



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1037/2001

Submitted by: Zdzislaw Bator (represented by counsel: the law firm of Winston and Strawn in Switzerland and Mr. Sloan and Leon Zelechowski, United States of America.)

Alleged victim: The author

State party: Poland

Date of communication: 3 October 2001 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 9 January 2002. (not issued in document form)

Date of decision: 22 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Unfair hearing to dismiss individual as liquidator of company

Procedural issues: None

Substantive issues: Unfair hearing

Articles of the Covenant: 14, paragraph 1 and 2

Articles of the Optional Protocol: 2

[ANNEX]

ANNEX**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Eighty-fourth session

concerning

Communication No. 1037/2001*

Submitted by: Zdzislaw Bator (represented by counsel: the law firm of Winston and Strawn in Switzerland and Mr. Sloan and Leon Zelechowski, United States of America.)

Alleged victim: The author

State party: Poland

Date of communication: 3 October 2001 (initial submission)

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

Meeting on 22 July 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Zdzislaw Bator, an American and Polish citizen, currently residing in the United States of America. He claims to be a victim of violations of articles 2, paragraph 3 (a) and (b), and 14, paragraph 1, by Poland, of the International Covenant on Civil and Political Rights. He is represented by counsel: the law firm of Winston and Strawn in Switzerland and Mr. Sloan and Leon Zelechowski, United States of America.

* 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. Edwin Johnson, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Roman Wieruszewski did not participate in the adoption of the present decision.

Factual background

2.1 In 1986 the author formed a joint venture company with his brother Waldemar Bator (“Waldemar”), a Polish citizen residing in Plock, Poland. The business was named Capital Ltd. (“Capital”) and its principal place of business was Plock. The author owned 81% and Waldemar 19% of the shares of the company. The author provided the funding for the company and Waldemar operated Capital’s day-to-day operations in Poland. The author resided in the United States but travelled to Poland several times a year to assist in the running of the business.

2.2 In 1994, the author allegedly discovered that Waldemar and his wife were embezzling money from the company. The author spent several months in Poland trying to “save the business”. However, in 1995, he decided that Capital should be dissolved. On 6 November 1995, in a meeting with Waldemar, the author, as the majority shareholder, passed a resolution dissolving Capital and elected himself as liquidator. At the meeting, Waldemar voted against the author’s candidature and threatened that he would have the author removed as liquidator.

2.3 The author took several steps to liquidate Capital’s assets, including selling some of Capital’s real estate. On 18 December 1995, the Plock District Court sent the author notice that the liquidation should be entered immediately into the Commercial Registry. Waldemar obtained this notice from the Court on the same day that it was issued and faxed it to the author. The original notice arrived at Capital’s offices in Plock on 27 December 1995. In response to this notice, the author filed a petition informing the Court that the liquidation had taken place on 3 January 1996.

2.4 On 18 December 1995, Waldemar filed his first motion to replace the author as liquidator. On 15 March 1996, the Plock District Court held a “closed hearing” on the motion to change liquidators. The hearing was not held in open Court but in the judge’s chambers and according to the author neither he nor his lawyer were notified of the time and place of the hearing. As a result, neither was present to contest the motion. In addition, the case was heard by the Commerce Law Division of the District Court as a “registry case”, allegedly in violation of applicable rules of Polish civil procedure. As such, according to the author, the Court’s jurisdiction was incorrectly invoked. The judge ruled that Waldemar should replace the author as Capital’s liquidator. Her reasons for this ruling included the author’s failure to register the liquidation until 3 January 1996, and his U.S residence, which rendered him less able to carry out the duties of liquidator (either personally or through his agents).

2.5 Pursuant to this ruling, the author’s name was immediately deleted from the Commercial Register, and Waldemar’s name was inserted as liquidator. According to the author, this was contrary to Polish law, because the District Court’s ruling should not have been officially recognised until the author had had an opportunity to pursue an appeal. On 27 May 1996, the judge of the District Court reversed her ruling of 15 March 1996, admitting that she had exceeded her authority by entering Waldemar’s name as liquidator in the Commercial Register. On 21 October 1996, an appeal by Waldemar was denied and in January 1997, the Registry was amended to show the author as liquidator.

2.6 In early 1997, Waldemar filed a second motion to change liquidators. On 11 July 1997, the same judge heard his application without any representation from the author and found for Waldemar. She provided almost identical reasoning to that provided in her ruling of 15

March 1996 ruling. On 30 October 1997, this decision was reversed by the Circuit Court as the author had not been properly informed of the date of the hearing and therefore the principle of equality of arms between the parties had not been respected. The Circuit Court returned the case to the District Court for reconsideration.

