

HUMAN RIGHTS COMMITTEE

Hesse v. Australia

Communication No. 1087/2002

15 July 2002

CCPR/C/75/1087/2002

ADMISSIBILITY

Submitted by: Peter Hesse

State party concerned: Australia

Date of registered communication: 26 February, 6 August 2001, and 10 May 2002

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

Meeting on 15 July 2002,

Adopts the following:

Decision on inadmissibility

1. The author of the communication dated 26 February, 6 August 2001, and 10 May 2002, is Peter Hesse, who claims to be a victim of a violation by Australia of articles 7, 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights.¹ He is not represented by counsel.

The facts as submitted by the author

2.1 The author is a resident of Western Australia. While attending the public hospital Sir Charles Gairdner Hospital in Perth and two other hospitals between 1977 and 1989, the author was given 24 Intrathecal spine injections of the drug Depo-Medrol manufactured by the Pharmacia & Upjohn Company, allegedly without his consent. The doctors informed the author that the injections were harmless.

2.2 In 1977 the Health Department of Australia advised the Pharmacia & Upjohn Company that their product was unsuitable for Intrathecal use, and suggested that they introduce a warning on the

product instructions. This, however, was not done. Then in 1982, the Pharmacia & Upjohn Company applied to the Australian Drug Evaluation Committee to have the drug passed for use in epidural spinal injections. The Committee rejected the application in 1983.² However, the Commonwealth Government Health Insurance Commission continued to pay for these injections. In 1992, the Federal Labour Government Health Minister, Brian Howe, disclosed in Parliament that Depo-Medrol had never been passed or evaluated by the Australian Drug Evaluation Committee, and that the drug was of experimental use. According to the author, Depo-Medrol injected Intrathecally is a known cause of Arachnoiditis, a disease that inflames the arachnoid lining (one of the three coverings that envelops the brain and the spinal cord).

2.3 Because of serious pain in back, head and arms, the author had a myelogram carried out in October 1979. He was diagnosed as suffering from chronic Arachnoiditis. From November 1980, he received full disability pension. The doctors continued to treat the author with spinal injections of Depo-Medrol up to May 1989, when on returning home from the hospital, the author's right leg collapsed and caused him to fall and break his right foot.

2.4 On 19 November 1990, the author wrote to his treating Pain Specialist, asking him whether he had used Depo-Medrol and how many injections he had received during the treatment period from 1977 to 1989. When the doctor did not reply to the letter, the author phoned the doctor's office on 19 November 1991, and was advised that his medical records had been moved, and that the doctor had died three months earlier. The author then wrote to the doctor's wife, as Executor of his Estate, to the three hospitals where the doctor had treated the author, but received no reply from either. He also contacted the Western Australian Health Minister's Office, and eventually received replies from two of the three hospitals. On 22 September 1992, an expert in spinal medicine examined the author, and concluded that he would attribute 70 per cent of the author's symptoms to the complications of Arachnoiditis following exposure to Depo-Medrol.

2.5 On 27 June 1991, the author contacted the Law firm Cashman & Partners, which was looking into starting a "Class Action" with 122 plaintiffs having received spinal injections of Depo-Medrol, against the Pharmacia & Upjohn Company. Proceedings were initiated in 1993, the author's case being one out of six lead cases.³

2.6 In the author's petition to the Supreme Court of New South Wales, the author, together with four other plaintiffs, claimed that the case should be transferred to the Court of Appeal pursuant to SCR Part 12 rule 20.⁴ On 29 February 1996, the Court dismissed the case with costs.

2.7 In the Supreme Court of New South Wales' judgement of 22 December 1998, the author and three other plaintiffs' claim for transfer of their claim to the Court of Appeal was again dismissed, and their claim of transfer to their respective regional courts, was postponed.⁵

2.8 In year 2000, the High Court of Australia interpreted the Limitation Act applicable throughout Australia, in a way that returned the author's claim back to the jurisdiction of the Supreme Court of Western Australia. According to the author, the High Court ruling implies that his case, when returned to the Western Australia Supreme Court, will be statute-barred. Had the author's claim passed before the Supreme Court of New South Wales, his claim would not have been statute-barred,

since in this, and several other Australian states, an applicant is granted a six years' extension to file a claim once he becomes aware that injury has been caused by medical neglect or malpractice.

