

HUMAN RIGHTS COMMITTEE

Karker v. France

Communication No 833/1998

26 October 2000

CCPR/C/70/D/833/1998

VIEWS

Submitted by: Mrs. Samira Karker, on behalf of her husband, Mr. Salah Karker
(represented by Mr. Jean-Daniel Dechezelles)

Alleged victim: Mr. Salah Karker

State party: France

Date of communication: 27 March 1998 (initial submission)

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

Meeting on 26 October 2000

Having concluded its consideration of communication No. 833/1998 submitted to the Human Rights Committee by Mrs. Samira Karker 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 Mrs. Samira Karker. She presents the communication on behalf of her husband, Salah Karker, a Tunisian citizen born on 22 October 1948, residing in France since 1987. She claims that her husband is a victim of violations by France of his Covenant rights. After the initial communication, the author was represented by Jean-Daniel Dechezelles, barrister

in Paris.

The facts

2.1 In 1987, Mr. Karker, who is co-founder of the political movement Ennahdha, fled Tunisia, where he had been sentenced to death by trial *in absentia*. In 1988, the French authorities recognised him as a political refugee. On 11 October 1993, under suspicion that he actively supported a terrorist movement, the Minister of the Interior ordered him expelled from French territory as a matter of urgency. The expulsion order was not, however, enforced, and instead Mr. Karker was ordered to compulsory residence in the department of Finistère. On 6 November 1993, Mr. Karker appealed the orders to the Administrative Tribunal of Paris. The Tribunal rejected his appeals on 16 December 1994, considering that the orders were lawful. The Tribunal considered that from the information before it, it appeared that the Ministry of the Interior was in possession of information showing that Mr. Karker maintained close links with Islamic organisations which use violent methods, and that in the light of the situation in France the Minister could have concluded legally that Mr. Karker's expulsion was imperative for reasons of public security. It also considered that the resulting interference with Mr. Karker's family life was justifiable for reasons of *ordre public*. The Tribunal considered that the compulsory residence order, issued by the Minister in order to allow Mr. Karker to find a third country willing to receive him, was lawful, in accordance with article 28 of the decree of 2 November 1945(1), in view of the fact that Mr. Karker was a recognized political refugee and could not be returned to Tunisia. On 29 December 1997, the Council of State rejected Mr. Karker's further appeal.

2.2 Following the orders, Mr. Karker was placed in a hotel in the department of Finistère, then he was transferred to Brest. Allegedly because of media pressure, he was then transferred to St-Julien in the Loire area, and from there to Cayres, and subsequently to the South East of France. Lastly, in October 1995, he was assigned to Digne-les-Bains (Alpes de Haute Provence), where he has resided since. According to the order fixing the conditions of his residence in Digne-les-Bains, Mr. Karker is required to report to the police once a day. The author emphasizes that her husband has not been brought before the courts in connection with the suspicions against him.

2.3 The author states that she lives in Paris with her six children, a thousand kilometres away from her husband. She states that it is difficult to maintain personal contact with her husband. On 3 April 1998, Mr. Karker was sentenced to a suspended sentence of six months' imprisonment for having breached the compulsory residence order by staying with his family during three weeks.

The complaint

3. The author does not invoke any article of the Covenant, but it would appear that the facts may raise issues under articles 12 and 17, and possibly 9 and 13 of the Covenant.

State party's observations

4.1 By submission of 23 November 1998, the State party addresses both the admissibility and the merits of the communication.

4.2 As to the admissibility, the State party argues that the author of the communication has not justified that she is qualified to represent her husband. The State party refers to rule 90(b) of the Committee's rules of procedure that a communication should be submitted by the victim personally or by his representative, and that a communication on behalf of a victim can be accepted when it appears that the individual in question is unable to submit the communication personally. In the present case, the author has advanced no circumstances to justify why her husband is not in a position to present personally a communication to the Committee, nor has she shown that she has received a mandate to represent him. The State party therefore requests the Committee to reject the communication as inadmissible.

4.3 Secondly, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies, as far as the alleged violations of articles 9, 12 and 17 of the Covenant are concerned. In this context, the State party notes that whereas the expulsion order and the first compulsory residence order were appealed by Mr. Karker, the further compulsory residence orders, in particular the order of October 1995 to assign him to residence in Digne-les-Bains has not been subject of appeal. The State party adds that an appeal to the Administrative Tribunal is an available and effective remedy, which allows the judge to verify whether the compulsory residence order does not interfere more than necessary with the rights of the person, in particular with his right to family life.

