the excessive delay of the author's pre-trial detention. Thus, he explains that pre-trial investigations by the office of the public prosecutor should not, under Panamanian law, exceed four months, whereas they had, at the time of his submission (7 June 1993), already lasted for over 38 months. Counsel further points out that the length of pre-trial detention of his client (nearly four years by the end of 1993) is in absolutely no relation to the maximum sentence he would incur under article 324 of the Criminal Code (namely imprisonment of six months to one year), and which even according to a report of the Controller General would be the only provision of the Criminal Code applicable to the author's case.

5.3 Counsel observes that Mr. J. E. S. B.'s representatives in Panama have unsuccessfully lodged all possible appeals with a view to securing his release on bail. Even an intervention on the author's behalf in late July 1993 from the Archbishop of Panama City, M. M., requesting that the author's preventive detention be substituted by house arrest on humanitarian considerations, was unsuccessful; on 20 August 1993, a judge of the Second Circuit Court rejected the request. In conclusion, counsel submits that the State party's explanations strengthen, rather than explain away, the argument that there has been a violation of article 9, paragraphs 3 and 4, in the case.

5.4 Finally, counsel argues that the state of health of Mr. J. E. S. B. - prostate cancer in an advanced state, as confirmed by several specialists - does not justify the continued pre-trial detention of his client. The situation is said to be contrary to sections 2039 and 2144 D of the Panamanian Criminal Code and Article 31 of Law No. 3 of 22 January 1991, which prohibits the preventive detention of any person in a precarious state of health.

5.5 In conclusion, counsel invites the Committee to find that the pursuit of available domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2(b), of the Optional Protocol. Given the author's state of health, he requests the adoption of interim measures

of protection, pursuant to rule 86 of the Committee's rules of procedure.

Issues and proceedings before the Committee:

6.1 Before considering any claims 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.

6.2 Concerning the alleged violation of article 9, the Committee has noted the State party's contention that the criminal proceedings against the author follow their normal course, and that such delays as have been encountered in preparing the trial against him must be attributed to the complexity of the facts, the number of co-defendants and the difficulties of collecting evidence. On the other hand, it has remained uncontested that all attempts of the author's lawyers to secure the release on bail of Mr. J. E. S. B., pending trial, have been unsuccessful. More than one year after the State party's admissibility observations, there is no indication that any hearing of the charges against him has taken place. The Committee observes that, notwithstanding extraneous factors such as the author's ill health, a delay of over four years between arrest and trial at first instance justifies the conclusion that the pursuit of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2(b), of the Optional Protocol, notwithstanding the fact that several cases against the author are proceeding through the local courts.

6.3 The Committee observes that counsel has sufficiently substantiated, for purposes of admissibility, his allegations that the author's continued detention without being brought promptly to trial is contrary to article 9, paragraph 3, and that his client has not been tried within a reasonable time, contrary to article 14, paragraph 3(c). These allegations should, therefore, be considered on their merits.

6.4 Regarding counsel's claim that the nature of the State party's submission impairs impartiality, the Committee notes that factual information was sought from a domestic court, which was in a position to provide this information. The Committee finds no reason to object to this practice of the State party.

6.5 As to counsel's request, on his client's behalf, for interim measures of protection under rule 86 of the rules of procedure, the Committee has carefully examined the material presented by the parties. In the particular circumstances, and considering the uncontested gravity of the author's state of health, it requests the State party not to adopt or sustain any measures that would place the author's life at risk, pending the determination of the merits of the complaint.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible in so far as it appears to raise issues under articles 9, paragraph 3, and 14, paragraph 3(c), of the Covenant;

(b) that in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of the present decision, written explanations or statements clarifying the matter and the measures, if

any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated under rule 93, paragraph 3, of the Committee's rules of procedure, to the author and his counsel, with the request that any comments they may wish to submit thereon should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) that the State party be requested to refrain from adopting or sustaining any measures that may place the life of Mr. J. E. S. B. at risk; this request does not imply any determination of the merits of the author's claims;

(e) that this decision shall be communicated to the State party, to the author and to his counsel.

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

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