HUMAN RIGHTS COMMITTEE

Rogl v. Germany

Communication No 808/1998

25 October 2000

CCPR/C/70/D/808/1998

ADMISSIBILITY

Submitted by: Mr. Georg Rogl (represented by Mr. Georg Rixe)

Alleged victim: The author

State party: Germany

Date of communication: 29 October 1997 (initial submission)

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

Meeting on 25 October 2000

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr Georg Rogl, a German national, born 30 May 1950. He presents the communication on his own behalf and on behalf of his daughter Nicole, also a German national, born 7 April 1985. He is represented by legal counsel, Mr Georg Rixe. He claims that he and his daughter are victims of violations by the State party of article 14, paragraph 1, article 17, paragraphs 1 and 2, article 23, paragraphs 1 and 4, and article 24, paragraphs 1 and 2.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 17 March 1974, and the Optional Protocol on 25 November 1993. Upon acceding to the Optional Protocol, the State party entered a reservation to the Optional Protocol which reads: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that

the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany, or (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

The facts as presented

2.1 Following the breakup of the author's marriage, his former wife remarried on 15 December 1989. She had previously received custody of the daughter out of her marriage to the author, who is the center of the present communication. The author's former wife, by way of application of 16 September 1991 to the Cham Municipal District Administration, applied for the daughter's surname to be changed from the author's surname to the new surname of the author's former wife. This application was granted on 9 March 1992.

2.2 The author's administrative appeal to the Upper Palatinate District Government was rejected on 23 July 1992. The Regensburg Administrative Court, the Bavarian Administrative Court of Appeal, and the Federal Administrative Court rejected further appeals by the author on 7 December 1992, 30 November 1992 and 27 June 1994. The author's subsequent constitutional motion to the Federal Constitutional Court was rejected on 9 December 1994 as inadmissible.

2.3 Following the exhaustion of domestic legal proceedings, the author introduced on 26 May 1995 an application concerning the same facts and issues to the European Commission of Human Rights. On 25 August 1995, the application was registered under file No. 28319/95. The European Commission, by majority plenary decision of 20 May 1996, held the application "manifestly ill-founded" and accordingly inadmissible.

2.4 The present communication was transmitted to the State party on 26 February 1998. The State party's observations concerning the admissibility of the communication were received on 24 April 1998, and counsel's comments thereon on 3 August 1998. Counsel supplied supplementary comment on 7 June 2000, upon which the State party commented on 26 September 2000.

The complaint

3.1 The author alleges that the official change of his daughter's surname from his own surname to the new surname of his former wife, the confirmation of the name change by each instance of the State party's courts and a variety of alleged procedural defects in those proceedings (including the failure in one instance for a judgment to be publicly pronounced) constitute a violation of both the author's and the daughter's rights under article 14, paragraph 1, article 17, paragraphs 1 and 2, article 23, paragraphs 1 and 4, and article 24, paragraphs 1 and 2.

Counsel's information and observations with regard to the admissibility of the communication

4.1 The author's original submission, in addition to an extensive rehearsal of facts and argument on merits, makes a variety of arguments on the admissibility of the case. The author contends firstly that the communication is not excluded by paragraph (a) of the State party's reservation to article 5, paragraph 2(a) of the Optional Protocol, lodged upon accession, which precludes the Committee's competence to consider a communication that has already been considered by another procedure of international investigation or settlement.

4.2 The author presents two arguments with respect to this reservation. He invokes the Committee's decision in Casanovas v France,(1) where a case held inadmissible *ratione materiae* by the European Commission was not found to have been "considered", so as to preclude consideration by the Committee by virtue of a very similar reservation lodged by that State party. In terms of the claim brought on behalf of the child, the author argues that, since the author's preliminary standing to bring a claim on behalf of the child was denied by the European Commission, there can be no contention that any consideration of that aspect of the claim occurred. Nor can any consideration of the father's case preclude, by virtue of the reservation, separate consideration of the daughter's case, for the various persons make different claims.

4.3 The author's second argument is that the Committee is not precluded from considering the communication by paragraph (b) of the State party's reservation. The author contends that it was only with the receipt of the decision of the Federal Administrative Court on 8 July 1994 that the ordinary legal proceedings were concluded and that the change of name received legal effect. At this point, the Optional Protocol was in force for the State party. Moreover, the decision of the Federal Constitutional Court of 9 December 1994 declining a constitutional challenge constituted a renewed violation.

