

HUMAN RIGHTS COMMITTEE

Borisenko v. Hungary

Communication No. 852/1999

14 October 2002

CCPR/C/76/D/852/1999

VIEWS

Submitted by: Mr. Rostislav Borisenko

Alleged victim: The author

State party: Hungary

Date of communication: 2 August 1997 (initial submission)

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

Meeting on 14 October 2002,

Having concluded its consideration of communication No. 852/1999, submitted to the Human Rights Committee by Mr. Rostislav Borisenko 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 Mr. Rostislav Borisenko, a Ukrainian citizen, currently residing in the Ukraine. He claims to be a victim of violations by the Republic of Hungary of the International Covenant on Civil and Political Rights. The communication appears to raise issues under articles 7, 9, paragraphs 1, 2, and 3, 13, 14, paragraphs 2 and 3 (c), (e) and (g) and 17 of the

Covenant. He is not represented by counsel.

The facts as submitted by the author

2.1 On 29 April 1996, the author and his friend, Mr. Kuspish arrived in Budapest. They were at the time en route from Belgrade where, as members of the Sambo Wrestling National Team of the Ukraine, they had taken part in a wrestling competition, and were on their way back to the Ukraine. Later that day, they lost their way and asked a travel agent where the metro station was located. Because they were late for their train, they ran to the metro station. At this point, they were stopped by three policemen in civilian clothing. The police suspected them of pick-pocketing. They ill-treated the author and his friend by "tightening handcuffs and striking our heads against metal booths when we attempted to speak". They were interrogated for three hours at the police station.

2.2 On 30 April 1996, the author and his friend were charged with theft. Although the charge was not translated from Hungarian they were provided with an interpreter. Mr. Kuspish signed the investigation report but the author refused to do so without the presence of a lawyer and without including his version of the facts of the incident. The author and his friend lodged complaints against their arrest and interrogation. On 1 May 1996, in a written decision, the public prosecutor rejected these complaints, having reviewed the legality of the arrest and detention.

2.3 On 2 May 1996 the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody. The court decided to detain them due to the risk of flight. During the police interrogation, the hearing on detention and the detention itself, the author and his friend were not allowed to contact their Embassy, families, lawyers or sports organization. On 7 May 1996, the police authorities completed the investigation and referred the case to the public prosecutor's office.

2.4 On 15 May 1996, and at the request of the Ukrainian Embassy, the public prosecutor terminated the author and his friend's detention. On the same date, the immigration authorities ordered the author and his friend expelled from Hungary prohibiting their re-entry and stay in the country for five years. On requesting the police officers whether they could challenge the expulsion order, they were informed, through an interpreter representing the Ukrainian Embassy, that it was not possible to appeal. At the same time, the author and his friend unknowingly signed a waiver of their right to appeal.^{1/} A translation of the expulsion order was not provided. It was only when the author and his friend returned to the Ukraine and saw an English translation of the order that they became aware that it would have been possible to appeal against the expulsion order and that they had unwittingly waived their right to appeal. Upon guarantees offered by the Ukrainian Embassy that the author and his friend would comply within a prescribed time to leave the Republic of Hungary, they were not deported. The author and his friend left the country on 16 May 1996.

2.5 On 3 July 1996, after reprimanding the author and his friend under section 71 of the Hungarian Code of Criminal Procedure, the public prosecutor's office discontinued its investigations under section 139 2/ of the Code as "their conduct ceased to be punishable".^{3/}

2.6 On 17 November 1996, the author and his friend lodged a complaint against this decision

requesting an acknowledgment of their innocence and claiming that they were maltreated by the investigating police. On 12 June 1997, and on the basis of the author and his friend's complaint, the Municipal Chief Public Prosecution's Office quashed the decision of 3 July 1996 and instructed the District Public Prosecution's office to continue proceedings.

2.7 On 28 May 1998, the case file was sent to the Ukrainian authorities so that the case could be conducted in the Ukraine. On 13 November 1998, the author was informed by the Ukrainian Ministry of Foreign Affairs that, on the basis of the information before it, the Ukrainian authorities did not intend to institute criminal proceedings against the author and his friend.

