

HUMAN RIGHTS COMMITTEE

Kurowski v. Poland

Communication No 872/1999

18 March 2003

CCPR/C/77/D/872/1999

ADMISSIBILITY

Submitted by: Mr. Eugeniusz Kurowski (represented by counsel, Mr. Adam Wiklik)

Alleged victim: The author

State party: Poland

Date of communication: 30 September 1996 (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:

Decision on admissibility

1.1 Communication submitted by Mr. Eugeniusz Kurowski, a Pole, born in 1949. He claims to be a victim of violations by Poland of article 14, paragraph 1, and of article 25 (c), in combination with article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for Poland on 18 June 1977, and the Optional Protocol on 7 February 1992.

Facts as submitted by the author

2.1 From December 1976 until 1989, the author held a post in the Polish law enforcement services

(National Militia). In 1989, he was appointed deputy security chief of the Regional Office of Internal Affairs in the town of Andrychów. On 31 July, he was dismissed pursuant to the State Protection Office Act of 6 April 1990, which had dissolved the Secret Police by transforming it into a new department.

2.2 In its Ordinance No. 69 of 21 May 1990, the Council of Ministers established qualification proceedings and criteria for the reinstatement in the new department of officers who had been dismissed. Reinstatement could take place only after a regional qualifying commission issued a positive assessment or through an appeal to the Central Qualifying Commission in Warsaw. On 22 July 1990, the Bielsko-Biala Qualifying Commission declared that the author did not meet the requirements for officers or employees of the Ministry of Internal Affairs. The Central Qualifying Commission confirmed that opinion on 5 September 1990, following an appeal made by the author on 28 July 1990.

2.3 On 25 April 1995, 1/ the author requested the Minister of Internal Affairs to overturn the decisions of the qualifying commissions and to reinstate him in the Police. On 29 May 1995, the Minister replied that he had no authority to alter decisions by the qualifying commissions or to recruit anyone who did not receive a positive assessment from them. On 1 February 1996, the Minister confirmed that reply. The author lodged an appeal with the Central Administrative Court. However, the Court nonsuited him, considering that it was not competent to give a ruling on decisions taken by the qualifying commissions.

The complaint

3.1 The author claims that he is a victim of a violation by the State party of article 25 (c) of the Covenant, since the Ministry of Internal Affairs dismissed him from the Police 2/ because he was a member of the Polish United Workers' Party and held leftist political views. Moreover, the Ministry of Internal Affairs had unjustly classified him as a member of the Security Service although, at the time of his admission to the Police, he had been a police officer and had worn the uniform for the duration of his service. The author considers that this violation should be considered together with a violation of article 2, paragraph 1, of the Covenant.

3.2 The author also claims to be a victim of the State party's violation of his right to access to a court, since neither the question of his dismissal nor his retroactive reclassification as an agent of the Security Service could be reviewed by a court.

3.3 He considers that the decisions of the qualifying commissions had been handed down by members hostile to the left and who dismissed any candidate holding political views different from theirs. Since the decisions that had been handed down in that manner were not subject to appeal before a court or other body independent of the Ministry of Internal Affairs, the author considers himself a victim of the State party's violation of his right to a hearing by an independent and impartial tribunal.

The State party's observations on admissibility and the merits

4.1 The State party transmitted its observations on 31 May 2000. After briefly summarizing the facts of the case, the State party refers to the relevant national legislation. It states that, following the political transformation in 1989, it was necessary to adopt completely new provisions concerning security and public order. The Parliament took a decision to reorganize the units subordinate to the Ministry of Internal Affairs, particularly its political service. This resulted in the dissolution of the Secret Police, the dismissal of officers and the establishment of the State Protection Office. In view of the role formerly played by the Secret Police, 3/ the State party considers these changes indispensable. The ideological nature of the Secret Police was another reason for the decision to disband it. 4/ However, the principal objective of replacing the Security Police by the State Protection Office was to create more effective guarantees for the rule of law and respect for human rights. Criteria have been adopted for that purpose. Conformity with those criteria entitled former officers of the Security Police to be reinstated in public service. The legal basis for the aforementioned reorganization of the Ministry of Internal Affairs is to be found in two acts, adopted on 6 April 1990 (on the Police and on the State Protection Office), as well as Council of Ministers Ordinance No. 69 of 21 May 1990. Article 129 of the State Protection Office Act provides for the dissolution of the Security Police beginning from the date of the establishment of the State Protection Office. Under article 131, paragraph 1, of that Act, the officers of the Security Police were dismissed *ex lege*. This provision also applied to officers of the Militia, who until 31 July 1989 were officers of the Security Police, according to paragraph 2 of the aforementioned article.