4.4 Secondly, the author contends in any event that the doctrine of 'continuing effects', by which violations of the Covenant dating before entry into force of the Protocol may be considered by the Committee if there are continuing effects felt by the alleged victims, is applicable in this case. The bond between father and daughter is weakened on an ongoing basis for as long as the name change remains in effect. The author cites to that effect the Committee's views in E. and A.K. v Hungary(2) and Simunek v Czechoslovakia,(3) supported by the Committee's General Comment No 24 of 11 November 1994. The author contends that to interpret the State party's reservation to exclude violations with continuing effects would be contrary to the spirit and purpose of the Optional Protocol.

4.5 Thirdly, the author contends that the communication on the name and on behalf of the daughter is not inadmissible *ratione personae* simply because the father is not a custodial parent. The author cites the Committee's Views in P.S. v Denmark(4) in support of the proposition that non-custodial parents may bring a communication on behalf of a their child. The author argues that it is clear that the daughter herself is not able to bring a communication, while the mother's own separate interests clearly do not incline her to do so. The relationship of father and daughter is therefore claimed to be sufficient to found his standing to bring the communication on his daughter's behalf.

The State party's information and observations with regard to the admissibility of the communication

5.1 The State party's first argument on admissibility is that the Committee is precluded from examining the communication under paragraph (a) of its reservation. The State party argues that a "consideration" within the meaning of the State party's reservation occurred when on 20 May 1996 the European Commission of Human Rights declared the author's application of 26 May 1995 inadmissible. The State party argues that it is incorrect to characterise the dismissal of the application as a finding of inadmissibility *ratione materiae*. In contrast to the Casanovas case, where the Commission reached such a finding on the basis that the rights recognised by the European Convention simply did not extend to the facts in question, the Commission in the instant case proceeded from the assumption that the provisions of the European Convention that the author felt had been violated were applicable.

5.2 In terms of Article 8 of the Convention, which broadly corresponds to Article 17 of the Covenant, the Commission proceeded not only from an assumption of applicability, but also of interference with that right, before finding the interference justified. The State party argues that the provisions of the European Convention the author claims were violated are for the greater part identical with the provisions of the Covenant now invoked. The Commission carried out a complete, thorough and comprehensive examination of the entire circumstances of the case before reaching a finding that the complaint was manifestly ill-founded.

5.3 The State party observes that a significant reason for this part of the State party's reservation is to avoid duplication of procedures of international review, which could give rise to conflicting results. It is also in the interests of the ability of international human rights organs to function effectively to avoid applicants engaging in 'forum shopping'. This is particularly the case where extensive consideration of the factual situation had already taken place under an international procedure, as in the present case.

5.4 This approach of seeking to avoid the repeated involvement of different international human rights organs with identical applications is not a particularly restrictive one taken by the State party, but one which is said to be becoming standard in international agreements. The State party cites very similar provisions to this effect in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in the (then) draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

5.5 On counsel's arguments as to inadmissibility *ratione temporis*, the State party contends that the decisive event is the advice of 9 March 1992 of the Cham Municipal District Administration of the change of name, and the subsequent confirmation of 23 July 1992 by the Upper Palatinate District Government. Both these dates fall prior to entry into force of the Optional Protocol for the State party. The State party notes that its administrative law makes the last administrative act, ie. the 23 July 1992 advice, the subject of judicial review proceedings.

5.6 This falls within both the wording and intention of the State party's reservation, which excludes violations having their "origin in events" prior to entry into force of the Optional Protocol, in addition to violations occurring prior to that entry into force. The State party cites the Committee's views in K. and C.V. v Germany(5) as consistent with that approach.

5.7 The State party further regards the communication inadmissible as it regards the daughter for

two reasons. Firstly, it is said to be inadmissible *ratione personae*, as held by the European Commission, as a non-custodial parent lacks authority to bring these proceedings. The State party considers that it does not appear that the Committee applies different criteria than the Commission in this respect. It is argued that recognising standing in this case would be disregarding the will of the custodial parent. The State party also considers that domestic remedies have not been exhausted as the State party's courts had at no point been seized of the question of a violation of the daughter's, as opposed to the father's, rights. For this to have occurred, the daughter herself would have to have brought proceedings, which for obvious reasons did not occur.