2.9 In a fax dated 23 February 2001, Cashman & Partners notified the author that they ceased to act as Solicitor for him. However, in a letter from the Supreme Court of South Wales, dated 14 March 2001, the Court advised the author that the proceedings were adjourned to 20 July 2001, and that the matter would proceed on that date despite the absence of the author or his legal representative. Due to the author being unable to obtain legal aid and to travel, a barrister advised him that his claim would be lost on "technicality", and therefore that he should cease his case.⁶ The author later discovered that the Court on 26 October 2000 had ordered the author to pay two of the defendants' costs from 7 July 2000.

Complaint

3.1 The author claims that since his claim against the Pharmacia & Upjohn Company is statute-barred in Western Australia, whereas a similar claim in New South Wales would not be statute-barred, he is being discriminated against, in violation of article 26 of the Covenant. The author submits that the State party's discriminatory practice continued after the Optional Protocol entered into force for Australia.

3.2 The author claims that he was submitted to medical experimentation without giving his consent, in violation of article 7 of the Covenant.

3.3 The author claims that by transferring his claim from a state where it was not statute-barred to a state where it was statute-barred, the Australian courts have violated his rights to equal access to the courts under article 14, paragraph 1 of the Covenant. Furthermore, the doctors' and hospitals' delay in submitting his medical records, caused him to fail to comply with the Limitation Act, and consequently deny him his rights under article 14 of the Covenant.

Issues and proceedings before the Committee

4.1 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.

4.2 With regard to the author's claim under article 26 of the Covenant, that the State party's legislation which bars the author's claim against the Pharmacia & Upjohn Company in Western Australia, whereas a similar claim in New South Wales would not be statute-barred, the Committee finds that the author has not substantiated for the purposes of admissibility, that differences in the statute of limitations in different parts of a federal state would as such raise an issue under article 26.

4.3 With regard to the author's claim that he was subjected to medical experimentation without giving his consent in violation of article 7 of the Covenant, the Committee notes that the alleged medical experimentation took place in the period from 1977 to 1989, which is prior to the entry into force of the Optional Protocol for Australia. This claim which relates to the actual treatment

administered before September 1991 is therefore inadmissible *ratione temporis*.

4.4 With regard to the author's claim that by transferring his claim from a state where it was not statute-barred to a state where it was statute-barred, the Australian courts have violated his rights under article 14, paragraph 1 of the Covenant, the Committee finds that the author has not substantiated for purposes of admissibility that he would have had a right under article 14, paragraph 1 to pursue his claims in the courts of New South Wales or that the High Court ruling that the case fell under the jurisdiction of the courts of Western Australia would raise an issue under article 14 of the Covenant. The Committee also finds that the author has not substantiated for the purposes of admissibility that his claim that the doctors' and hospitals' delay in submitting his medical records would raise an issue under article 14, paragraph 1, of the Covenant.

5. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 1 and 2, of the Optional Protocol;
- (b) That this decision shall be communicated to the author, and, for information, to the State party.

* 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. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

** Pursuant to rule 84, paragraph 1 (a) of the Committee's Rules of Procedure, Mr. Ivan Shearer did not participate in the consideration of this case.

Notes

¹ The Optional Protocol entered into force for Australia on 24 September 1991.

² This is confirmed in a letter to the Hon. Judi Moylan MP, Member for Pearce, from Ministry for Health and Ageing, dated 29 April 2002. The letter includes a reference to a letter from the author.

³ The only information submitted on the proceedings are the two judgements described below.

⁴ There are no explanations as to the name and the contents of the law.

⁵ The author's claim for damages was directed at the Pharmacia & Upjohn company, the three hospitals where he was given the injections of Depo-Medrol, and five doctors who were involved in the administration of the injections.

⁶ There is no information on whether the author followed the barrister's advice.