

HUMAN RIGHTS COMMITTEE

Patera v. Czech Republic

Communication No. 946/2000

25 July 2002

CCPR/C/75/D/946/2000

VIEWS

Submitted by: Mr. L.P.

State party: The Czech Republic

Date of communication: 17 May 1999 (initial submission)

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

Meeting on 25 July 2002,

Having concluded its consideration of communication No. 946/2000, submitted to the Human Rights Committee by Mr. L.P. 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 L.P., a Czech citizen. He claims that he and his son are victims of a violation by the Czech Republic (1) of articles 17, paragraphs 1 and 2, and 2, paragraph 3, of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1 The author, a businessman and leading representative of the non-governmental organization "Justice for children" and one of the founding members of "Society for the Family Mediation", has a son, who was born in 1989. Since the author separated from his wife and the mother of his son, Ms. R.P., in March 1991, their son has been under the exclusive care of the mother, and the author has been denied regular contact with him.

2.2 In a preliminary court decision from the Regional Court Prague West of 12 July 1993, confirmed in a further preliminary court decision of 2 October 1995, the author was granted the right to see his son every second weekend from Saturday morning until Sunday evening. However, Ms. R.P. did not comply with the decisions and has refused the author regular access ever since. Only during 1994 and 1995 was the author allowed to see his son on an irregular basis, but then under the surveillance of a family member of Ms. R.P. or armed security officers. Ms. R.P. has been repeatedly fined for her refusal to comply with the courts' decisions.

2.3 In 1994, the author initiated criminal proceedings against her for not complying with the said court decisions, in accordance with the Criminal Code No. 140/1961 Coll., paragraph 171, section 3. The case was dealt with by the Court of Okresní soud Ústí nad Labem, and had at the time of the author's submission to the Committee on 9 February 2002, not yet been decided.

2.4 Subsequently, the author brought new criminal charges against Ms. R.P. for not complying with further preliminary decisions granting the author access to his son from December 1997 to August 1998. The case was held over for two years, from 11 January 1999 until 14 February 2001, when eventually the judge withdrew from the case. The new judge dismissed the charges against Ms. R.P. (2) However, the author alleges that this decision was not delivered to the parties in accordance with law, and it therefore did not enter into force. The author's complaint to the Constitutional Court was dismissed.

2.5 On 18 November 1993, the Kladno Regional Court convicted Ms. R.P. of three criminal acts relating to the child custody case. The decision was appealed, but shortly before the verdict of the Court of Appeal, Ms. R.P. was granted a pardon for two of the criminal acts, whereas the third remained undecided, and eventually became time-barred. On 20 November 1995, the author submitted a constitutional complaint, which was rejected on the ground that the author had not been a party to the criminal case.

2.6 In a statement of 1 June 1992, a court specialist MUDr. J.K., and MUDr. J.B., explained that the author's wife suffers from a mental disorder in the development of her personality. In another statement by MUDr. J.C. and PhDr. H.D. of 11 May 1993, it was stated that the author's wife was damaging the interests of their son by not allowing contact between the father and the son. These statements were supported by statements from a court specialist, PhDr. V.F., dated 14 May 1995 and 15 April 1997.

The Complaint

3.1 The author alleges violations of his and his son's rights to protection of their family life, including his right to regular access to his son.

3.2 The author claims that the Czech authorities have refused to act upon the court decisions allowing him regular access to his son, thus violating his and his son's right to protection of their family life under article 17, and to an effective remedy under article 2, paragraph 3, of the Covenant.

The State party's submission on the admissibility and the merits of the communication

4.1 By note verbale of 28 February 2002, the State party made its submission on the admissibility and merits of the communication. It regards the communication as inadmissible for non-exhaustion of domestic remedies and for being manifestly ill-founded.

4.2 In respect of the facts, the State party explains that the divorce proceedings between the author and his wife, which commenced in 1989, are still pending. The custody of their son is therefore regulated by provisional orders. The extensive court files relating to the divorce case now amount to several thousand pages.