Counsel's response to the State party's information and observations with regard to the admissibility of the communication

6.1 The author, by his submission of 3 August 1998, rejects the State party's views on admissibility.

6.2 As to the contention that the communication has already been considered by another mechanism, the author argues for a restrictive interpretation of the reservation, noting that the European Commission's decision was solely on admissibility and not on the merits. Arguing from a general observation by the Committee in Casanovas that the European Convention's rights "differ in substance" from those set forth in the Covenant, the author rejects the State party's characterisation of the two sets of rights invoked in this case as being "for the greater part identical". He observes that the articles 23 and 24 pleaded have no equivalent guarantees in the European Convention. In terms of article 17, he contends that the equivalent article 8 in the European Convention is more restrictively phrased. Moreover, regarding the alleged violation of article 14(1) through the lack of public pronouncement of an appellate decision, it could not be said that any "consideration" of that aspect has occurred as the Commission found local remedies had not been exhausted.

6.3 In terms of the State party's argument of inadmissibility *ratione temporis*, the author repeats the contention that the date of violation in question is the legal finality of the name change in the form of service on 8 July 1994 of the Federal Administrative Court's order of 27 June 1994 declining leave to appeal, and is therefore not excluded *ratione temporis* by the second part of the State party's reservation. It was only at this point that the change of name took actual effect.

6.4 In any event, the decision of the Federal Administrative Court and then the Federal Constitutional Court were further violations of the Covenant in that they confirmed the original violation. The author also views these confirmations of the original alleged violation as providing a continuing effect over which the Committee has competence. The name change itself also has continuing and future effects for father and daughter. The author states that these continuing effects are not contested by the State party. The author also argues that this portion of the State party's reservation is incompatible with the object and purpose of the Optional Protocol.

6.5 Finally, the author argues that he does have standing to bring the communication on behalf of the daughter, citing the Committee's views in P.S. v Denmark(6) and Santacana v Spain(7) in support. At least to this extent, the Committee takes a broader approach than the European Commission. As to the exhaustion of domestic remedies, the author states that the domestic courts did consider the rights and interests of the daughter, and that the daughter was legally party to the

court proceedings via her mother. It is not necessary for the daughter herself to have brought proceedings.

Further information and observations with regard to the question of admissibility

7 By further submission of 7 June 2000, the author makes a further submission on the arguments of inadmissibility *ratione temporis*. He argues that according to domestic law the key time point is the oral proceeding before the last appellate court, where the authorities have made the effectiveness of their decision conditional upon it being no longer legally contestable. The State party observes by submission of 26 September 2000 that there is no suggestion in the present case that the original decision was made conditional in any such respect, and that accordingly the general administrative law rule originally outlined by the State party, ie. that the original administrative decision was the key time point, remains applicable.

The author's arguments with respect to the merits

8.1 The author makes detailed submissions on the alleged breaches of his rights under Articles 14, 17 and 23, which, for the reasons as to admissibility developed below, it is not necessary to set out further. In terms of the alleged violations of the daughter's rights, the author states, in terms of articles 17 and 23, that the change of name has disrupted her family life, interfered with the bond with her father, and has not been shown to be necessary and in the best interests of the child.

8.2 In terms of the daughter's rights under articles 14 and 24, the author states that at no time in the proceedings was the daughter heard by the Courts in a matter which clearly affected her, nor was independent legal representation provided to her in circumstances where her mother, as legal guardian, had her own independent and distinct interests in the matter. The daughter's rights to a fair trial and special protection as a child are therefore alleged to be violated by these procedural lacunae in the proceedings. In this connection the author refers to the Committee's Views in Gallicchio v. Argentina,(8) which found a breach of Article 24 in insufficient representation of a child in the relevant court proceedings.

Issues and proceedings before the Committee

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

9.2 Concerning the author's allegations of violations of his own rights under Articles 14, 17 and 23, the Committee notes that the European Commission of Human Rights has rejected, on 20 May 1996, the author's application concerning the same facts and issues as are before the Committee. The Committee also recalls that the State party, when acceding to the Optional Protocol, made a reservation with respect to article 5, paragraph 2(a), of the Optional Protocol to the effect that the Committee shall not have competence to consider communications which have already been considered under another procedure of international investigation or settlement.

9.3 The Committee notes that the European Commission proceeded on the assumption that the

provisions of the European Convention that the author felt had been violated were applicable, and carried out a complete examination of the facts and issues arising in the case. The Commission, having considered the entire circumstances of the case thoroughly and comprehensively, ultimately found that the interference with the author's right to family life was justified and consequently declared his claim inadmissible as manifestly ill-founded. In terms of the claims of unfairness of the proceedings, the Commission found that, with the exception of an alleged violation through the failure of the Bavarian Administrative Court of Appeal to pronounce its decision publicly, there was no reason to conclude that the proceedings were unfair when viewed as a whole.