4.4 Subsidiarily the State party addresses the merits of the communication and argues that no violation of the Covenant has occurred. First, the State party argues that article 9 of the Covenant is not applicable in Mr. Karker's case, because he is not subject to any arrest or detention. In this respect, the State party explains that under its domestic law a clear difference is made by the courts between measures to retain a person in a closed space, such as measures of detention, and measures to assign a person to residence, which give freedom of movement within determined boundaries. In Mr. Karker's case, first he was free to move within the department of Finistère, and at the moment, having been assigned to Digne-les-Bains, he is free to move within that community. According to the State party, Mr. Karker is thus not subject to any restriction of his liberty within the meaning of article 9 of the Covenant.

4.5 The State party acknowledges that the compulsory residence order limits Mr. Karker's freedom of movement within the meaning of article 12 of the Covenant. However, the State party argues that these restrictions are permissible under paragraph 3 of article 12, since they are provided by law (article 28 of the decree of 2 November 1945 as amended) and necessary for protection of public order, as was confirmed by the courts. The State party refers to the decision by the Administrative Tribunal of Paris that the Minister of the Interior could have concluded lawfully that Mr. Karker's expulsion was imperative for reasons of public security. Since the expulsion order could not be carried out because of Mr. Karker's refugee status, a certain measure of monitoring his activities had to be imposed. The State party concludes that the measures restricting Mr. Karker's freedom of movement have thus been imposed in his own interest, in order to safeguard his rights as political refugee.

4.6 The State party submits that its decision to expel Mr. Karker was in compliance with the requirements of article 13 of the Covenant. In this context, it notes that the order of 11 October 1993 was taken in accordance with the law (article 26 of the decree of 2 November 1945 as amended).

The law provides that in case of necessity for reasons of State security or public security, an expulsion order can be pronounced without obtaining the recommendation of a commission of three magistrates. The State party invokes article 13, and argues that compelling reasons of national security would have allowed it not to provide Mr. Karker with any possibility of review. However, in fact, Mr. Karker did have access to the administrative tribunal and subsequently to the Council of State to contest the expulsion order taken against him. The courts confirmed that the order was lawful. According to the State party, the requirements of article 13 have thus been fully met.

4.7 With respect to article 17 of the Covenant, the State party argues that the compulsory residence order does not prevent Mr. Karker's family members from being with him. The members of his family are not subject to any restriction, and are free to join Mr. Karker in Digne-les-Bains. The separation of Mr. Karker from his family is due to the fact that his family have chosen their residence in Eaubonne, a suburb of Paris, instead of in Digne-les-Bains. The State party moreover states that Mr. Karker benefits from regular administrative authorisations to visit his family in the Parisian region. Further, the State party argues that in general the separation of family members within the context of compulsory residence orders does not violate article 17 of the Covenant. As to the alleged insecurity concerning Mr. Karker's situation, the State party submits that as long as he benefits from refugee status, the expulsion order against him cannot be executed.

Counsel's comments on the State party's submission

5.1 In his comments on the State party's submission, counsel contests the State party's argument that the communication should be declared inadmissible. As to the standing of the author to present the communication, counsel argues that there is no doubt that Mr. Karker is not in a position to present his communication personally. He further argues that the Committee's rules of procedure do not require an explicit mandate of representation as is the case in certain procedures of domestic law. Counsel explains that, in view of the insecurity of his place of residence, Mr. Karker has preferred to leave the documents pertaining to his case with his wife. Further, he is far away from his legal counsel which creates difficulties in communication. For these reasons, Mr. Karker consented to have his wife represent him before the Committee. In any event, counsel joins a letter from Mr. Karker giving his express approval of his representation by his wife.

