HUMAN RIGHTS COMMITTEE

Bryhn v. Norway

Communication No. 789/1997

29 October 1999

CCPR/C/67/D/789/1997

VIEWS

Submitted by: Monica Bryhn (represented by Mr. John Ch. Elden)

Alleged victim: The author

State party: Norway

Date of communication: 5 November 1996

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

Meeting on 29 October 1999

Having concluded its consideration of communication No.789/1997 submitted to the Human Rights Committee on behalf of Monica Bryhn, 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, her counsel and the State party,

Adopts the following:

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

1. The author of the communication is Ms. Monica Bryhn, a Norwegian citizen born on 21 October 1966. She claims to be a victim of a violation by Norway of article 14(5) of the Covenant. She is represented by counsel, Mr. John Christian Elden.

The facts

2.1 On 3 February 1993, the author was convicted for import and sale of drugs on a commercial basis; she was sentenced to four years' imprisonment. On 16 June 1995, she was released on probation, the remaining 1 year and 132 days of her sentence being suspended.

2.2 On 13 December 1995, while still on probation, the author was again arrested and charged with possession of heroin and other narcotics, the amounts being consistent with personal use. On 21 December 1995, she pleaded guilty to these offences at the Drammen Magistrate's Court and was accordingly convicted. The Court, exercising discretionary powers, then passed a joint sentence combining the remaining time of the previous sentence and the imprisonment for the new offence, thus sentencing her to a term of imprisonment of one year and six months. As required by law, the Court set out in its judgement the aggravating and mitigating circumstances and recommended transfer from prison to a centre for treatment of her addiction.

2.3 The author appealed the sentence to the Borgarting Court of Appeal. With respect to cases concerning a maximum sentence of less than 6 years, the Criminal Procedure Act provides that the Court of Appeal may disallow the appeal if the court unanimously considers it obvious that the appeal will not succeed. On 26 January 1996, the three-judge Court unanimously decided that the appeal had no possibility of leading to a lesser sentence and summarily dismissed the appeal without a full hearing. The author requested the Court to reconsider its decision, invoking article 14(5) of the Covenant. On 26 March 1996, a differently constituted Court of Appeal decided by majority not to change the previous decision; part of the appellant's case concerned an alleged inconsistency between the Norwegian Criminal Procedure Act and article 14(5) of the Covenant. This second decision was in turn appealed to the Appeals Committee of the Supreme Court, which on 6 May 1996 held that none of the three points of law put forward on the author's behalf (including a breach of article 14(5) of the Covenant) was sustainable.

2.4 With this, all domestic remedies are said to be exhausted.

The complaint

3. In his communication, the author's counsel simply recites the above sequence of events and claims that it constitutes a breach of article 14(5). However, he also sends copies of his presentations to the Court of Appeal and to the Supreme Court. In the Court of Appeal, he argued that, in order to comply with article 14(5), domestic law must provide for a retrial both to establish the guilt of the accused as well as to determine the harshness of the sentence. He referred to the travaux prééparatoires on the Criminal Procedure Act and suggested that a system requiring leave to appeal constituted a breach of article 14(5). In the Supreme Court he argued that an appeal as to the severity of the sentence should be admitted regardless of the maximum penalty when the actual sentence is as high as one year and six months.

State party's observations and counsel's comments

4.1 In its comments, the State party does not raise any objections to the admissibility of the communication and addresses the merits of the communication. It explains that its appeal system was changed in 1995, and that the present system provides for a wider range of appeal possibilities than the old one. Under the old system, cases concerning charges punishable by imprisonment of

more than six years, were tried by the Court of Appeal as a first instance court, and no appeal was possible in respect of the assessment of evidence in relation to the question of guilt. Under the new system, all cases are tried by first instance courts, and all convicted persons have a right to appeal to the Court of Appeal. Following the new Criminal Procedure Act, Norway partially withdrew its reservation to article 14, paragraph 5, of the Covenant.[1]

4.2 The State party explains that the grounds on which an appeal may be lodged are unlimited and can concern any defect in the judgement or procedure. For reasons of procedural economy, a screening system was introduced, in order to avoid overburdening of the Court of Appeal. According to section 321 second paragraph, of the Criminal Procedure Act, the Court of Appeal (composed of three judges) may refuse to allow an appeal to proceed if the court unanimously considers it obvious that the appeal will not succeed. Thus, the Court of Appeal must in fact review the case in order to assess whether the appeal should be allowed to proceed. Appeals concerning crimes punishable by law with imprisonment of more than six years are always allowed to proceed. As a rule, appeals concerning an issue of evidence should also be admitted to a full hearing. According to section 324 the Court of Appeal takes its decision without oral hearings. The parties, however, are allowed to express their views in writing. Thus, the documents of the case, including the judgement of the Court of first instance, together with the arguments made in the submissions from the parties, constitute the basis of the assessment by the Court of Appeal.