4.2 Article 132, paragraph 2, of the State Protection Office Act provides that the Committee of Ministers is authorized to establish the procedural modalities and criteria for the reinstatement of officers of the Security Police in the new departments. On 21 May 1990, the Committee of Ministers adopted Ordinance No. 69, which provided for the possibility of reinstatement only for those officers of the Security Police who obtained a positive assessment from a qualifying commission as part of special qualification proceedings. The qualification proceedings were begun on the initiative of the person concerned. Regional qualifying commissions were authorized to give a first instance opinion. Subsequently, within seven days, the person concerned could lodge an appeal against a negative assessment with the Central Qualifying Commission. The decision of the Central Qualifying Commission was final. The State party maintains that the commissions had the obligation of determining whether or not candidates met the criteria established for officers of a given service of the Ministry of Internal Affairs and whether or not they met the requisite moral qualifications.

4.3 The State party continues, indicating that the new State Protection Office had been established in the context of a democratic society and that that had been the reason for the substantial reduction of posts in the State Protection Office. The law did not oblige that new body to recruit all candidates who had received a positive assessment in the qualification proceedings; moreover, that is made clear in paragraph 10 of Ordinance No. 69, which specifies that a positive assessment was merely a condition that allowed candidates to apply for posts in the Ministry of Internal Affairs but did not guarantee placement.

4.4 On 22 January 1990, the Minister of Internal Affairs promulgated Order No. 8/90, 5/ containing a list of Security Police posts and indicating, inter alia, the posts allocated to the Research and Analysis Section of the Regional Office of Internal Affairs. For the purposes of qualification, the Minister promulgated Order No. 53/90 on 3 July 1990 in order to confirm and reiterate the categories of posts recognized as having been part of the Security Police. According to that order, officers employed until 10 May 1990 in posts allocated, inter alia, to the Research and Analysis Section of the Regional Office of Internal Affairs were classified as officers of the Security Police.

4.5 With regard to the admissibility of the communication, the State party recalls that the Covenant entered into force for Poland on 18 June 1977 and the Optional Protocol on 7 February 1992. The State party considers that the Committee can admit only individual communications concerning allegations of human rights violations that took place after the Optional Protocol entered into force, that is, after 7 February 1992. The qualification proceedings with respect to the author were completed on 5 September 1990. 6/ All subsequent letters from the complainant sent to various institutions and concerning his reinstatement in the Police were more on the order of routine correspondence and did not constitute administrative decisions or acts of public administration. Thus, as confirmed, inter alia, in the decision of the Supreme Administrative Court on 7 May 1996, rejecting his complaint concerning the letter refusing to reinstate him in the police force, such correspondence should not be considered an integral part of the proceedings in the author's case. According to the State party, such correspondence also did not constitute an effective legal recourse.

4.6 The State party also considers that, in the case under consideration, there is no reason to invoke the principle of the retroactive application of the Optional Protocol, as elaborated by the Committee, in exceptional circumstances. According to the State party, the alleged violations are not of a continuous nature and their effects are not persistent. It refers to the Committee's jurisprudence (communications 520/1992 and 568/1993), according to which a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party. According to the State party, the proceedings relating to the author's case ended on 5 September 1990, that is, before 7 February 1992. For these reasons, the State party contends, the communication should be declared inadmissible ratione temporis with respect to the Optional Protocol to the International Covenant on Civil and Political Rights.

4.7 With regard to the exhaustion of domestic remedies, the State party notes that the author exhausted all remedies available under Polish law, by lodging an appeal with the Central Qualifying Commission in Warsaw against the decision of the Bielsko-Biala Regional Qualifying Commission.