2.8 The Hungarian authorities investigated the author and his friend's complaints against the police and in a decision, dated 30 October 1998, the investigation was discontinued. Although the author challenged this decision, he did not receive a response from the authorities.

The complaint

3.1 The author complains that his rights were violated as he was arrested and charged without any proof of being involved in criminal activity and was ill-treated by police on arrest. He claims that he did not understand what he was being charged with and that the charge itself was not translated. He also claims a violation of the Covenant, for having been detained for over two weeks without trial.

3.2 The author complains that the State party has violated the Covenant, as he was unlawfully expelled and denied the possibility of review. He claims that the law dealing with expulsion states that the entry of a foreigner may be prohibited if he/she commits a premeditated crime, for which he/she is sentenced to more than five years of imprisonment. In this case, the author was only charged with a crime for which the maximum possible sentence is two years. In addition, he claims that the police deceived him on serving the deportation order on him, as they claimed incorrectly that he had no right to appeal.

3.3 The author claims a violation of the Covenant as he was not tried "without undue delay", and because an important witness to the incident was not called for the detention hearing.

3.4 The author also claims a violation of the Covenant as, although he made numerous requests for a lawyer, one was not made available to him and he was refused contact with his friends and Embassy, from the time of his arrest to his release from detention.

3.5 Finally the author claims a violation of the Covenant, as due to his detention he could not take part in the Judo European rating championship nor participate in the Olympic Games. Also, as a director in a law firm, he incurred loss of reputation as well as clients. He also lost his "sports qualification" and was looked upon badly by the members of the Sambo Wrestling Club of the Ukraine, family and friends.

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

4.1 By letter of 19 April 1999, the State party made its submission on the admissibility and merits

of the communication. It contests the author's version of the events leading to the author's arrest and presents them as follows. On 29 April 1996, in Budapest, three plainclothes policemen saw two men in a tram, one asking a woman a question while the other unzipped her handbag and put his hand into her bag. When the policemen signalled to the woman what was going on the two men suddenly jumped off the tram. The woman told the policemen that although she had a purse in a different part of her bag, she only had papers in the part into which one of the men put his hand. Having got off the tram at the next stop, the policemen caught the two men, handcuffed them by physical force and took them to the police station. Through an interpreter the order for arrest was communicated to them against which they both lodged a complaint.

4.2 On 30 April 1996, the author and his friend were charged by the police with attempted theft and informed of the charges by an interpreter. The investigating authorities ordered a defence counsel for each alleged victim. The defence counsel failed to appear either at the police interrogation or the detention hearing. They appeared only at the "presentation of the files" when the investigations were closed by the police and the case was referred to the prosecution's office.

4.3 On admissibility, the State party submits that the author's claim of a violation of article 13 is inadmissible for failure to exhaust domestic remedies. When the order for expulsion was communicated to the author, through an interpreter, he was also informed of the fact that the decision was subject to appeal but that the appeal did not have suspensive effect for the execution of the decision. As he failed to exercise his right to appeal, he prevented the State from the opportunity of fully inquiring and redressing any alleged violations. The State party also submits that if the author had been unsuccessful in his appeal he could have then sought judicial review of this decision. On the author's claim that he had been deceived on the possibility of appealing the expulsion order, the State party submits that the author never brought this issue to the attention of the authorities and, considering the presence of a representative from the Ukrainian Embassy during this incident, such a complaint would have been easy to substantiate.

4.4 On the complaint that from the time of arrest to his release from detention, the Hungarian authorities prevented the author from making contact with a lawyer, friends or his Embassy, the State party submits that this allegation is similarly inadmissible for failure to exhaust domestic remedies. According to the State party, the author could have lodged a complaint in the same way as he did against his arrest and interrogation.

4.5 With respect to the allegations of violations of article 14, the State party submits that these allegations are inadmissible *ratione materiae*, as the author was not arraigned by the Hungarian authorities and the only issue considered in court was the order for detention on remand.