4.3 It states that on 22 November 1994, the author brought criminal charges against Ms. R.P. for obstructing the execution of a court decision, pursuant to the Criminal Code, Act No. 140/1961, Section 171, paragraph 3.

4.4 On 16 September 1997, a hearing took place before the District Court in Usti. According to the records of this hearing, after the Prosecuting attorney's speech, the author demanded information about his procedural rights. The judge advised him to read the Criminal Procedural Code, Act No. 141/1961, Section 43. The author refused to do so, and pleaded that the judge, the prosecuting attorney, and all attorneys at the District Public Attorney's office were biased against him. He also informed the court that he had brought criminal charges against the judge. On 19 September 1997, the court decided that the judge would not be disqualified for bias. The author challenged the decision by complaining to the Regional Court in Usti nad Labem, which rejected the complaint on 23 March 2000. The next hearing of the criminal case was scheduled for 23 February 2001, but the case is still pending.

4.5 On 29 December 1994, the author again brought criminal charges against Ms. R.P. for the crime of oppression, pursuant to Section 237 of the Criminal Code.

4.6 However, the police decided, on 30 June 1995, not to proceed with the case. The author's complaint about this decision was dismissed by a resolution of the Public Attorney in Usti nad Labem pursuant to Section 148, paragraph 1 (c) of the Code of Criminal Procedure, paragraph 1.

4.7 The Public Attorney initiated separate criminal charges against Ms. R.P. for obstructing the execution of a court decision pursuant to the Criminal Code, Section 171, paragraph 3, at the District Court in Usti nad Labem. The hearing took place on 13 May and 17 August 1999 and both the author and his wife were heard. The trial was then postponed for the purpose of collecting additional evidence. The judge requested some Regional Court documentation, but was unable to obtain it because the file had in the meantime been sent to the High Court in connection with the

author's appeal. The next hearing was also adjourned for the purpose of collecting additional evidence, after Ms. R.P.'s lawyer had requested that the evidence should include an expert opinion on their son. The case is still pending.

4.8 The Public Attorney initiated yet another criminal case against Ms. R.P., on the basis of criminal charges filed by the author. However, the investigator decided to discontinue the proceedings, on the basis of an opinion of a specialist in clinical psychology, who stated that the author's son was very firm in his views, and refuses to spend with the author the time ordered by the court.

4.9 The author complained against the investigator's decision. On 5 April 2000, the Public Attorney dismissed his complaint as unfounded, pursuant to the Code of Criminal Procedure, Section 148, paragraph 1 (a).

4.10 The author sought a review of this decision, but the complaint procedure was discontinued on 6 October 2000, on the grounds of being legally unfounded.

4.11 The author has filed a total of eight constitutional complaints, seven of which have been dismissed as manifestly ill-founded. The complaints concerned alleged breaches of the right to judicial protection. In two of the constitutional complaints, he complained about being fined for orally attacking a judge. In another motion, he required that a fine should be imposed on Ms. R.P., and in yet another, he complained against a police inspector's decision not to initiate criminal proceedings. In two of the motions, the author claimed a cancellation of a Regional Court decision, and of a Constitutional Court resolution, and in another he claimed additional information for his petition. The one constitutional complaint that was not dismissed for being manifestly unfounded, was not considered by the Constitutional Court because it did not constitute a proper motion initiating Constitutional Court proceedings, but merely a complaint against the actions of the Public Attorney's Office and a request for preliminary arrangements.

4.12 In respect of the admissibility of the communication, the State party argues that the author's constitutional complaints concerned other rights than those invoked before the Committee, and therefore the communication should be declared inadmissible for non-exhaustion of domestic remedies.

4.13 Furthermore, the State party contends that the documentation provided by the author does not reveal an arbitrary or unlawful interference by the Czech authorities in terms of article 17 of the Covenant, and the communication should be declared inadmissible for being manifestly ill-founded.

