

HUMAN RIGHTS COMMITTEE

Kehler v. Germany

Communication No 834/1998

22 March 2001

CCPR/C/71/D/834/1998

ADMISSIBILITY

Submitted by: Mr. Waldemar Kehler

Alleged victim: The author

State party: Germany

Date of communication: 5 May 1998 (initial submission)

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

Meeting on 22 March 2001

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 5 May 1998, is Waldemar Kehler, a German national. He claims to be a victim of violations by the Federal Republic of Germany of several provisions of the Covenant. He is not represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976, and the Optional Protocol on 25 November 1993. Upon acceding to the Optional Protocol, the State Party entered a reservation to the Optional Protocol which reads, inter alia: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement".

The facts as presented

2.1 The author's two children, Sonja and Nina, were born on 30 December 1981 and 20 February 1983 respectively from his marriage to Anita Kehler. After the author suffered long-term disability through an accident and illness, the spouses separated, with the wife moving out of the common dwelling with both daughters on 29 May 1995.

2.2 By provisional order of 12 June 1995, the Dieburg Local (Family) Court granted the mother the right to determine the place of residence of the children during the period of separation. On 28 June 1995, the court referred the proceedings to the Tuttlingen Local Court after oral hearing, as the author had previously applied to the latter court for custody to be granted to himself. On 7 August 1995, following the children's indication that they wished to remain with their mother, the Tuttlingen court upheld the provisional arrangement of the right to determine place of residence which had been made by the Dieburg court.

2.3 On 17 October 1995, following representations by the author that the children's expressed wishes were not free of pressures, the Tuttlingen court ordered a psychiatric examination of the children. Multiple individual interviews with both children and parents as well as psychiatric tests indicated that these wishes were genuine. Accordingly, on 21 February 1996, the Tuttlingen court confirmed the award of custody to the mother. The author was provided with access to the children one weekend per month and further holiday access. The author's appeal against that decision was rejected by the Stuttgart Higher Regional Court on 20 September 1996. On 5 June 1997, the Dieburg court ordered the author to pay maintenance for the children and their mother.

2.4 On 18 July 1997, the author wrote to the Tuttlingen court seeking enforcement of the visiting arrangements. The judge stated that the court was not in a position to enforce the judgment as the author's children now refused to see him. On 27 October 1997, the Dieburg court rejected an application by the author for transfer of custody of the children and a fine for the mother following an unsuccessful attempted visit to the children.

2.5 On 20 January 1998, the Frankfurt Higher Regional Court amended the custody arrangements, providing the author with more frequent access to the children every second Saturday of the month from 11 am to 5 pm. The court ordered that this arrangement was to be complied with by both parties upon pain of financial penalty. On 25 March 1998, the Federal Constitutional Court rejected the author's constitutional complaint.

2.6 On 25 May 1998, the European Commission of Human Rights declared inadmissible the author's complaint, which had been filed on 1 September 1996 and registered on 3 October 1997 under file No. 38012/97, finding that the application did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention or its Protocols.

The complaint

3. The author claimed violations of his and his children's rights, which look to raise issues primarily under articles 23 and 24 of the Covenant. He initially focussed on the contention that the deprivation of access to his children by the mother constituted child abduction and that State complicity existed

in a failure to enforce access and in the failure to bring criminal charges against the author's former wife. More recently the author contends that visiting arrangements requiring him, in condition of serious disability, to travel long distances to visit his children constitutes torture.

The State party's information and observations with regard to the admissibility of the communication

4.1 The State party considers it manifest that the communication has already been considered under another procedure of international investigation or settlement, and the Committee's competence is therefore excluded by paragraph (a) of the State party's reservation.

4.2 The State party further contends that there are considerable doubts as to whether domestic remedies have been exhausted. Since the Federal Constitutional Court does not provide the grounds upon which the application was rejected and the author has not supplied his application to the Court, the fact that the Federal Constitutional Court did not accept a claim for adjudication is not of itself sufficient, in this multi-faceted and prolonged litigation, to demonstrate that domestic remedies have been exhausted.

4.3 The State party also considers the communication to be seriously deficient in the material transmitted and the statements made which fail to specify any objective reason for the application and requests that the author be asked to supply further clarification. In particular, the State party argues that the author does not reveal which domestic decisions he is contesting, nor in which respect(s) the author considers a violation of the Covenant to have occurred.

Author's response to the State party's information and observations with regard to the admissibility of the communication

5. In response to the State party's submissions, the author makes a variety of comments on recent German law and jurisprudence regarding family issues, correspondence with members of Parliament and others, general discussion on international cross-border cases of child abduction in Germany and other countries, accounts of his state of health and medical history, and repeated allegations as to the conduct of his wife and other persons involved in his cases.

Issues and proceedings before the Committee

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

6.2 The Committee notes the State party's contention that paragraph (a) of the reservation entered upon its accession to the Optional Protocol excludes the Committee's competence to examine the author's claim because the same matter has already been considered under another procedure of international investigation or settlement. In this connection, the State party has informed the Committee that the European Commission of Human Rights declared the author's complaint inadmissible on 3 October 1997, finding that the application did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention or its Protocols. In view of

the author's failure to supply his application to the Commission, the absence of any recitation of facts or reasoning in the Commission's decision, and the broader provisions of the Covenant which touch upon present issues, the Committee possesses insufficient information to determine the applicability of the State party's reservation to the present communication.

6.3 Nevertheless, with respect to the author's various claims made primarily under articles 23 and 24 of the Covenant, the Committee considers that the author has failed to substantiate his claims for purposes of admissibility, and accordingly declares them inadmissible under article 2 of the Optional Protocol. In the circumstances, therefore, it is unnecessary for the Committee to address the remaining arguments on admissibility raised by the State party.

7 The Committee therefore decides:

- a) that the communication is inadmissible under article 2 of the Optional Protocol.
- b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* 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, Mr. Louis Henkin, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfick Khalil, Mr. Patrick Vella, Mr. Maxwell Yalden.