4.6 On the merits, the State party contests that there has been a violation of article 9 of the Covenant. It submits that upon arrest the author was informed, through his interpreter, of the reasons for his arrest and was brought before a court within three days. At the detention hearing the court considered, in a procedure established by law, whether there was a "reasonable suspicion" that an offence had been committed by the author. On the basis of the evidence presented the court found that such suspicion existed. According to the State party, the author was detained as he had no place of residence in Hungary and in the opinion of the court was likely to abscond. In addition, the court

found that because of the nature of the offence with which he was charged there was a fear of recidivism. The State party also submits that the duration of the author's detention did not exceed a reasonable time.

4.7 The State party also adds that the author's complaint about ill-treatment received at the hands of the police, which relates to the question of the lawfulness of the arrest, was investigated by the public prosecutor's office. The State party submits that Mr. Kuspish's statement was taken from which it was established that the allegations were ill-founded and, except for the handcuffing, no violence had been used. According to the State party, the Hungarian authorities could not examine the author's statement, as his place of residence was unknown even to the Ukrainian authorities and he could not be contacted. In sum, it is the State party's view that all the requirements of the rights protected under article 9 were complied with.

4.8 In the event that the Committee decides that the allegation of a violation of article 13 is admissible, the State party submits that there has been no violation of article 13 as section 23, paragraph 2, of the Aliens Act provides that prohibition of entry and stay in the country may be imposed in respect of foreign nationals whose entry or stay may injure or jeopardize public safety. It was believed that the author's stay in the Republic of Hungary would so jeopardize public safety due to the pick-pocketing charge and was, therefore, lawful.

Comments by the author

5.1 By letter, of 1 July 1999, the author responded to the State party's submission. On the issue of the expulsion order, the author affirms that he did lodge a complaint against the police for deceiving him on the possibility of an appeal, to the "Procurator-General" prior to his departure from Hungary and through the Consular Section of the Ukrainian Embassy.

5.2 On the State party's argument that he failed to exhaust domestic remedies by not making a complaint about the State party's refusal to allow him to contact his lawyer, Embassy or friends, the author states that he had no opportunity to make such a complaint.

5.3 With respect to the State party's argument on the failure to take a further statement from the author on ill-treatment by the police, the author submits that he did provide such evidence, having received documents sent from the Office of the Procurator-General of the Republic of Hungary, on 10 March 1998, through the Procurator-General of the Republic of the Ukraine. The author responded to questions posed by the Hungarian authorities and provided them with a statement of his version of the treatment received.

5.4 With respect to the State party's argument that the author's stay in Hungary would jeopardize public safety, the author questions how the State party arrived at this conclusion considering the fact that he had not been convicted of any offence.

5.5 The author confirms that a lawyer appeared on his behalf at the "presentation of the files" when the investigation was complete, but says that one lawyer was allocated for both alleged victims and that neither of them were given an opportunity to talk to him.

5.6 The author makes the following new claims in relation to his case. Firstly, that the State party violated article 14, paragraph 2, of the Covenant, as the author's expulsion from Hungary on the basis of a charge of which he had not been convicted was a violation of the presumption of innocence. Secondly, that the State party violated article 14, paragraph 3 (g), as the author claims to have been pressured to testify against himself by not allowing him to go to the toilet while in detention and telling him that if he made a complaint, it would take one month to process and he would be detained for the whole period.

