

HUMAN RIGHTS COMMITTEE

Ó Colchúin v. Ireland

Communication No. 1038/2001 *

28 March 2003

CCPR/C/77/D/1038/2001

ADMISSIBILITY

Submitted by: Dáithí Ó Colchúin

Alleged victim: The author

State party: Ireland

Date of communication: 3 July 2000

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

Meeting on 28 March 2003

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Dáithí Ó Colchúin, an Irish citizen, born 22 April 1946. He claims to be a victim of violations by the Republic of Ireland of articles 2, 25 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2. The author, being ordinarily resident outside of Ireland (Australia) is unable to vote in elections for the Irish Parliament, for the Presidency and in referenda. The author is so restrained from voting in Dáil (Lower House of Parliament) elections by direct operation of section 8, of the Electoral Act 1992, which provides, in order for registration in a constituency as an elector, that a person must have reached the age of 18, be an Irish national, and ordinarily resident in that constituency. All constituencies are within the State, and there are no provisions to vote from abroad except for

certain immaterial exceptions. The right to vote in Presidential elections and in referenda is derived from the right to vote in Dáil elections.

The complaint

3.1 The author claims that this exclusion prevents many Irish nationals abroad, including himself, on the basis of their residency, from participating in political affairs in accordance with article 25. He argues that article 25 confers a right to vote on "every citizen". 3.2 The author also claims that the exclusion is discriminatory and breaches his right to equality before the law under articles 2 and 26. The author refers to paragraph 8 of the Committee's General Comment No. 23 in which it states that access to equal rights does not mean "identical treatment in every instance". It also states that article 25 "guarantees certain political rights, differentiating on grounds of citizenship". The author argues that the Electoral Act, 1992, does not differentiate on grounds of citizenship but between two different groups of citizens on the basis of residential status. He claims that it discriminates between people born in Ireland who are resident within the State and people born in Ireland who are resident outside the State. 3.3 As to the admissibility of the communication, the author states that the pursuit of domestic remedies would be prohibitively expensive, having received an estimate from counsel that pursuit of the case before the domestic courts would total "anything from about £20,000 to £100,000" (approximately 25,400 to 127,000 euros). However, he states that he has lobbied legislators without any results.

The State party's submissions on admissibility

4.1 By Note Verbale of 13 March 2002, the State party submits that this communication is inadmissible *ratione loci* and for failure to exhaust domestic remedies. The State party submits that it is inadmissible *ratione loci* because the author is neither within the territory of Ireland nor is he subject to Irish jurisdiction, for the purposes of article 2, paragraph 1, of the Covenant and article 1 of the Optional Protocol thereto. It submits, therefore, that it is not obliged under article 2 of the Covenant to ensure to the author all the rights recognized in the Covenant and the Committee is not competent to receive and consider the communication under article 1 of the Optional Protocol. 4.2 The State party submits that this communication may be distinguished from other communications in which the author was physically outside the territory, but where the Committee found that he was subject to the jurisdiction. The situation of the author in this case is not comparable to that of the author in *Montero v. Uruguay*, 1/ where the communication concerned the refusal of the Uruguayan authorities to renew the author's passport. The Committee in that case stated that, "The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose." 2/ According to the State party, it is implicit in the use of the words "for that purpose" that a citizen who is not physically within the territory of a State is not "subject to its jurisdiction" for all purposes. 4.3 The State party also refers to the Committee's decisions in *Lopez Burgos v. Uruguay* 3/ and in *Celiberti de Casariego v. Uruguay* 4/ to support the proposition that where a citizen is outside the territory of the State and his rights are deliberately violated by agents of the State, the State may not avoid its obligations under the Covenant merely because the violation was carried out outside the territory of the State. In an individual opinion, appended to the Committee's views