5.2 With regard to the State party's argument that not all available domestic remedies have been exhausted, counsel submits that the legality of the compulsory residence order to Digne-les-Bains has been contested by Mr. Karker during the criminal proceedings against him before the first instance court in Pontoise, in April 1998. During these proceedings, where Mr. Karker was being charged for breach of the compulsory residence order, he based his defence on the unlawful nature of the order. Moreover, in May 1996, Mr. Karker applied to the first instance court in Digne-les-Bains to challenge the modalities of the compulsory residence order, since he was subject to additional around the clock surveillance by the police. His application was rejected by the court, and the Court of Appeal in Aix-en-Provence dismissed his appeal. Counsel further argues that since the compulsory residence order is dependent on the expulsion order, and since no more remedies exist to challenge the expulsion order, it would be useless to continue appealing each separate compulsory residence order. In this context, counsel recalls that under article 5(2)(b) of the Optional Protocol only those remedies that provide a chance of success need to be exhausted. The appeal against the legality of the first compulsory residence order having been rejected, it is clear that no

effective recourse was available against the following orders which were based on the same expulsion order.

5.3 On the merits, counsel contests the State party's argument that Mr. Karker has not been deprived of his liberty within the meaning of article 9 of the Covenant. Counsel argues that, like detention, compulsory residence equally limits freedom of movement. He recalls that the first order limited Mr. Karker's freedom of movement to 15,6 square kilometres, and in his opinion this constitutes a closed space seriously restricting the liberty of the person. In Digne-les-Bains Mr. Karker's liberty is restricted to 117,07 square kilometres, that is 0,02 % of French territory. Moreover, counsel points out that Mr. Karker is being followed by the police, which in itself constitutes an attack on his liberty.

5.4 With regard to article 12 of the Covenant, counsel acknowledges that the restriction of Mr. Karker's freedom of movement is provided by law, but challenges the State party's assertion that it is necessary for reasons of public order. He notes that the State party bases itself on the judgement by the Administrative Tribunal of Paris, concerning the lawfulness of the expulsion order of October 1993, as well as the first compulsory residence order of the same date, and argues that this conclusion by the tribunal at the time cannot be used to show justification for the present restriction of the author's freedom of movement. According to counsel, the State party has failed to show that at this moment the restriction is necessary for protection of public order. He emphasizes that a compulsory residence order imposed because of the impossibility to execute an expulsion order, is by its nature only an emergency measure and cannot be prolonged indefinitely. In this context, counsel observes that in 1994, the court in Paris convicted a newspaper, Minute, for having called Mr. Karker an active terrorist, since the newspaper could not substantiate its accusations that he was involved in attacks in Monastir and in an attempt to assassinate the prime minister of Tunisia. According to counsel, this shows that accusations of terrorism against Mr. Karker have been rejected by the courts. Nevertheless, the State party bases itself on these accusations to justify the restrictions on Mr. Karker's freedom of movement. In counsel's opinion, if the State party does not show evidence of links between Mr. Karker and terrorist organizations, the expulsion order and consequently the compulsory residence order are unlawful. Counsel further points out that paragraph 3 of article 12 lays down a further condition for restrictions of freedom of movement, namely that they be consistent with the other rights recognized in the Covenant. In this context, he argues that to assign a person to a residence hundreds of kilometres removed from his family, in rural areas, limiting his freedom of movement continuously since 1993, evidently constitutes violations of numerous rights recognized in the Covenant, such as the right to freedom of movement (articles 9 and 12), the right to dignity of the human person (article 10), the right to review (article 13) and the right to family life (articles 17 and 23).

5.5 Concerning article 13 of the Covenant, counsel notes that said provision only allows the elimination of review of an expulsion where compelling reasons of national security exist. He argues that the State party has not shown that these reasons existed, since in substantiation it only refers to the decisions of the Administrative Tribunal of Paris and the Council of State, which are being challenged by Mr. Karker. Counsel reiterates that the State party should show the Committee that Mr. Karker's expulsion is necessary for protection of public order at present. He further argues that, whatever urgency may have existed in 1993, is not likely still to exist at present. He recalls in this context that Mr. Karker has never been convicted by the French courts for acts of terrorism.

5.6 With regard to article 17 of the Covenant, counsel contests the State party's argument that the separation of Mr. Karker from his family is caused by his family's choice to reside in Eaubonne. Counsel notes that Mr. Karker and his family resided in Eaubonne at the time of the issuance of the expulsion, and consequently compulsory residence, order against him. Counsel recalls that Mr. Karker was assigned to five different localities within the first two years following the expulsion order. Because the authorities can issue a new compulsory residence order at any time, changing the place of residence, and consequently Mr. Karker never knows how long he is going to stay at a particular place, it is unreasonable to require his family to change residence and interrupt the social life and schooling of the children, every time when the authorities change the conditions of Mr. Karker's order. According to counsel, Mr. Karker has obtained permission only twice to join his family in Paris. Counsel concludes that there is no justification for the interference with Mr. Karker's family life.