2.7 Prior to the reconsideration of this matter in the District Court on 15 October 1998, the author's lawyer had filed a motion requesting an adjournment, as the author was ill and unable to travel, and his lawyer could not represent him on the date in question. The Court did not acknowledge receipt of the motion to delay the hearing. According to the author, this request was delivered to the Court by 8:00 a.m. on the day of the hearing. A different judge presided over the proceedings and ruled in favour of Waldemar reiterating the reasoning of the District Court¹. On 6 July 1999, the Circuit Court affirmed the District Court's ruling. The Court allegedly refused the author's request to testify and to present documentary evidence. The author filed several procedural motions to reopen the proceedings and to appeal before the Supreme Court. All these requests were denied.

The complaint

3.1 The author claims that his rights under articles 2 and 14 were violated, as he did not receive a fair and public hearing to defend himself against repeated attempts to dismiss him as liquidator. Each time the District Court dismissed the author as liquidator it did so in the author's absence, and allegedly refused to allow the submission of evidence to support his case. Similarly, during the hearing on 6 July 1999, the Circuit Court refused to allow the author to testify or to otherwise participate in the hearing. The author also claims that by hearing these motions in the absence of the author, the District Court violated article 379, para. 5, of the Civil Proceedings Code.

3.2 The author claims that the judges of the Plock District Court were neither independent nor impartial. In support of his claim, he observes that the District Court found in Waldemar's favour every time a motion to remove the author was before it, that the author was never informed of the time or place of the hearings; that the Court proceeded with the hearing on the third motion even though it was informed that the author was ill and could not attend; and that on the same day of each hearing the Court issued a full written judgment, which to the author suggests that the outcome was pre-determined.

3.3 In addition, the author infers from the fact that Waldemar received the District Court's notice to register the liquidation on 18 December 1995, i.e. the same day it was issued, that Waldemar had prior knowledge from the Court that this notice would be issued. He also refers to the fact that after the District Court's ruling on the first motion, Waldemar's name was immediately entered in the Commercial Registry as liquidator. This was against Polish law and allowed Waldemar to act on Capital's behalf without authority. Even though the District Court reversed its decision, the Registry was not corrected until January 1997, three months after Waldemar's appeal to the Circuit Court had been finally determined and denied by that Court.

¹ According to the judgment, the Court gave several reasons for its decision and determined that the author had failed to fulfill his responsibilities as liquidator under the Commercial Code.

3.4 The author affirms that he was told by the District Court judge, who had presided over the first two motions, that she had been told what decision to make in this case by the judge who was supervising her. He claims that this supervising judge was having a romantic relationship with one of Waldemar's friends and that Waldemar's friend admitted to this relationship during a defamation suit which he filed against the author and three other individuals. During this hearing, he referred to the judge as his "fiancée".

3.5 To support his argument that the judges were neither impartial nor independent, the author refers to a World Bank report of 1999, which outlines the problems of corruption generally among the judiciary in Poland. Finally, the author admits that while all these allegations of corruption in paragraphs 3.2 to 3.4 do not constitute direct evidence, the combination of these events raise a strong inference of bias or at least unfairness against the author. The actions of the judiciary as a whole are said to have cost him "hundreds of thousands of dollars in losses".

State party's response on admissibility and the merits

4.1 On 8 July 2001, the State provided its submission on admissibility and the merits. It clarified the facts as follows: Waldemar had filed the first motion on 18 December 1995, on the grounds that the author lived in the United States and was thus unable to carry out the liquidation process in a proper manner, and that in the event of misuse of company funds, it would be practically impossible to sue him before Polish judicial authorities. On 25 January 1996, Waldemar informed the District Court that the author had sold real estate belonging to the company to the latter's wife on 20 January 1996. For these reasons, on 26 January 1996, the court held a hearing at which the author, albeit duly summoned, did not appear. Another hearing was set for 9 February 1996, at which the author also did not appear. As a consequence, the court postponed the hearing until 23 February 1996 and ordered the author's compulsory appearance at the hearing. On 23 February 1996, the author was present and the court ordered that information about the commencement of the liquidation proceedings be entered into the Commercial Register. At the next hearing on 8 March 1996, the author's lawyer was present.