on each of these communications, Mr. Christian Tomuschat observed that it was not envisaged, "... to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad". The State party submits that the communication herein does not fall within this category of cases.^{4.4} The State party also refers to the Committee's decisions on issues concerning extradition or expulsion. If a State party extradites or deports a person within its territory and subject to its jurisdiction in such circumstances that, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant. ^{5/} In the State party's view, no comparison may be drawn between the instant communication and such cases involving extradition or deportation.^{4.5} The State party draws the Committee's attention to the recent case of *Bankovic and Others v. Belgium* ^{6/} heard by the European Court of Human Rights in which the judgement states that "... it is difficult to suggest that the exceptional recognition by the Human Rights Committee of certain instances of extraterritorial jurisdiction ... displaces in any way the territorial jurisdiction expressly conferred by that article of the CCPR 1966 or explains the precise meaning of 'jurisdiction' in article 1 of its Optional Protocol 1966 ...". The State party submits that this interpretation of article 2, paragraph 1, of the Covenant and article 1 of the Optional Protocol is correct. The Court cited examples of extraterritorial acts recognized as constituting an exercise of jurisdiction, namely extradition or expulsion of a person by a Contracting State, acts of the authorities of a Contracting State which produced effects or were performed outside their own territory or where a Contracting State, as a consequence of military action, exercised effective control of an area outside its national territory. The Court also noted other situations where "... customary international law and treaty provisions have recognized the extraterritorial exercise of jurisdiction by the relevant State". The State party submits that none of the examples alluded to in this judgement corresponds to the situation of which the author complains.^{4.6} The State party submits that the instant case does not justify extending the recognition of extraterritorial jurisdiction. It argues that in order to qualify as a victim of a violation of article 25, an individual must be within the territory and subject to the jurisdiction of a State Party and must be a citizen of that State Party. The requirement of citizenship in article 25 is additional to the territorial and jurisdictional requirements, and not an exception to them. This interpretation, the State party argues, is supported by the travaux préparatoires of the Covenant. ^{7/}

^{4.7} The State party additionally submits that this case is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol, because the author has failed to exhaust all available domestic remedies. In fact, the author has not taken any judicial proceedings in the Irish Courts. He has not claimed that such proceedings would be futile, nor could he. The author has made no attempt to challenge the constitutionality of the provision in question in the Irish Courts on the grounds set out by the author, nor has the question of its compatibility with the Covenant or any other international human rights instrument been raised in the Irish Courts.^{4.8} According to the State party, it was open to the author to challenge the validity of section 8 of the Electoral Act 1992 under the following Constitutional provisions. The right to vote at elections for members of Dail Eireann is governed by article 16.1.2 of the Constitution, which provides:

"(i) All citizens, and (ii) Such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dail Eireann, shall have the right to vote at an election for members of Dail

Eireann."

Article 40.1 of the Constitution provides:

"All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

4.9 According to the State party, the author's only attempt to address the alleged violation was by "political lobbying of legislators". The State party refers to the Committee's constant jurisprudence that an author must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress. 8/ The State party recollects that the rationale behind the necessity to exhaust domestic remedies 9/ is to give the State party an opportunity to address the alleged violation of the author's rights before the Committee is seized of the matter. In the State party's view, political lobbying does not enable the State to examine individual complaints in the way a legal action does. It cannot lead to any legal determination that an individual's rights have been violated. 4.10 The State party notes that the author has conceded that he has not exhausted all available domestic remedies. The reason he gives for this is that he does not have the means to do so. The State party submits that the Committee should follow its decision in *P.S. v. Denmark*, 10/ where it stated that "financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them". The author has merely contacted one solicitor and made no further attempts to find any other lawyer to take on his case, nor does he appear to have made efforts to seek legal aid or to accumulate the money required to pursue his case. The State party refers to *G. T. v. Canada*, 11/ in which the Committee noted that the author appeared "... to have made no effort to apply for legal aid under the Ontario Legal Aid Act" and concluded that the author had not met the requirement of exhaustion of domestic remedies. The State party submits that the statement quoted above is equally true of the author herein in this case that, accordingly, this communication should be inadmissible. 4.11 The State party submits that it is possible to seek legal aid in its jurisdiction in order to pursue a case of this nature. In particular, it was open to the author to seek legal aid under section 27 of the Civil Legal Aid Act 1995. The State party submits that as the only information provided by the author on his financial circumstances is that he is currently unemployed, the question of his financial eligibility under the 1995 Act and the Civil Legal Aid Regulations 1996 cannot be addressed. However, although it cannot be conclusively stated that the author would have received legal aid, had he applied for it, the author does not appear to have even made any attempt to apply for legal aid. 4.12 According to the State party, in addition or as an alternative to seeking aid under the 1995 Act, the author could have sought legal aid through the Free Legal Advice Centres (FLAC). These centres receive an annual grant from the State and provide legal services to persons in need, through one lawyer engaged on a salaried basis and others who give their time voluntarily. There are no restrictions as to the type of cases which FLAC may take. In fact, FLAC brings test cases to court challenging existing legislation with a view to bringing about amendments to the law for the benefit of everyone affected. It is not known whether FLAC might consider it appropriate to take a case like that of the author as a test case, as the author does not appear to have made contact with them. 4.13 The State party also brings to the attention of the Committee a further potential source of legal aid, under the Human Rights Commission Act 2000, which has become available since the author submitted this communication. The 2000 Act sets up a Human Rights Commission, which was established on 25 July 2001. This Act now provides a further potential source of legal aid to a person in the author's

position. While it is impossible to predict what the outcome of an application to the Human Rights Commission for assistance might have been, it was open to the author, since 25 July 2001, to make such an application.

