

HUMAN RIGHTS COMMITTEE

Ben Said v. Norway

Communication No. 767/1997

21 July 1998

CCPR/C/63/D/767/1997*

ADMISSIBILITY

Submitted by: Zouhair Ben Said

Alleged victim: The author

State party: Norway

Date of communication: 28 October 1996

Date of present decision: 21 July 1998

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 Mr. Zouhair Ben Said, a Tunisian citizen. He claims to be a victim of a violation of his rights by Norway.

The facts as presented

2.1 The author married a Norwegian citizen on 29 September 1976, in Tunisia. That same year the author obtained a residence permit and immigrated to Norway. In September 1977, a daughter was born, who received the Norwegian nationality in 1979. The author was granted a permanent residence permit. In 1982, a second child was born.

2.2 At the end of 1980, the author was sentenced to 5 years of imprisonment 1/. In October 1982, the Norwegian authorities informed him that he would be expelled from Norway after serving half of his sentence. The author appealed against this decision to the Ministry of Justice. His appeal was rejected on 22 November 1982. The author then, using a leave from prison, escaped Norway to go

to France with his wife and children. From there, the author and his family moved to Tunisia, where they lived from February 1983 onwards.

2.3 In 1987, the author and his wife contacted a Norwegian lawyer, because they wanted to move back to Norway. According to the author, he was then informed that the Minister of Justice would consider granting him a residence permit once he and his family would be back in Norway and he would have served the remainder of his sentence. 2/

2.4 In November 1987, the family returned to Norway. While the author was serving his sentence, his wife filed for separation and sole custody of the children. In an oral settlement of 18 April 1988, the author and his wife agreed to separation. On 10 October 1988, the Court gave sole custody of the children to the mother and the author was given regular access. The author's wife changed the family name of the children to her own and had Norwegian passports issued for them on her name, in accordance with Norwegian rules governing custody. According to the author, he has filed a cassation appeal against the October 1988 judgment 3/.

2.5 On 16 May 1988, the Minister of Justice annulled the previous expulsion order. In May 1989, the author was released from prison.

2.6 On 9 October 1989, the author's wife filed for denying the author access to the children. In January 1990, the Court provisionally provided limited access in the presence of a third person, an arrangement which was apparently not kept. On 17 January 1990, the author was refused a residence permit. By judgment of 7 May 1990, the Court revoked the author's visiting rights, because of the alleged risk that he would kidnap his children. Subsequently, the author's appeal against the denial of his residence permit was refused on 28 May 1990. He was ordered deported by the Ministry of Justice and on 14 June 1990, he was arrested and shortly thereafter returned to Tunisia, against his will. The author appealed the Court's decision revoking his visiting rights to the Eidsivating High Court. On 21 December 1990, his appeal was dismissed because he was unable to provide security for the costs, a condition when plaintiffs reside abroad.

2.7 On 19 November 1991, the author by writ of summons demanded to be warded custody and access. This was denied by the Court on 21 February 1992.

2.8 Visa applications by the author in order to visit his children were denied by the Norwegian authorities on several occasions from 1992 to 1994. On 26 February 1992 and on 18 October 1994, the author tried to enter Norway without a visa and was rejected on entry. On 19 October 1994, the author was ordered expelled for repeated violations of the Immigration Act. On 8 September 1995, he requested asylum in Norway, which was denied.

2.9 On 15 January 1996, the author filed an action with the Oslo City Court for custody and access to his children. On 22 March 1996, he applied for a visa to attend the Court hearing of his case, which was scheduled for 24 July 1996, for which he had received a convocation. Because he did not receive an answer in time, the hearing was postponed until 14 January 1997. On 20 August 1996, the Ministry of Justice refused the author a visa to enter the country, because of indications that he would not voluntarily leave Norway after the hearing. Nevertheless, the author, who wanted to be present at the hearing, arrived at the airport of Oslo, where he was refused entry.

He was not allowed to make any phone calls and in the morning of 14 January, he was handed a decision of deportation, put on a plane, and sent back to Tunisia. On 11 March 1997, the author's claim was heard and dismissed by the Court. At the hearing, he was represented by a lawyer. On 22 October 1997, his appeal against the Court's decision was dismissed by the Borgarting High Court for failure to have it co-signed by a lawyer.

2.10 The author states that he has in vain tried to obtain copies of the Court documents in his case.

The complaint

3. The author claims that he is a victim of discrimination, and that other Europeans are not treated in the same way. He also claims that he is a victim of a violation of the right to fair trial.