5.7 The State party has not made any additional observations on the admissibility or the merits of this case.

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 it 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 the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the issue of the State party's failure to provide the author with access to a lawyer, the Committee notes the State party's argument that the author could have made a complaint in the same way as he had done when challenging the lawfulness of his arrest and interrogation. The Committee notes that the State party does not provide any details of how the author would have made such a complaint. Neither does it state whether the author was informed of this possibility at the time he requested legal representation and access to a representative from his Embassy. As a Ukrainian citizen detained in a prison outside his home country and without the necessary language skills to find out how to make such a complaint, the Committee decides that the State party has not provided sufficient information to demonstrate that this remedy would have been effective. The Committee finds that this part of the communication is therefore admissible. (see para. 3.4)

6.4 On the issue of his expulsion, the Committee notes that the author has explained this failure to appeal against the expulsion order by alleging that he was informed by the police who served the expulsion order on him that he could not appeal the decision and was deceived into signing a waiver of his right to appeal. The State party argues that the author was told, through an interpreter from the Ukrainian Embassy, that he could appeal the order but that it would not have suspensive effect. The Committee observes that the author was accompanied by an interpreter from the Ukrainian Embassy who would have been in a position to translate the expulsion order which, the author concedes, included an explanation that he had a right to appeal. Accordingly, the Committee finds this part of the communication inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol. (see paras. 3.2 and 5.6)

6.5 With respect to the claims of a violation of article 14, paragraph 2, because of an alleged violation of the presumption of innocence, paragraph 3 (g), as the author claims to have been pressured to testify against himself, and his further claims that, the author was not tried without undue delay, and that a witness to the incident was not summoned to the detention hearing, the Committee finds that the author has failed to substantiate these claims for purposes of admissibility. These claims are therefore inadmissible under article 2 of the Optional Protocol. (see paras. 3.3 and 5.6)

6.6 Similarly, on the issue of a violation of the Covenant as, due to his detention, he suffered a loss of reputation, both personally and professionally, the Committee is of the view that in this respect the author has failed to substantiate a claim of a violation of the Covenant for the purposes of admissibility. The Committee is also of the view that the author's claim of ill-treatment by the police, which raises an issue under article 7 of the Covenant, is similarly unsubstantiated. The Committee therefore finds these claims inadmissible under article 2 of the Optional Protocol. (see paras. 3.5 and 3.1)

6.7 The Committee notes that the State party has raised no objections to the admissibility of the author's claims under article 9, of the Covenant concerning his arrest and detention and the failure to provide him with legal representation despite his requests. The latter claim also raises an issue under article 14, paragraph 3 (d) of the Covenant. Accordingly, the Committee declares these parts of the communication admissible. (see para. 3.1)

6.8 On the basis of the above, the Committee finds that the parts of the communication relating to the author's arrest and detention and the failure to provide him with legal representation are admissible.

Consideration of the 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 With respect to the claim that the State party violated article 9, paragraph 1, of the Covenant, the Committee recalls that, pursuant to this article, no one shall be subjected to arbitrary arrest or detention. The State party argues and the author has not contested that he was arrested on suspicion of having committed an offence. In these circumstances, the Committee cannot find a violation of article 9, paragraph 1 of the Covenant. (see para.3.1)

7.3 With respect to the author's claim that the State party violated article 9, paragraph 2, of the Covenant as he did not understand the reasons for his arrest or the charges against him, the Committee notes the State party's argument that the author was provided with an interpreter who explained to him the reasons for his arrest and the charge against him and finds that in the circumstances, the Committee is unable to find a violation of the Covenant in this regard. (see para. 3.1)

7.4 With regard to the claim of a violation of article 9, paragraph 3, the Committee notes that the

author was detained for three days before being brought before a judicial officer. In the absence of an explanation from the State party on the necessity to detain the author for this period, the Committee finds a violation of article 9, paragraph 3 of the Covenant.

7.5 With respect to the author's claim that he was not provided with legal representation from the time of his arrest to his release from detention, which included a hearing on detention at which he had to represent himself, the Committee notes that the State party has confirmed that although it assigned a lawyer to the author, the lawyer failed to appear at the interrogation or at the detention hearing. In its previous jurisprudence, the Committee has made it clear that it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation. It recalls its prior jurisprudence that legal assistance should be available at all stages of criminal proceedings. Consequently the Committee finds that the facts before it reveal a violation of article 14, paragraph 3 (d) of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

9. 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, including compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant 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.

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.

