HUMAN RIGHTS COMMITTEE

Hussain v. Mauritius

Communication No 980/2001 **

18 March 2003

CCPR/C/77/D/980/2001

ADMISSIBILITY

Submitted by: Fazal Hussain

Alleged victim: The author

State party: Mauritius

Date of communication: 18 February 1998 (initial submission)

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

Meeting on 18 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 18 February 1998, is Mr. Fazal Hussain, an Indian citizen currently serving a prison term in Mauritius. He claims to be a victim of a violation by Mauritius of article 14, paragraph 3 (b), (c) and (d), paragraph 5 and paragraph 6 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 On 7 July 1995, the author was arrested at Sir Seewoosagur Ramgoolam international airport in Mauritius and charged with "importation and trafficking" in heroin. Before 15 October 1996, the author was brought twice before the District Court of Mehbourgh. 1/

2.2 On 20 June 1996, the author appeared before the Supreme Court for his trial. After the Chief Justice had read out the charges against him, the author was confused as he was not assisted by counsel and did not understand English properly. He mentioned that he had applied for legal aid and that he wanted to be assisted by an interpreter. The Supreme Court adjourned the trial for these reasons.

2.3 In September 1996, the author personally contacted a lawyer, Mr. Oozeerally, who agreed to start working on the case as soon as he received the copies of the author's statement as well as of other evidence related to the case. Mr. Oozeerally was later appointed as legal aid counsel. The author claims that his counsel received the documents only five days before the trial.

2.4 The author was advised by his counsel to plead not guilty but after one day of proceedings, the author decided to plead guilty because he was "shocked to see the court proceedings and the way the trial was going on". On 17 October 1996, the author was sentenced to life imprisonment. He immediately indicated to the judge that he wanted to appeal.

2.5 On 29 October 1996, the author applied for legal laid for his appeal (*in forma pauperis*) but his request was turned down by the Chief Justice on the basis of his counsel's opinion who considered that there were no grounds for appeal.

The complaint 2/

3.1 The author first alleges that the prosecution had 14 months to prepare its case while his counsel received the necessary information to prepare his defence only five days prior to the trial. The author thus did not have sufficient time to prepare his case.

3.2 The author further alleges that he had been sentenced to life imprisonment by a court composed by a single judge and not by a jury, which is allegedly contrary to the Covenant.

3.3 Finally, the author alleges that he has been denied his right to appeal and legal aid to make such an appeal. He further claims that it is on the basis of his trial counsel's opinion that the application for his appeal *in forma pauperis* was denied.

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

4.1 By submissions of 13 August 2001 and 29 January 2002, the State party made its observations on the admissibility and merits of the communication.

4.2 With regard to the admissibility of the communication, the State party holds that the claim made by the author constitutes an abuse of the right of submission and that the author has failed to exhaust all available domestic remedies to the extent that, if it was his opinion that his constitutional rights of fair trial had been breached, he could have applied to the Supreme Court for redress. Moreover, the author was entitled to apply to the Commission on the Prerogative of Mercy for a review of the punishment imposed by the Supreme Court.

4.3 With regard to the merits of the case, the State party explains that, at the first hearing on 20 June 1996, the author's trial was postponed so that he could be legally represented and assisted by an interpreter. It appeared later that, although proceedings were translated in his mother tongue, as a matter of fairness, the author was conversant in English and that he had no objections that proceedings be conducted in this language.

4.4 The State party further contends that at no time during the trial did counsel ask for an adjournment on the grounds that he needed more time for preparing the case, which, according to the practice in such cases, would have been granted by the court.

4.5 Moreover, although counsel stated at some stage that a statement by a witness and some photographs were not communicated to him, he made clear that he was not making any objection to the admissibility of most documents brought by the prosecution. Counsel further stated that he did not need time to look at the documents as they were read out in court. Finally, the witnesses who recorded the statement and took photographs were also heard in court and could have been cross-examined by counsel.