The State party's admissibility submission and the author's comments

4. The State party submits that it is unclear what the author claims has been in breach of the Covenant. It understands that the complaint relates mainly to the denial of residence permit and visa in the author's case. In this connection, the State party points out that all administrative decisions concerning residence permits and visa can be brought before the courts for judicial review. The courts' review encompasses the question of whether the decision was in accordance with international law. According to the State party, the author's rights to petition for judicial review are not affected by the fact that he resides in Tunisia. The State party informs the Committee that it has not been possible to obtain the judgement of 11 March 1997 because of the rules concerning secrecy.

5.1 In his comments, the author submits that the decision to refuse him a residence permit was taken on the pretext that he had been refused access to his children. In this context, he refers to an exchange of correspondence between his ex-wife's lawyer and the Ministry of Justice. He contends that a permanent residence permit cannot be revoked simply upon request of his ex-wife. He claims that his de facto expulsion from Norway was abusive, and that an appeal was not effective, as shown by his deportation, while an administrative appeal was still pending.

5.2 He further suggests that the Norwegian authorities are using immigration procedures against him to prevent him access to court in the case of access to and custody over his children. In this connection, he recalls that he was in Norway from 28 October 1991 until 28 February 1992, that his entry was legal because at the time no visa was required for Tunisian citizens, that he stayed for longer than the allowed three months because he had brought a case to the Oslo City Court, and that the police came to deport him on 28 February 1992, a few days before the hearing was scheduled on 2 March 1992. According to the author, this shows the abuse by the authorities of the immigration law in order to prevent him from personally bringing his case to court.

5.3 He further denies that he ever entered Norway illegally, because he always presented himself to the airport police in order to obtain a legal entry permit, which was then refused, and that he never left the international zone of the airport.

5.4 The author further points out that the Ministry of Justice, which is the appeal instance for decisions taken by the Directorate of Immigration, always takes its decisions at the last minute or

even too late.

5.5 The author claims that the Court's decision of 11 March 1997, refusing him access to his children, is unacceptable because he was prevented from personally attending the hearing scheduled for 14 January 1997, but kept against his will at the Oslo airport, despite a convocation from the court to attend the hearing.

5.6 The author further claims that it is illegal that the State party has issued passports for his children under their mother's name. He states that his children always had a Tunisian passport under his family name.

5.7 In respect of the State party's claim that he has failed to exhaust all domestic remedies, the author states that he has done what was in his power to do, and that ten years of interventions and appeals have remained without success. He states that he does not have the means to pay for any further court actions, and that he is not prepared to lose another ten years by trying in vain to obtain redress. He adds that good contact between him and his ex-wife and children has been re-established.

5.8 The author demands that the deportation order of 28 May 1990 be annulled, as well as all decisions based on this order, that the judgement denying him access to his children be rejected, that the expulsion order against him be lifted and that he be paid compensation for moral and material damages.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in the 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 The Committee has taken note of the State party's argument that the communication is inadmissible for non-exhaustion for domestic remedies. The Committee notes that with respect to the denial of a residence permit to the author and with respect to the expulsion order of 1994, the author has made no efforts to appeal these matters to the courts, and concludes that this aspect of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Covenant.

6.3 A separate issue arises, however, in relation to the author's claim that he was not allowed to attend in person the hearing before the Oslo City Court, scheduled for 14 January 1997, and finally held on 11 March 1997. The Committee notes that the author appealed the Court's decision following the hearing, also on the ground that the hearing had been unfair because he was not present in person, and that the appeal was rejected because it was not co-signed by a lawyer. The Committee has taken note of the author's arguments that he has no means left to go to court. In the circumstances, the Committee finds that the author has made a reasonable effort to exhaust available domestic remedies and that the requirement of article 5, paragraph 2 (b), does not prevent it from examining the author's claim.

6.4 The Committee considers that the author's claim that he was denied personal access to the Court

in a hearing held on his initiative concerning the custody and visiting rights to his children, may raise issues under article 14, paragraph 1, and articles 17, 23 and 26, which should be considered on the merits.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible;

(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 this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it; the author shall be requested to provide a copy of the Oslo City Court's judgement of 11 March 1997, or, if he has no copy in his possession, to authorize the State party to access the judgment in order to provide the Committee with a copy.

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) that this decision shall be communicated to the State party and to the author .

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

1/ For a drug offence (selling 95 grams of heroin).

2/ The author refers to a decision of 18 November 1987 RF88025415, confirmed on 18 May 1988.

3/ According to the State party no appeal has been filed.