* 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. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

Individual Opinion of Committee Member Mr. Nisuke Ando

I concur with the Committee's finding that there was a violation of article 14, paragraph 3 (d) because the State party failed to ensure effective legal representation for the author (7.5). However, I am unable to share the Committee's finding that the State party violated article 9, paragraph 3, because the author had been detained for three days before being brought before a judicial officer and that the State party failed to explain the necessity to detain the author for this period (7.4).

As a matter of fact, on 29 April 1996, the author and his friend were arrested on suspicion of pick-pocketing (2.1 and 4.1). On 30 April 1996, they were charged with theft and on 1 May 1996, their complaints against their arrest and interrogation were rejected by the public prosecutor in a written decision (2.2 and 4.2). On 2 May 1996, the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody, and the court decided to detain them due to the risk of flight (2.3).

This series of events clearly indicates what happened during the three days (29 April-2 May 1996), which both the author and the State party admit. In addition, while the author claims a violation of the Covenant for having been *detained for over two weeks without trial* (3.1 and 3.3), he does not specifically claim that the detention for the three days in question constitutes a violation of article 9, paragraph 3. Indeed, it is the Committee itself which singles out the issue of the three days' detention and, basing itself on the failure of the State party's explanation, decides that the detention constitutes a violation of article 9, paragraph 3.

Under the circumstances, I do not consider that the State party is to blame for having failed to explain the necessity for the detention. Furthermore, as far as I remember, the Committee has never decided that the detention for three days, as such, constitutes a violation of article 9, paragraph 3. For these reasons I am unable to concur with the Committee's Views in this respect.

(Signed): Mr. Nisuke Ando

Individual Opinion of Committee Member Mr. P. N. Bhagwati

I am in agreement with the finding of the Committee that there was a violation of article 14, paragraph 3 (d) of the Covenant. But I am unable to agree that there was violation of article 9, paragraph 3 because the author had been detained for two days before being brought before a judicial officer.

The principal reason why I am unable to agree with the Committee in regard to the alleged violation of article 9, paragraph 3 is that this complaint was not made by the author in the communication filed by him and the only complaint made in this respect was that he was detained for two weeks without trial and in the circumstances, it would not be correct to hold that the State party having failed to explain the delay of three days in bringing the author before a judicial officer such delay must be regarded as constituting a violation of article 9, paragraph 3 of the Covenant. When the author did not specifically make this complaint in his Communication, how can the State party be expected to deal with and explain this delay of three days? No inference could therefore be drawn from the State party not having explained the delay of three days. If the specific complaint had been made, the State party would have been called upon to explain the delay and if the State party did not offer an

acceptable explanation, the Committee would have been justified in finding a contravention of article 9, paragraph 3. But not so, when a specific complaint of delay of three days was not made in the Communication. Moreover, I am unable to agree that article 9, paragraph 3 envisages a rigid, inexorable rule that a person detained must be produced before a judicial officer within 48 hours of his arrest. The determination of compliance or non-compliance with the requirement of article 9, paragraph 3 must ultimately depend on the facts of each case.

I am accordingly of the opinion that in the present case, it would not be correct to hold that there was a violation of article 9, paragraph 3 of the Covenant.

(Signed): Mr. P. N. Bhagwati

Notes

1/ According to the author he understood the request to write "no" on the expulsion order to mean that he objected to the order itself rather than a wish not to enter an appeal.

2/ Section 139 reads as follows: "(1) Investigations shall be terminated by an order if ... (c) there is a reason which excludes or terminates punishability ...".

3/ Section 71 reads as follows: "Persons not punishable owing to the fact that the degree of the threat the committed offence poses to society has become negligible (section 36) shall be reprimanded ... (3). By a reprimand the authority expresses its disapproval and invites the offender to refrain in the future from committing criminal offences." According to the State party these decisions were served in the Russian translation on the persons concerned via the public prosecutor's office of Ukraine. Section 36 reads as follows: "The person whose act at the time of its adjudication does no longer pose a threat to society or if the threat it poses is of such a negligible degree that also with respect to his person even the most lenient punishment applicable in accordance with this Act is unnecessary, shall not be punished."