5.7 As to Mr. Karker's sense of insecurity, counsel notes that Mr. Karker's refugee status is not permanent. But more seriously, in counsel's opinion, is the insecurity caused by the compulsory residence order, which can be changed without advance notice. According to counsel, the resulting insecure situation constitutes arbitrary interference with his family life. Counsel recalls that Mr. Karker has petitioned the Minister of the Interior on numerous occasions, most recently in April 1998, without ever having received a reply.

5.8 Counsel joins a letter from Mr. Karker, in which he challenges the expulsion order and consequent compulsory residence order against him, and states that they were issued for political reasons. He complains that the charges against him have never been specified, and that he has never been brought before a court to have these charges determined. According to him, Ennahdha, the movement of which he is a leader, has never practised or supported terrorism, and is one of the most moderate Islamic movements in the world. He argues therefore that the orders against him are arbitrary. Concerning the conditions of the compulsory residence order, Mr. Karker states that he was followed by police officers around the clock, from 30 October 1993 to 25 May 1996. This surveillance was renewed on 8 October 1997, some weeks before a visit of the President of Tunisia to France and again terminated after the return of the President to Tunisia. According to Mr. Karker, this shows that the decisions taken by the French administration in this regard are purely political.

5.9 Mr. Karker further contests the impartiality of the decisions taken by the courts concerning the lawfulness of the expulsion order and consequent compulsory residence order against him. He states that the French Government provided the courts with police documents, which were made up for the occasion, copied from the Tunisian police and not credible, but which the courts considered trustworthy. According to Mr. Karker, the courts' judgements are unjust and taken under political pressure. If the State party had evidence against him, it should have charged him accordingly and brought him before a judge.

5.10 Mr. Karker confirms that his wife acted with his consent when presenting his case to the Committee. He argues that it is clear that the compulsory residence order violates his right to family life, since he is forced to live in a hotel room, and he does not have the means to rent a lodging for his family. He also states that the State authorities refuse to pay the costs of his family's visits during the holidays. He further states that he does not want to impose on his family the same insecure life he is forced to lead by taking them with him to each new place of residence. He states that in the

summer of 1995, while he was residing in St. Julien Chapteuil, his family rented a holiday bungalow for a week, close to the hotel where he was staying. However, he was not allowed to spend the nights with his family, but had to be in his hotel from ten o'clock at night until 8 o'clock in the morning. He further states that at the time, he was followed everywhere by plain clothes armed policemen.

5.11 Mr. Karker complains that he is for all practical purposes kept in detention, since he cannot freely travel, work, lead a family life. Moreover, he complains that the length of his detention is unlimited, and that it has been imposed upon him without him ever having been convicted by the French courts.

Further submissions

6.1 Upon request from the Committee's Working Group, meeting prior to the Committee's 69th session in July 2000, that the State party provides information with regard to the Minister's answer to Mr. Karker's request for modification of the expulsion order and the compulsory residence order of 28 April 1998, the State party notes that the Minister did not reply to the request. According to its administrative law, a silence of four months after a request to a competent authority is to be interpreted as a denial of the request. Such implicit denial can be appealed to the administrative tribunals.

6.2 With regard to the Working Group's question which measures the State party has taken to review regularly the situation of Mr. Karker and the necessity of the continuation of the order against him, the State party recalls that anyone subject to an expulsion order or a compulsory residence order can at any time request the administrative authorities for a modification of such order. On the occasion of such requests from Mr. Karker, the authorities may reexamine his situation and review the necessity of the continuation of the measures against him.

6.3 As to the reasons for the continued compulsory residence order against Mr. Karker, the State party explains that the order was issued because of the impossibility to implement the expulsion order against him. According to the State party the compulsory residence is necessary for reasons of public order to prevent that Mr. Karker would engage in dangerous activities. For the State party, it is not possible to lift the order because of the persistence of the risks created by the movements of which Mr. Karker is considered to be an active supporter. The State party recalls that Mr. Karker may at any time apply to have the order against him lifted, and in case of refusal of his application, he may appeal to the administrative tribunals, which he has failed to do so far. The State party also submits that if necessary Mr. Karker is given permission to leave temporarily his place of residence. The State party also states that Mr. Karker is free to leave France for any other country of his choice where he will be admitted.