4.14 With regard to the merits of the complaint, in relation to article 17, the State party reiterates that it has never arbitrarily or unlawfully interfered with the author's rights in the terms of article 17 of the Covenant, and that all actions and decisions of the courts of all instances have complied with the rules of procedure set forth by Czech law. It points out that the author's numerous petitions and motions have resulted in a significant delay in the resolution of his divorce and the question of custody of his son. According to the State party, the author has accused of bias practically all

authorities involved in the resolution of his family issues, including the bringing of criminal charges against investigators, attorneys and judges, as well as against his ex-parents-in-law and other persons related to Ms. R.P.

4.15 In respect of the author's claim of a violation of article 2, paragraph 3 (a) and (c) of the Covenant, the State party contends that the communication falls outside the scope of this paragraph.

Comments by the author

5.1 By letter of 22 April 2002, the author responded to the State party's submission. He contends that the State party in several ways has misrepresented the facts. He states that the State party has avoided the substance of the case, which is that he for 11 years has been prevented from meeting with his son, and that the Czech authorities have neglected to protect his rights as a father, by failing to carry out appropriate investigations regarding the criminal allegations brought by him.

5.2 With respect to the State party's allegation that the author has not exhausted domestic remedies because he did not allege Covenant rights in his constitutional complaints, the author points out that he invoked the substance of the Covenant rights in maintaining that the State party does not provide him with protection from arbitrary interference with his privacy and family life, and does not enforce such protection with all available means.

5.3 Regarding the State party's contention that the author's numerous submissions to the courts have delayed the proceedings, the author argues that the State party confuses cause and effect, and that these numerous submissions are a result of the State party's toleration of Ms. R.P.'s criminal behaviour.

5.4 The author further contends that the only criminal charge he has brought against any of his son's grandparents was brought against Ms. R.P.'s mother, for limiting his parental rights and attacking him verbally and physically. He also brought charges against the grandmother's new husband, who had threatened to kill the author, and has not been sanctioned for bodily harm caused to the author on 30 October 1999.

5.5 According to the author, Section 1 of the Criminal Code provides that criminal proceedings must act towards the strengthening of the rule of law, and anticipate and prevent criminal acts. He considers that this section of the law enforces an obligation on the State party to act in order to stop the violation of his custody rights and prevent continuous violations of the same. The author emphasizes that he initiated criminal proceedings against Ms. R.P., not because he believes it is necessary to imprison her, but because the procedure of taking her into custody may persuade her to discontinue her culpable refusal of his custody rights.

Issues and proceedings before the Committee

Consideration of 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 the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

As regards the admissibility criterion in article 5, paragraph 2 (b), the State party alleges that the author's constitutional complaints concerned other rights than those invoked before the Committee and that he thereby has failed to exhaust domestic remedies. While it is not clear what the exact nature of these proceedings was, the Committee notes that the proceedings regarding divorce and custody rights have continued for 13 years without a final decision. (3)

6.3 While some delays in the proceedings may be attributed to the author himself, the Committee concludes that taking into account all the circumstances of the case, the application of the remedies has been unreasonably prolonged (4) for the purpose of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee notes that the author in his submissions also alleged that his son's rights had been violated. However, since he does not claim that he is representing his son, the Committee finds that this part of the communication is inadmissible under article 1 of the Optional Protocol.

6.5 The Committee has taken note of the State party's argument that the communication does not reveal an arbitrary or unlawful interference by the Czech authorities in terms of article 17 of the Covenant. However, the Committee considers that the author has substantiated sufficiently, for the purpose of admissibility, that his communication raises issues under article 17 of the Covenant, by the alleged failure of the State party to protect the author's right to have access to his son. It therefore decides that the communication is admissible insofar as it raises issues under article 17, in conjunction with article 2 of the Covenant.

Consideration of the merits

7.1 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 in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the alleged violation of article 17, the Committee notes the State party's contention that there is no documentation of arbitrary or unlawful interference by the State party with the author's family, that the decisions of courts of all instances have complied with the rules of procedure set by law, and that the delay in the resolution of the divorce and custody proceedings is due to the numerous petitions submitted by the author. However, the current communication is not based only on article 17, paragraph 1, of the Covenant, but also on paragraph 2 of the said provision, according to which everyone has the right to the protection of the law against interference or attacks on one's privacy and family life.