4.8 With regard to the merits of the case, the State party considers that the fact that the author had served in the Secret Police is incontrovertible; he had also been a member of the Polish United Workers' Party. Order No. 8/90 had been promulgated on 22 January 1990 as special legislation relating to the 1985 Act on the Security Police and the Civic Militia, which had been in force before the adoption of the new acts of 6 April 1990. The State party affirms its steadfast conviction

that, contrary to the author's allegations, the case under consideration has no bearing on the retroactive classification. The author himself does not deny the fact that he served in the Security Police, as is clear from his letter of 5 April 1995 to the Minister of the Interior. The fact that the author was dismissed as an officer of the Security Police, pursuant to article 131 of the State Protection Office Act, did not constitute a sanction against him. The aim of Parliament's decision, which was legal and legitimate, was to dissolve the infamous Security Police and to dismiss all its officers ex lege.

4.9 The State party asserts that a legal, financial and organizational distinction between the Civic Militia and the Security Police existed both before and after 1990. The two units were part of the Ministry of Internal Affairs. Within internal affairs at the regional and district levels, there were special sections of the Security Police headed by an officer holding the post of deputy chief of the Local Office of Internal Affairs. The author had been in the Security Police since February 1989.

4.10 The State party states that it interprets article 25 (c) of the Covenant in the spirit of the travaux préparatoires of the Covenant and shares the opinion that the provisions of that article are aimed at preventing privileged groups from monopolizing the State apparatus. In any case, according to the State party, the drafters of the Covenant were unanimous in their recognition of the fact that a State party must have the possibility of establishing certain criteria concerning the access of its citizens to public service positions. Ethical criteria, inter alia, were the basis for the dissolution of the Security Police and the adoption of the State Protection Office Act, which entailed the decision to dismiss all security officers.

4.11 The State party cites General Comment No. 25, adopted by the Human Rights Committee on 12 July 1996, and draws attention to paragraph 23, which states that "to ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable". The State party considers that the criteria applied in the present case met those conditions. Moreover, the State party notes that, in a similar case, the Committee did not find a violation of article 25 (c) of the Covenant (communication No. 552/1993, *Kall v. Poland*).

4.12 The State party also emphasizes that the qualification proceedings undertaken by the author were of a voluntary and non-obligatory nature. Council of Ministers Ordinance No. 69 of 21 May 1990 made that quite clear in its paragraph 6.1. According to the statistics of the Ministry of Internal Affairs, out of a total of 18,000 dismissed officers, 14,034 went through the qualification process and 3,595 received a negative assessment. According to the State party, that clearly demonstrated that not all officers had opted for qualification and, in the case of those who did, 25 per cent had received negative assessments. In spite of the fact that virtually all the officers of the Security Police were members of the communist party, the qualification proceedings had not led to "vengeance" on political grounds. All officers with negative assessments from the qualifying commissions had lost their social credibility and could no longer serve in internal affairs.

4.13 The State party maintains that, in the present case, there has been no violation of article 25 (c) of the Covenant and requests that the Human Rights Committee find the communication inadmissible ratione temporis. In addition, the communication should be considered as unfounded.

The author's comments on the State party's observations

5.1 The author submitted his comments on 5 October 2000. He states that he maintains his previous positions and that, contrary to the State party's arguments, article 25 (c) of the Covenant has indeed been violated in his case. The decision to dismiss him from the police force had been motivated by political considerations, without any other reason. The author explains that, if there had been other reasons, they would certainly have been contained in the Qualifying Commission's decision. The author believes that he had both the professional and moral qualifications to continue to work in the Police. The proof was his personal file in the Ministry of Internal Affairs, as well as the written opinion about the author by his superior (in the text, his "employer").

5.2 According to the author, the position that he expounded to the Committee was based on both well-founded and formal considerations, since the failure of a State administrative body to assemble all the evidence constituted a breach of the provisions on administrative procedure, particularly when one of the parties invokes special circumstances. To decide in an administrative case by taking a decision based on falsely established facts is contrary to the principle of objective truth, which is binding with respect to the provisions on administrative procedure and violates, inter alia, articles 7, 75, 79 and 81 of the Code of Administrative Procedure. ^{7/} The violation of the provisions on administrative procedure influenced the establishment of the facts in the case under consideration, and errors, as in the present case, led to a decision different from that which would have been taken had the facts been established in an appropriate manner. According to the author, the establishment of the facts, as well as the violation of provisions when the decision was taken to dismiss him from the Police, should have been subject to judicial review, in accordance with article 6, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms. However, the Supreme Administrative Court did not examine the author's claim contesting the refusal to offer him the possibility of resuming employment in the Police in spite of the fact that, in a similar decision relating to article 14 of the Covenant, the Constitutional Court had ruled that "everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal". The position of the Supreme Administrative Court is, according to the author, contrary to the ruling of the Court of Justice of the European Communities of Luxembourg. ^{8/} The author requests that this fact be taken into account when the communication is considered.