4.2 On 15 March 1996, the Plock District Court erroneously ordered changes to be made to the Commercial Register, without waiting for a final and enforceable order, in accordance with the Polish Commercial Code. As a result, on 27 May 1996, the same court ordered that the changes already introduced be removed. The decision of 11 July 1997 to dismiss the author as liquidator was quashed on 30 October 1997 by the Circuit Court, which sent the case back to the District Court, as the author had not been properly summoned and was unrepresented at the hearing. On 15 October 1998, after re-examining the case, the Plock District Court dismissed the author as liquidator and appointed Waldemar. The Circuit Court dismissed the author's appeal of this decision and concluded that he had been duly summoned to the hearing even if he was unable to attend and that the court had had ample opportunity to formulate an informed opinion on the petition in his absence. In the appeal to the Supreme Court, his claim was similarly dismissed.

4.3 The State party submits that the communication is manifestly ill-founded and contests the claim that the author was prevented from presenting documentary evidence or participating in the court proceedings. Except for the hearing on 11 July 1997, at which the court erroneously assumed that the author was properly informed about the hearing, an error

remedied by the Circuit Court, there is no evidence that the author was not duly summoned to all other court hearings in his case. As a result of the decision of the Circuit Court, the case was remitted back to the first instance court. The author did not appear at this hearing, even though he was duly summoned. The State party argues that in his absence, the court was able to examine the case on the basis of the written arguments provided.

4.4 The State party recalls that the author and his counsel were repeatedly summoned to the court hearings, and that both testified before the courts. In fact, for the greater part of the proceedings, the author was represented by two lawyers. Thus, it cannot be said that the author had no opportunity to present his position to the court. In addition, the author's lawyers filed numerous procedural writs with the court, in which they presented their client's position in detail. In the State party's view, it cannot be held responsible for the author's inability to attend each court hearing. The mere fact that the courts decided against him does not mean that he was deprived of fair proceedings.

4.5 As to the allegations of corruption in the District Court, the State party submits that they are unsubstantiated, that the report of the World Bank on corruption is of no relevance and cannot be considered direct evidence of corruption in the District Court of Plock. It adds that the allegations with respect to certain judges of the Plock District Court are defamatory and constitute an abuse of the right of submission. In addition, by failing to make an application under articles 77 and/or 417 of the Civil Code for harm caused by public officials, the author has not exhausted remedies available with respect to the alleged losses caused as a result of the judiciary's misconduct. Should the Committee consider the case sufficiently substantiated, the State party submits that the author has failed to demonstrate a violation of any of the provisions of the Covenant.

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

5.1 On 10 October 2002, the author commented on the State party's submission. He submits that his failure to be present at the hearing on 26 January 1996, was due to his son's illness, of which he informed the Court. He highlights the State party's failure to refer to the following issues: the author's request, due to his illness, to adjourn the hearing on 15 October 1998; the judge's decision to consider the case on 15 October 1998 "privately", outside the courtroom, despite her alleged initial decision to adjourn the case; the Circuit Court's refusal, on 6 July 1999, to permit the author to participate in the proceedings and its threat to have the author arrested if he continued to insist on participating; and the fact that the same judge who had dismissed his appeal in the Supreme Court considered and dismissed an application to reopen the case.

5.2 The author submits that on hearing his motion to reopen the proceedings, both the Circuit Court and the Supreme Court focused on the distinctions between "registry cases" and "commercial cases", glossing over the due process issues highlighted by the author. The author challenges the State party's view that the author's failure to participate in the hearing on 15 October 1998, due to his illness, is of no consequence, as the court was in possession of his written arguments. As to the claim that he failed to exhaust domestic remedies in his claim against individual judges, the author notes that such a claim would have been futile, since he had already failed to receive relief from the Circuit Court and the Supreme Court for the same due process violations, there is therefore no reason to expect a different result in proceedings under these articles. In addition, he had already spent five years attempting to

protect his rights before the Courts and the pursuit of further proceedings would be unreasonably prolonged.

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 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the author's claim that he did not receive a fair and public hearing to defend himself against repeated attempts to dismiss him as liquidator, the Committee observes that the author's allegations relate primarily to the evaluation of facts and evidence by the courts. It recalls that it is in principle for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.² In the instant case, the Committee notes that both the Circuit Court and Supreme Court considered the author's claims and it finds no evidence that these court decisions suffered from such defects. The Committee therefore concludes that the author has not substantiated his claim and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 In relation to the author's claim that the judges involved in the adjudication of his case were neither impartial nor independent, the Committee considers that by failing to raise these issues in any forum or pursuing other available remedies the author has not exhausted domestic remedies and the claim is thus inadmissible under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

- (a) that the communication is inadmissible, under article 2 of the Optional Protocol;
- (b) that this decision be transmitted 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.]

² See Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, paragraph 4.3.