

## HUMAN RIGHTS COMMITTEE

### Maleki v. Italy

Communication N° 699/1996\*\*

15 July 1999

CCPR/C/66/D/699/1996\*

### VIEWS

*Submitted by: Ali Maleki (represented by his son, Kambiz Maleki)*

*Alleged victim: The author*

*State party: Italy*

*Date of communication: 28 January 1999*

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

Meeting on 15 July 1999,

Having concluded its consideration of communication No.699/1996 submitted to the Human Rights Committee by Ali Maleki, 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 author of the communication and the State party,

Adopts the following:

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

1. The author of the communication is Ali Maleki, a sixty five year old Iranian citizen currently serving a 10 year prison sentence in Italy for drug trafficking. The case is submitted on his behalf by his son Kambiz Maleki. He claims that his father is a victim of violations by Italy of the International Covenant on Civil and Political Rights, although he does not specify which provisions of the Covenant he considers to have been violated.

The facts as submitted by the author:

2.1 The author, a truck driver for over 40 years who transported consignments between Iran and Italy, was tried and sentenced, *in absentia*, on 21 November 1988 to 10 years imprisonment for having imported and sold narcotic drugs in Italy. His sentence was confirmed by the Court of Appeal on 16 October 1989.

2.2 In 1991, while in California on a family visit, the author was arrested and detained for about six months, while awaiting his extradition to Italy. On 9 April 1992, the United States District Court, Central District of California, denied the Italian Government's request for his extradition. In May or June of 1995, the author returned to Iran via Italy. He was arrested at Rome airport, and has been detained since.

The complaint:

3.1 The author claims that he was wrongly convicted, and that the case was one of mistaken identity based on one single tapped telephone conversation between him and a known drug dealer, who was also a truck driver and who had been under police surveillance for some time.

3.2 Kambiz Maleki alleges that his father was tried in his absence and that the Public Prosecutor's Office appealed the sentence twice in order to effectively bar his father from appealing.<sup>1</sup> This, he claims, means that domestic remedies have been exhausted or are unavailable. In support of his contention, he submits a letter from an Italian lawyer, which states that article 630 of the Criminal Code of Procedure precludes a reopening of the case and concludes that the only possibility remaining is to request the transfer of Mr. Maleki to Iran, to serve the remainder of the sentence there.

3.3 The author's son notes that the only connection in the file submitted by the Italian authorities to the United States in substantiation of the extradition request, contains one single reference to his father.

3.4 Kambiz Maleki adds that his father has been on a hunger strike to obtain a review of his conviction. He claims that his father has a serious heart ailment, having refused heart surgery while in the United States because he wanted to die in his native country. He claims that his father has also been denied the possibility of serving his sentence in his own country (Iran).

The State party's information and author's comments thereon:

4.1 In its submission of 17 September 1996, the State party explains that Mr. Maleki was tried and convicted *in absentia*, duly represented by his court-appointed attorney. The decision of the court of first instance was appealed both by Mr. Maleki's counsel and the public prosecutor. The State party assumes that he was informed by his counsel of the proceedings followed against him in Italy. He was charged for drug trafficking. When the authorities were unable to execute the warrant, he was declared a fugitive. The State party notes that when the author was arrested in the United States, he was assisted by an American

attorney who argued against the extradition. It further notes that the Office of the Public Prosecutor informed Mr. Maleki of the ways and means still open to him for a revision or reversal of the judgments.

4.2 The State party contends that Mr. Maleki's medical condition is being closely monitored and submits a substantial file in this respect.

4.3 The State party argues that the claims about unfair trial relate to the evaluation of facts and evidence in the case which is better left to the appellate Courts of States parties.

4.4 With respect to the claim that Mr. Maleki should be transferred to his own country (Iran) to serve his sentence, the State party notes that his petition could not be entertained in view of the fact that Iran is not a signatory to the Convention on the Transfer of Sentenced Prisoners (Strasbourg, 21 March 1983) nor is there a bilateral agreement on the matter between Italy and Iran.

5. In his comments Kambiz Maleki reiterates the claims that a trial *in absentia* constitutes a violation of the Covenant even if his father had a court-appointed lawyer, and that his father suffers from an acute heart condition for which he requires surgery.

#### The Committee's decision on admissibility

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

6.2 As regards the author's complaint that he had a heart condition which was not being treated adequately, the Committee noted that the State party had submitted a comprehensive file showing that Mr. Maleki's medical condition was being closely monitored. In the circumstances, the Committee considered that the author had failed to substantiate this claim, for purposes of admissibility.

6.3 With respect to the author's complaint that he had not been transferred to his own country to serve his sentence, the Committee noted that the Covenant does not provide that an alien convicted and sentenced for a crime has a right to serve his sentence in his own country. Accordingly, this part of the communication was inadmissible ratione materiae.