5.3 The author also maintains that, contrary to article 10, paragraph 1, and article 79, paragraph 2, of the Code of Administrative Procedure, he had been deprived of his right to participate in the administrative proceedings, in spite of the fact that the provisions guaranteed each of the parties the right to participate in every stage of the proceedings before a State administrative body. He also states that article 8 of the Code of Administrative Procedure provides that real circumstances can be recognized as proved if the parties have had an opportunity to express their opinion concerning the oral evidence before a decision is taken. The real circumstances, established in the proceedings relating to the present case, in which Mr. Kurowski did not take part and was unable to express his opinion concerning the oral evidence before the Qualifying Commission prior to his dismissal from the Police, cannot be considered proved under Polish law. State administrative bodies are obliged to respect the provisions of articles 79 and 81 of the Code of Administrative Procedure, regardless of the weight and content of the oral evidence. ^{9/} Under Polish law, the orders

(instructions) of the Ministry of Internal Affairs on the dismissal of officers of the communist Security Service and the communist Militia, as explained by the State party, cannot be recognized as legal acts providing the legal basis for including Mr. Kurowski in the communist Security Service. Moreover, the mere fact of including a police officer in the communist Security Service should not result in his dismissal from the Police if it has not been proved that he acted to the detriment of citizens or the State, and if he had the requisite professional qualifications and fulfilled the ethical and moral conditions.

5.4 The author also challenges the State party's observations on the objectives and tasks of the State Protection Office, since that institution has long, and increasingly, been considered as being political, as demonstrated by its actions against the President of the Republic, as well as the comments made by the Minister of State Protection to the opposition and the President of the Republic, and the surveillance of the opposition. Consequently, the author contends that the main objective of replacing the Security Police by the State Protection Office - "to create more effective guarantees of the rule of law and respect for human rights" - is highly debatable. The objective of the replacement was to remove members of the Police whose political views were different from theirs. The regional qualifying commissions and the Central Qualifying Commission were composed of opponents of the Polish left, who handed down politically motivated decisions and who dismissed from the Police all those who held political views different from theirs. The assessments, terse and unsubstantiated, were an example of nepotism. The assessments could not be reviewed by a court or other administrative body independent of the Ministry of Internal Affairs. The assessments given by the commissions were tantamount to dismissal from public service and, consequently, had nothing in common with the law or the democratic order; on the contrary, they were an example of the post-1989 leaders' authoritarian style of government.

5.5 The author also asserts that the State party had been wrong in alleging that his dismissal from the Police had been due to a reduction of posts in the State Protection Office and the Police. The author claims that the number of police officers had in fact increased. Consequently, the State party's explanations do not merit consideration.

5.6 Finally, the author considers that the Human Rights Committee is in a position to examine his communication, since Poland had ratified the International Covenant on Civil and Political Rights on 3 March 1977, especially if account is taken of the fact that, in 1995, the author brought actions against the decision to dismiss him. In the light of the foregoing, as well as of the violation of articles 39 and 40 of the Labour Code by the Ministry of Internal Affairs - since the author had been dismissed from the Police on 31 July 1990 in spite of the fact that he had been ill between February 1990 and 26 August 1990 as the result of a work-related accident and that he had only one year remaining before his retirement - the communication to the Human Rights Committee should be considered admissible.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any 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 notes that the matter is not being examined under another international procedure and that the domestic remedies have been exhausted. The conditions set out in article 5, paragraph 2, of the Optional Protocol have therefore been met.

6.3 The Committee notes that the State party claims that the communication is inadmissible ratione temporis, since the qualification proceedings for the author ended on 5 September 1990, that is, before the Optional Protocol entered into force for Poland on 7 February 1992. The author challenges that argument and replies that the State was party to the Covenant since June 1977, that the Optional Protocol entered into force in 1992 and that he did not take legal action against his dismissal until 1995 (after the Optional Protocol had come into force).