7. In his comments, counsel states that the State party's submission contains no new information. He forwards to the Committee copies of requests made on Mr. Karker's behalf by third parties and the negative replies of the Minister of the Interior thereto. He also adds a copy of refusals, dated 24 March 1999 and 22 February 2000, by the Prefect of the Alpes de Haute Provence to grant Mr. Karker permission to go to Eaubonne. He also adds newspaper articles showing public support for Mr. Karker's cause.

Issues and proceedings before the Committee

8.1 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.

8.2 The Committee has noted the State party's objections to admissibility *ratione personae*. The Committee considers that there is no reason to doubt the standing of the author, who is the alleged victim's wife and who has acted with his full consent, as has since been confirmed by him.

8.3 With respect to the domestic remedies, the Committee notes that Mr. Karker has exhausted all available remedies with respect to the expulsion order against him. Since the subsequent compulsory residence orders are all based on the expulsion order and on the impossibility to carry out the expulsion, and seeing that Mr. Karker's appeal against the first compulsory residence order was rejected by the courts, the Committee considers that Mr. Karker is not required to challenge each new compulsory residence order before the courts, in order to comply with the requirement of article 5(2)(b) of the Optional Protocol.

8.4 In respect of the claim that Mr. Karker's right to privacy and family under article 17 of the Covenant has been violated, the Committee notes that this claim is based on the conditions of the compulsory residence order against him. The Committee notes that Mr. Karker has requested modification of these conditions on several occasions, and that, not having received any reply to his requests, according to French law after four months his requests were considered to be denied. The State party has explained and the author has not contested that Mr. Karker could have appealed the denial to the competent administrative tribunal, which however he has failed to do. The author's claim under article 17 of the Covenant is therefore inadmissible under article 5(2)(b) of the Optional Protocol.

8.5 The Committee considers that the claim under article 9 of the Covenant is inadmissible *ratione materiae*, since the measures to which Mr. Karker is being subjected do not amount to deprivation of liberty such as contemplated by article 9 of the Covenant.

8.6 The Committee finds the communication admissible as far as it may raise issues under articles 12 and 13 of the Covenant and proceeds without delay to a consideration of its merits.

9.1 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.

9.2. The Committee notes that Mr. Karker's expulsion was ordered in October 1993, but that his expulsion could not be enforced, following which his residence in France was subjected to restrictions of his freedom of movement. The State party has argued that the restrictions to which the author is subjected are necessary for reasons of national security. In this respect, the State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action. It should also be noted that the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area. Moreover, the restrictions on Mr.

Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security. Mr. Karker has only challenged the courts' original decision on this question and chose not to challenge the necessity of subsequent restriction orders before the domestic courts. In these circumstances, the Committee is of the view that the materials before it do not allow it to conclude that the State party has misapplied the restrictions in article 12, paragraph 3.

9.3 The Committee observes that article 13 of the Covenant provides procedural guarantees in case of expulsion. The Committee notes that Mr. Karker's expulsion was decided by the Minister of the Interior for urgent reasons of public security, and that Mr. Karker was therefore not allowed to submit reasons against his expulsion before the order was issued. He did, however, have the opportunity to have his case reviewed by the Administrative Tribunal and the Council of State, and at both procedures he was represented by counsel. The Committee concludes that the facts before it do not show that article 13 has been violated in the present 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 do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

* The following members of the Committee participated in the examination of the case: Mr. Nisuke Ando, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, 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 translated into Arabic, Chinese and Russian as part of the Committee's Annual Report to the General Assembly.]

Notes

1. Article 28 reads: "L'étranger qui fait objet d'un arrêté d'expulsion ou qui doit être reconduit à la frontière et qui justifie être dans l'impossibilité de quitter le territoire français en établissant qu'il ne peut ni regagner son pays d'origine ni se rendre dans aucun autre pays peut, ... , être astreint par arrêté du ministre de l'intérieur à résider dans les lieux qui lui sont fixés, dans lesquels il doit se présenter périodiquement aux services de police et de gendarmerie".