Comments by the author

5.1 By letter of 18 May 2002, the author submitted the following comments on the State party submission. On the State party's argument of inadmissibility, *ratione loci*, the author submits that it is entirely within the State's jurisdiction to decide which Irish citizens and which, if any, non-citizens, are entitled to vote in Irish elections regardless of country of residence. Citizens who live outside the State participate already in Irish elections in two ways. Firstly, citizens who have become resident in another State are eligible to vote in Dail elections for up to 18 months. Secondly, citizens who are graduates of two particular Universities (National University of Ireland and University of Dublin) are eligible to vote in elections for the Senate (Upper House of Parliament) elections. The author argues that, as he has been voting in Senate elections since 1993 from his Australian address, this demonstrates that he is subject to the jurisdiction of Ireland for the purposes of voting. In addition, the author states that in many other democratic countries, provision is made for non-resident citizens to vote in their countries' elections and such non-citizens are therefore subject to the State's electoral laws.

5.2 On the State party's argument that the author has not exhausted domestic remedies, the author reiterates that the failure to proceed on this issue through the Irish legal system was due to estimates he received from two lawyers 12/ demonstrating that the costs of such proceedings would be prohibitive. For this reason, in the author's view, these proceedings were not "available" to him as required by article 5, paragraph 2 (b), of the Optional Protocol. The author refers to the Committee's decisions in *Thomas v. Jamaica* 13/ and *Currie v. Jamaica*, 14/ in which the Committee found that the failure to file a constitutional motion to the Supreme Court of Jamaica owing to lack of financial means and the unavailability of legal aid was not an obstacle to admissibility.

5.3 On the issue of legal aid, the author states that to be eligible for assistance under the 1995 Civil Legal Aid Act, disposable income must be less than 12,697.38 euros. He states that as his disposable income is above this figure he would not be eligible. With respect to the possibility of receiving legal aid from the FLAC, the author states that he made such a request and was informed by e-mail in May 2002 that the organization would be unable to assist him on this issue.

5.4 Finally, on the possibility of receiving financial assistance from the Human Rights Commission, the author says that this Commission was not established until 25 July 2001, one year after his initial application to the Human Rights Committee and is therefore irrelevant for the question of admissibility.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes that the author's communication challenges his inability to participate in certain elections in the abstract, i.e. without reference to any particular elections where the author would have been prevented from

exercising his right to vote. Consequently, the Committee finds that the author cannot claim the status of a "victim", within the meaning of article 1 of the Optional Protocol, of an alleged violation of any of his Covenant rights, and the communication is accordingly inadmissible under article 1 of the Optional Protocol. 7. Accordingly, the Committee decides:(a) That the communication is inadmissible;(b) That the State party and the author should be informed of this decision.

[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. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1/ Case No. 106/1981, Views adopted on 31 March 1983.2/ Ibid. at paragraph 5. 3/ Case No. 52/1979, Views adopted on 29 July 1981.4/ Case No. 56//1979, Views adopted on 29 July 1981.5/ The State party refers to *Ng v. Canada* Case No. 469/1991, Views adopted on 5 November 1993, and *T. v. Australia* Case No. 706/1996, View adopted on 4 November 1997.6/ Application No. 52207/99, judgement of 12 December 2001.7/ As support for this proposition, the State party simply refers to the following comment: "There was general agreement that, notwithstanding the provisions of article 2, paragraph 1, restrictions placed in certain substantive articles of part III of the Covenant such as article 23, on political rights, which refers to 'every citizen' would apply". E/CN.4/SR.125, p. 12, in M.J. Bossuyt: Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, 1987, Martinus Nijhoff Publishers: Dordrecht.8/ The State party refers to *R.T. v. France* Case No. 262/1987, Decision adopted on 30 March 1989, and *Patiño v. Panama* Case No. 437/1990, Decision adopted on 21 October 1994.9/ The State party refers to *T.K. v. France* Case No. 220/1987, Decision adopted on 8 November 1989, in which it was stated that "The purpose of article 5, paragraph 2 (b), of the Optional Protocol is, inter alia, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter."10/ Case No. 397/1990, Decision adopted on 22 July 1992.11/ Case No. 420/1990, Decision adopted on 23 October 1992.12/ The author refers to a second lawyer for the first time in his comments on the State party's submissions.13/ Case No. 321/1988, Views adopted on 19 October 1993.14/ Case No. 377/1989, Views adopted on 29 March 1994.