6.4 The Committee recalls that the obligations that the State party assumed when it signed the Covenant took effect on the date on which the Covenant entered into force for the State party. Following its jurisprudence, the Committee considers that it cannot consider violations that took place before the Optional Protocol entered into force for the State party, unless such violations persisted after the entry into force of the Optional Protocol. A persistent violation is understood to mean the continuation of violations which the State party committed previously, either through actions or implicitly.

6.5 In the present case, the author was dismissed from his post in 1990, under the law in force at the time, and the same year he presented himself as a candidate, without success, before one of the regional qualifying commissions in order to determine whether he satisfied the new statutory criteria for employment in the restructured Ministry of Internal Affairs. The fact that he did not win his case during the proceedings which he initiated in 1995, after the Optional Protocol came into force, does not in itself constitute a potential violation of the Covenant. The Committee is unable to conclude that a violation occurred prior to the entry into force of the Optional Protocol for the State party and continued thereafter. Consequently, the Committee declares the communication inadmissible ratione temporis, in accordance with article 1 of the Optional Protocol.

7.1 Accordingly, the Human Rights Committee decides:

- (a) That the communication is inadmissible under article 1 of the Optional Protocol to the Covenant;
- (b) That this decision shall be communicated to the State party and to the authors of the communication.

[Adopted in French, English and Spanish, the French text being the original version. Subsequently 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, Mr. Alfredo Castellero 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, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgewood and Mr. Maxwell Yalden.

Notes

1/ The author justifies the delay between his dismissal in 1990 and the date on which he made his appeal by stating that, between 1991 and 1995, he was in poor health and had neither the strength nor the opportunity to fight for his rights, but that he did so as soon as he recovered his health. The author attaches two pieces of documentary evidence: the conclusion of a board of inquiry attesting that, on 13 June 1990, he had suffered lower back pain while performing his duties, following which he received sick leave from 10 to 27 September 1988. The consequences for the author had been difficulty in moving part of his lower back and reduced feeling in his legs. The other piece of evidence is an extract from the author's health record, referring to medical follow-up in 1990 of the after-effects of his accident.

2/ The author insisted in his request that he had lost his job for political reasons. He describes his career in the Police and explains that he had been offered a promotion to the post of deputy security chief in Andrychów in 1989 because of his good work. He indicates that, at the time, the refusal of such an offer was tantamount to blocking any future advancement of the person concerned and even could prevent him from continuing to work in his former post. The author also stated that, as deputy security chief, neither he nor any of his subordinates had engaged in reprisals against the opposition. He also explained that he considered that he had been deprived of his right to defend himself, since the decision of the Regional Qualifying Commission did not give any reason for his dismissal but indicated only that he did not meet the necessary requirements.

3/ The State notes in this regard that, until 1989, the role of the Secret Police was to keep citizens under surveillance and, in particular, to persecute pro-democratic activists, through the use of unlawful methods and means.

4/ The State party cites article 1 of the Act of July 1985 on the service of officers of the Security Police and the Civic Militia of the People's Republic of Poland, according to which members of the Security Police must distinguish themselves by (...) fulfilling the programme of the Polish United Workers' Party.

5/ Order No. 8/90 amended Order No. 60/87 on the service of officers of the Security Police and the Civic Militia. The adoption of these orders are duly authorized, in accordance with the Act of 31 July 1985 on the service of officers of the Security Police and Civic Militia of the People's Republic of Poland.

6/ With the Central Qualifying Commission's decision on the appeal. The State insists that the decision was final and not subject to appeal.

7/ The author did not furnish the text of the aforementioned articles.

8/ The author uses the term "European Court of Justice of Luxembourg". With regard to the relationship between Community law and national law, the Court of Justice of the European Communities affirmed the primacy of Community law over national law in its judgement of 15 July 1964, Costa, 6/64, Recueil [Collection], p. 1141. In that judgement, which it subsequently confirmed on a number of occasions in its jurisprudence, the Court ruled "... the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

9/ In this regard, the author cites a judgement of 13 February 1998 of the Supreme Administrative Court, ref. No. II SA 2015/86 ONSA No. 1, item 13, but does not furnish a copy of the decision.