4.6 Concerning the right to appeal, the State party's legislation provides for legal aid at the stage of appeal. According to the procedure in such cases, the file is sent to a barrister to see whether there are reasonable grounds to appeal a decision. In the present case, on 17 October 1996, the author gave notice to the judge of his intention to appeal the court's decision. The relevant documents were thus sent to counsel who, on 5 November 1996, wrote an opinion stating that there were no reasonable grounds to make such an appeal. The author was informed of the latter by the Commissioner of Prisons and his request for legal aid was accordingly rejected.

4.7 The State party is of the opinion that due consideration was given to the author's application for legal aid, but that on the basis of his own counsel's advice, the court had no other option but to reject his request. The State party explains that it is a settled matter of its courts to reject applications for legal aid in appeal cases that are deemed frivolous and vexatious. Furthermore, the author could have appealed directly to the Supreme Court, which he chose not to do in the circumstances.

Comments of the author

5.1 By submission of 7 March 2002, the author gave his comments on the State party's submissions.

5.2 With regard to the merits of the case, 3/ the author reiterates that his counsel was not given sufficient time to prepare his defence and refers to a document submitted by the State party where counsel mentioned that the brief was submitted to him only a few days prior to the trial. In this regard, the author states that he is not in a position to ask his counsel why he did not ask for the adjournment or postponement of the trial.

5.3 The author also maintains his claim that he was denied his right to appeal and states that he had never asked for his first instance's counsel to take care of the appeal. The author considers that a

different counsel should have been appointed for the appeal procedure. The author further states that he has never been informed of his counsel's opinion that there were no reasonable grounds to appeal the Supreme Court's decision.

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 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.

6.3 Concerning the author's claim that his counsel has not received sufficient time to prepare his defence because the case file was transmitted to him only five days prior to the first hearing, which may raise issue under article 14, paragraph 3 (b) and (d), of the Covenant, the Committee notes from the information brought by both parties that counsel had the opportunity to cross-examine the witness as well as to ask for the adjournment of the trial, which he did not do. In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. 4/ In the instant case, there is no reason for the Committee to believe that the author's counsel was not using other than his best judgement. Moreover, the Committee notes that the author eventually decided to plead guilty against the advice of his counsel. The Committee finds therefore that the author has not sufficiently substantiated his claim under article 14, paragraph 3 (b) and (d) of the Covenant. This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

6.4 Concerning the author's claim that he was not tried by a jury but by a single judge, the author has not demonstrated how this could constitute a breach of the Covenant. This part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

6.5 Concerning the author's claim of a violation under article 14, paragraph 3 (c), the Committee considers that the author has not sufficiently substantiated, in the circumstances of his case, how a period of 11 months between his arrest and the first hearing by the Supreme Court could constitute a violation of article 14, paragraph 3 (c). This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

6.6 Concerning the author's claim of a violation under article 14, paragraph 6, the Committee notes that the author has not brought before it any element that could raise an issue under these provisions. This part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

6.7 Concerning the author's claim that he has been denied his right to appeal, which may raise an issue under article 14, paragraph 3 (d) and paragraph 5, the Committee, bearing in mind that he

pleaded guilty against the advice of his counsel, notes that the author sought legal aid for his appeal without presenting any grounds or supporting reasons for the appeal, and that after his request for legal aid was denied, he failed to apply to the Supreme Court for violation of his constitutional rights. The Committee is of the opinion that the communication is inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is inadmissible under articles 2, 3 and 5 of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[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. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

** Pursuant to rule 85 of the Rules of Procedure, Mr. Rajsoomer Lallah did not participate in the adoption of the present decision.

Notes

1/ The author does not give any indication whether anything relevant for the case was raised at the District court level.

2/ The author makes a general allegation of a violation of article 14, paragraph 3 (b), (c) and (d), paragraph 5 and paragraph 6 of the Covenant and does not make a legal distinction between his claims.

3/ The author does not raise any arguments related to the fact that he has not applied to the Supreme Court for violation of his constitutional rights.

4/ See inter alia, the Committee's decision in communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.