6.4 The author's claim that he was tried *in absentia* was not contradicted by the State party. On the contrary, the State party conceded that the author was not present at his trial, but argued that he was represented by court-appointed counsel and that he therefore had a fair trial. The Committee was of the opinion that, in these circumstances, the author had substantiated, for the purposes of admissibility, his claims that his right to a fair trial, under article 14, paragraph 1, and his right, under article 14, paragraph 3 (d), to be tried in his presence, were violated, and these should be examined on their merits.

6.5 In deciding on admissibility the Committee was aware that upon ratification of the

Covenant the State party made the following declaration: "The provisions of article 14, paragraph 3 (d), are deemed to be compatible with existing Italian provisions governing trial of the accused in his presence and determining the cases in which the accused may present his own defence and those in which legal assistance is required". The State party did not refer to this declaration in its detailed reply to the author's communication. The declaration's scope, and its effect on the author's claim of a violation of article 14, paragraph 3 (d), therefore remained unclear. The Committee decided that both the State party and the author could include in their replies on the merits arguments relating to the scope of the above declaration, and its effect on the admissibility of the author's claim under article 14. The Committee would examine such arguments together with the arguments on the merits.

6.6 The Human Rights Committee therefore decided that the communication was admissible.

States party's merits observations:

7. In its submission, dated 18 February 1998, the State party in response to the Committee's decision on admissibility, raises two arguments:

a. That the declaration made by the State party upon ratification of the Covenant constitutes a reservation that precludes the Committee from holding that a trial *in absentia*, according to the law of the State party, violates the State party's undertakings under the Covenant. The communication should therefore be declared inadmissible;

b. Even if the communication were to be considered admissible, the provisions of Italian law regarding trial *in absentia* are compatible with article 14, paragraph 3 (d) as, inter alia, in certain circumstances they allow a person who has been tried *in absentia* to apply for a retrial in his or her presence.

8. The author's son, who represents his father in this communication, informed the Committee that he does not intend to submit further arguments, and the Committee can therefore proceed to examine the arguments raised by the State party.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present 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.

9.2 The State party's argument is that its declaration concerning article 14, paragraph 3 (d) is a reservation that precludes the Committee examining the author's argument that his trial *in absentia* was not fair. However, that declaration deals only with article 14, paragraph 3 (d), and does not relate to the requirements of article 14, paragraph 1. The State party itself has argued that its legal provisions regarding trial *in absentia* are compatible with article 14, paragraph 1. Under this provision, basic requirements of a fair trial must be maintained, even when a trial *in absentia*, is not, *ipso facto*, a violation of a State party's undertakings. These requirements include summoning the accused in a timely manner and informing him of the

proceedings against him.

9.3 The Committee has held in the past that a trial *in absentia* is compatible with article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him<sup>2</sup>. In order for the State party to comply with the requirements of a fair trial when trying a person *in absentia* it must show that these principles were respected.

9.4 The State party has not denied that Mr. Maleki was tried *in absentia*. However, it has failed to show that the author was summoned in a timely manner and that he was informed of the proceedings against him. It merely states that it "assumes" that the author was informed by his counsel of the proceedings against him in Italy. This is clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused *in absentia*. It was incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial *in absentia*. Failing evidence that the court did so, the Committee is of the opinion that the author's right to be tried in his presence was violated.

9.5 In this regard the Committee wishes to add that the violation of the author's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy. The State party described its law regarding the right of an accused who has been tried *in absentia* to apply for a retrial. It failed, however, to respond to the letter from an Italian lawyer, submitted by the author, according to which in the circumstances of the present case the author was not entitled to a retrial. The legal opinion presented in that letter must therefore be given due weight. The existence, in principle, of provisions regarding the right to a retrial, cannot be considered to have provided the author with a potential remedy in the face of unrefuted evidence that these provisions do not apply to the author's case.

10. 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 before it disclose a violation of article 14, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Maleki with an effective remedy, which must entail his immediate release or retrial in his presence. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that by becoming a State party to the Optional Protocol, Italy 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 or subject to its jurisdiction the rights recognized in the Covenant and 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. The State party is also requested to translate and publish the Committee's Views.

[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.]

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

\*\* Under Rule 85 of the rules of procedure, Mr. Fausto Pocar did not participate in the consideration of the communication.

1/ From a Statement made by the Office of the State Attorney General in Florence, it transpires that under Italian law, Mr. Ali Maleki could, once he surrendered to the Italian authorities, avail himself of the possibility of appealing both sentence and conviction.

2/ Communication No. 16/79, (Mbenge v. Zaire).