9.4 In terms of the author's argument that the provisions of the European Convention are different from the provisions of the Covenant now invoked, the mere fact that the wording of the provisions vary is not enough, of itself, to conclude that an issue now raised under a Covenant right has not been "considered" by the European Commission. A material difference in the applicable provisions in the instant case must be demonstrated. In this case, the provisions of articles 6, 8 and 14 of the European Convention, as interpreted by the European Commission, are sufficiently proximate to the provisions of articles 14 and 17 of the Covenant now invoked that the relevant issues arising can be said to have been "considered". That conclusion is not altered by the additional pleading before the Committee of article 23 of the Covenant, as any issues arising under that article have in their substance been addressed in the foregoing consideration by the European Commission.

9.5 Thus the present communication is to be distinguished from Casanovas v France,(9) upon which the author places considerable reliance, by reason of the fact that in that case the European Commission did not consider the provisions of the European Convention even to extend in their application to the facts of that case. It follows that the instant communication has been "considered" by another international mechanism as far as the author's rights to family and the right to a fair trial (excepting the allegation on the pronouncement of judgment) have been concerned. Paragraph (a) of the State party's reservation to article 5, paragraph 2(a), of the Optional Protocol is therefore applicable, and the Committee is precluded from examining these aspects of the communication.

9.6 Regarding the author's allegation of a violation of Article 14(1) by a failure of the Bavarian Administrative Court to publicly hand down its judgment, the Committee notes that the European Commission dismissed this aspect on the basis of a failure to exhaust local remedies, in particular, that this aspect had not been raised before the Federal Constitutional Court. Accordingly, this part of the communication has not been "considered" by another international mechanism so as to be excluded from consideration by the State party's reservation. However, for the same reasons advanced by the Commission, the Committee considers that available domestic remedies in this respect have not been exhausted. This part of the communication is accordingly inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

9.7 In terms of the alleged violations of the daughter's rights under Articles 14, 17, 23 and 24, the Committee notes that the author was denied standing by the European Commission to bring a complaint on behalf of his daughter. Accordingly, it cannot be said that the daughter's aspect of the complaint has been "considered" by the European Commission so as to exclude the Committee's competence to examine the case from the daughter's point of view.

9.8 The Committee notes that, according to its jurisprudence, a non-custodial parent is not

necessarily excluded from possessing sufficient standing to bring a complaint on a child's behalf. In terms of the alleged violations of the daughter's rights under Articles 14, 17, 23 and 24, however, the Committee considers that neither the author's arguments nor the material provided substantiate, for the purposes of admissibility, the adverse effects upon the daughter said to constitute violations of those articles. The Committee would observe in this connection that, despite the daughter having achieved the age of 15 years at the point of the author's last correspondence, there is no indication that the daughter supports any inference that her rights have been violated. Accordingly, the Committee considers this aspect of the communication inadmissible under Article 2 of the Optional Protocol.

9.9 In the light of the Committee's foregoing conclusions, the Committee need not address the various remaining arguments on admissibility presented by the author and responded to by the State party.

10. The Committee therefore decides:

a) that the communication is inadmissible;

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

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Eckart Klein did not participate in the examination of the case.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1. Communication No 441/1990, declared admissible on 7 July 1993 (CCPR/C/48/D/441/1990).

2. Communication No 520/1992, declared inadmissible on 7 April 1994 (CCPR/C/50/D/520/1994).

3. Communication No 516/1992, declared admissible on 22 July 1994 (CCPR/C/51/D/516/1992).

4. Communication No 397/1990, declared inadmissible on 22 July 1992 (CCPR/C/45/D/397/1990).

5. Communication No 568/1993, declared inadmissible on 8 April 1994 (CCPR/C/50/D/568/1993).

6. Communication No 397/1990,declared inadmissible on 22 July 1992 (CCPR/C/45/D/397/1990).

7. Communication No 417/1990, declared admissible on 25 March 1992, see the Committee's Views of 15 July 1994(CCPR/C/51/D/417/1990)

8. Communication 440/1990, Views adopted on 3 April 1995 (CCPR/C/53/D/400/1990).

9. Communication No 441/1990, declared admissible on 7 July 1993 (CCPR/C/48/D/441/1990).