4.3 In the instant case, the sole ground of appeal advanced by the author was the harshness of the sentence. She did not raise any questions relating to the assessment of evidence. Her main argument was that the Court should not have passed a joint sentence with the previous judgement. The review, therefore was mainly a question of the application of the penal Code and the case law of the Supreme Court. The relevant information could be found in the documents produced in relation to the hearing of the case in the Court of first instance.

4.4 The State party considers that the review so performed by the Court of Appeal does constitute a review within the meaning of article 14, paragraph 5. When amending the previous legislation and setting up the new system, the drafting committee and independent experts looked into the question of compatibility with article 14 (5) and concluded that the system was in compliance with the Covenant. The State party points out that the words 'according to law' in paragraph 5 of article 14 govern the modalities by which the review by a higher tribunal is to be carried out, as stated by the Committee in its Views in case No. 64/1997 (Salgar de Montejo v. Colombia).[2] Article 14(5) therefore covers a wide range of second instance supervision, having in common the essential requirement that the case be reviewed. In this regard, the State party argues that States must enjoy a certain margin with regard to the implementation of the right to review. Many States have enacted in one form or another a system of leave to appeal. According to the State party, even if second instance proceedings are limited to so-called 'leave to appeal proceedings', they must be considered review within the meaning of article 14(5).

4.5 The State party adds that an unlimited right to appeal could easily be subject to abuse and result in the courts being burdened with unreasonable cases. An unlimited right to appeal would unnecessarily lead to a heavier workload of the courts and might result in delays in breach of article 14(3)(c). The State party emphasizes that the Court of Appeal also at the preliminary stage conducts an assessment of the merits of the appeal.

4.6 The State party is further of the opinion that when deciding whether a system is in compliance with article 14(5), account must be taken of the entirety of the proceedings in the national legal system and the role and function of the appellate court therein. Provided that there has been an oral and public hearing at first instance, the absence of public and oral hearings during the appeal proceedings should be held to be justifiable, provided that the parties are given an opportunity to express their views in written form. In this context, the State party observes that the principle of 'equality of arms' is observed.

4.7 The State party also refers to a decision by the European Commission of Human Rights of 26 October 1995, relating to the previous appeal system but raising similar issues as in the present case. The Commission considered that limitations in the form of regulation by the State should pursue a legitimate aim and not impair disproportionately the essence of the right to review. The Commission rejected as manifestly ill-founded the allegation that Norway's system infringed the right to review.

5. In her comments on the State party's submission, the author contests the State party's affirmation that the summary review by the Court of Appeal in her case constituted a review within the meaning of article 14(5). According to the author, the denial of a full rehearing indicates that the court did not consider the merits of her case. She has therefore not enjoyed a genuine review of her case by a higher tribunal, as prescribed by article 14(5).[3]

Issues and proceedings before the Committee

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 is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has not challenged the admissibility of the communication. The Committee is not aware of any obstacle to the admissibility of the communication. Accordingly, it finds the communication admissible and proceeds without delay to a consideration of its merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the author of the present case appealed the judgement of first instance only in respect of the sentence imposed. The Court of Appeal, sitting with three judges, in accordance with section 321 of the Criminal Procedure Act, reviewed the material that had been before the court of first instance, the judgement and the arguments advanced on behalf of the author as to the inappropriateness of the sentence, and concluded that the appeal had no possibility of leading to a reduced sentence. Moreover, the Court of Appeal again reviewed the elements of the case when reconsidering its earlier decision, and this second decision was subject to appeal to the Appeals Committee of the Supreme Court. Although the Committee is not bound by the consideration of the Norwegian parliament, and sustained by the Supreme Court, that the Norwegian Criminal Procedure Act is consistent with article 14(5) of the Covenant, the Committee considers that in the circumstances of the instant case, notwithstanding the absence of an oral hearing, the

totality of the reviews by the Court of Appeal satisfied the requirements of article 14, paragraph 5.

8. 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 do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

[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.]

Notes:

1/ On 19 September 1995 Norway declared that following "the entry into force of an amendment to the Criminal Procedure Act, which introduces the right to have a conviction reviewed by a higher court in all cases, the reservation made by the Kingdom of Norway shall continue to apply only in the following exceptional circumstances:

1. Riksrett (Court of Impeachment)

According to article 86 of the Norwegian Constitution, a special court shall be convened in criminal cases against members of the Government, the Storting (Parliament) or the Supreme Court, with no right of appeal.

2. Conviction by an appellate court

In cases where the defendant has been acquitted in first instance, but convicted by an appellate court, the conviction may not be appealed on grounds of error in the assessment of evidence in relation to the issue of guilt. If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever."

2/ Views adopted by the Committee on 24 March 1982.

3/ Counsel refers to Nowak, CCPR commentary, 1993, page 266, concerning article 14(5): "Remedies of cassation are thus just as admissible as meritorial appeals, as long as the appeal deals with a genuine review ('examine'). It is thus doubtful whether proceedings limited to mere questions of law are sufficient. [...] In appellate proceedings as well, the guarantees of a fair and public trial are to be observed."