7.3 The Committee considers that article 17 generally includes effective protection to the right of a parent to regular contact with his or her minor children. While there may be exceptional circumstances in which denying contact is required in the interests of the child and cannot be deemed unlawful or arbitrary, in the present case the domestic courts of the State party have ruled that such contact should be maintained. Consequently, the issue before the Committee is whether the State party has afforded effective protection to the author's right to meet his son in accordance with the court decisions of the State party.

7.4 Although the courts repeatedly fined the author's wife for failure to respect their preliminary orders regulating the author's access to his son, these fines were neither fully enforced nor replaced with other measures aimed at ensuring the author's rights. In these circumstances and taking into account the considerable delays at various stages of the proceedings, the Committee takes the view that the author's rights under article 17 of the Covenant, in conjunction with article 2, paragraphs 1 and 2 of the Covenant, did not receive effective protection. Consequently, the Committee is of the view that the facts before it disclose a violation of article 17, in conjunction with article 2 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact between the author and his son. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

An individual opinion signed by Committee members Mr. Nisuke Ando and Prafullachandra Natwarlal Bhagwati is appended to this document.

[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.]

Individual Opinion by Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati

While agreeing with the admissibility of the communication on the basis of article 5, paragraph 2, of the Optional Protocol I am unable to share the Committee's views that the author's rights under article 17, in conjunction with article 3 of the Covenant, have been violated.

First of all, in my opinion the provision of article 1 does not guarantee an "absolute right" of a separated father to have access to his child, who is under the mother's custody. The Committee should recall its views on Communication No. 201/1985 (Hendriks v. the Netherlands), where the same or similar situation was considered as raising issues under article 23.

Secondly, the Committee seems to conclude that the author did not receive "effective protection" as provided for under articles 17 and 2 (para. 7.4). However, I consider that the State party has done what it could. Thus, in a preliminary court decision of the Regional Court Prague West of 12 July 1993, confirmed in a further preliminary court decision of 2 October 1995, the author was granted the right to see his son every second weekend. In fact, the author was allowed to see his son during 1994 and 1995, though on an irregular basis and under the surveillance of a family member of the mother or armed security officers (para. 2.2). Later, facing non-compliance with the court decision on the part of the mother, the Public Attorney initiated criminal charges against the mother (para. 4.6). In addition, the Public Attorney initiated other criminal charges against the mother on the basis of criminal charges filed by the author himself (para. 4.7). Obviously, the mother has been repeatedly fined (para. 2.2).

Thirdly, while I do not understand why the mother has tenaciously refused to allow the father to see his son, I take note of the fact that during the procedure of the other criminal charges mentioned above, a specialist in clinical psychology stated that the son was very firm in his views and refused to spend with the father the time ordered by the court (para. 4.7). Considering that the son, who was well over 10 years of age, should be able to judge on his own and that the father made no comment on this particular point, I think that the Committee should give due consideration to the son's own wish. In this connection, I like to emphasize that what matters most in the present case is "the best interest of the child" and that the Czech courts should have concrete materials to determine the matter, while the author has not provided the Committee with sufficient materials to reverse the courts' judgements. In any event, it has been an established jurisprudence of the Committee that it is not for the Committee but the relevant domestic courts to evaluate facts and evidence in a given case unless such evaluation suffers from impartiality or constitutes denial of justice. In the present case, no such circumstance exists.

Finally, the author contends that the State Party fails to enforce protection with all available means (para. 5.3) and the Committee states that the State Party is under the obligation to provide the author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact (para. 8). However, considering the specific nature of family

matters in general and the particular circumstances of the present case, I must admit that judicial remedy is not omnipotent and that there are certain limits over which it could not and should not go. Therefore, it is difficult to expect that the State Party could have done more than it actually did.

Notes

1. The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.
2. This point of the submission is unclear.
3. See Case No. 514/1992, *Fei v. Colombia*, paragraph 8.4, Views adopted on 4 April 1995.
4. See also Case No. 417/1990, *Balaguer v. Spain*, Views adopted on 15 July 1994.