HUMAN RIGHTS COMMITTEE

X v. Australia

Communication No 557/1993

16 July 1996

CCPR/C/57/D/557/1993

ADMISSIBILITY

Submitted by: X [name deleted] (represented by counsel)

Victim: The author

State party: Australia

Date of communication: 1 March 1993 (initial submission)

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

Meeting on 16 July 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is X, a member of the Wiradjuri Aboriginal Nation of New South Wales, and an initiated member of the Arrente Nation of Central Australia. He submits the communication on his own behalf and on behalf of his three children, born in 1977, 1979 and 1983 respectively. He claims violations by Australia of articles 14, paragraph 1; 18, paragraphs 1 and 4; 23, paragraph 1; 26 and 27 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author and his ex-wife, who is not Aboriginal, lived together from 1976 to 1990. It is stated that a marital relationship under Aboriginal law was already established before they entered into a marriage under the Marriage Act 1961 on 9 March 1982. In May 1990, the

author and his wife separated; his wife subsequently initiated proceedings in the Family Court of Australia for custody (and access) of their three children, and division of property. In March 1992, the Family Court granted custody to the mother and right of access to the author, and divided the property.

2.2 During the proceedings before the Family Court, the main item of property in dispute was the matrimonial home, a house purchased by the author with a loan from the Aboriginal Development Corporation, a Government body set up to provide housing funds to Aboriginal people. As to the issues of custody and access to the children, the author sought to maintain the prior arrangement of joint custody, since in his opinion it would give the children fair exposure to both the Aboriginal and the European culture. The wife's request for sole custody was based, inter alia, on the fact that the author was absent from home for a considerable part of the year because of his activities on Aboriginal affairs both inside and outside Australia. The author argued that, in accordance with the Aboriginal practice, his extended family would take care of his children during his absence.

2.3 On 28 November 1991, a hearing on the admissibility of the affidavit evidence was held. With regard to the matrimonial home, evidence was given by the author and his family members that he and the children had had considerable input into the house by renovating it, that it was purchased with a low-interest loan which he had obtained on account of his aboriginality, and that they considered it to be Aboriginal land. It is submitted that most of this evidence was ruled inadmissible as being irrelevant.

2.4 In response to his wife's application for sole custody of their children, the author submitted affidavits from himself and members of his family, and from prominent members of the Aboriginal and Anglo-Australian community. It was submitted, inter alia, that the author's extended Aboriginal family in the Sydney area alone consists of eight sisters and their husbands and children, and that the grandmother plays a significant role in the rearing of the children, e.g., teaching them Aboriginal customary law and the Wiradjuri language. Furthermore, it was explained that in Aboriginal custom, the children of one set of biological parents are, from the age of toddlers upwards, integrated into the family structure of their uncles and aunts so that their biological cousins become as close as brothers and sisters. When either biological parent is unavailable to supervise the children, the family immediately takes over the caring role so that there is no social or emotional disruption to the children's daily routine. It was further submitted that, since the European invasion, the practice of sharing child-care responsibilities is an important survival mechanism for the Aboriginal people and their culture, as Anglo-Saxon Australian institutions have often interfered with Aboriginal families.

2.5 The author complains that most of the affidavit material filed on his behalf had been struck out, either under the rules of evidence of the Family Court or on public policy grounds. In this context, it is submitted that any references to the aboriginality of the three children were struck out as being irrelevant to the consideration of what would be in their long-term "best interest". Evidence given by Aboriginal society members as to the effect on them personally after having been removed from Aboriginal society as children and raised as "Whites" in the assimilation process was struck out, as were affidavits by academics who

had studied the assimilation process and its effect on Aboriginal children. Furthermore, evidence given by the author's sisters, about the way in which Aboriginal children were raised and cared for by more than one family member in an extended family was ruled inadmissible. The judge also ruled inadmissible an affidavit from an elder of the Arrente Nation, who testified that in early 1992 the author would be attending initiation rites with the Arrente Nation in the Northern Territory, and that, under Aboriginal law, the author had no control over the time or circumstances of his initiation.

2.6 After the hearings on the admissibility of the evidence, the issues of custody, access and settlement of property were scheduled to be heard before another judge of the Family Court on 3 March 1992. On that day, however, the author's counsel requested an adjournment on the grounds that the author had been admitted to hospital on 2 March 1992, following a ritual circumcision from which an infection had ensued. It is submitted that the wife's counsel made racist and offensive comments about the author and the initiation wound and suggested that the wound was self-inflicted in order to delay the proceedings, questioning the seriousness of the author's medical condition, since he had been able to attend court on 28 February 1992. It is further submitted that the judge did not prevent counsel from making such comments, but instead treated the application with overt scepticism, suggesting that the wound had been self-inflicted, and that the expert witnesses were "led along by the nose". The application for adjournment was dismissed, as well as the author's application to have the custody and property matter heard in a different court on the grounds that Family Court had no jurisdiction.

2.7 On 4 March 1992, the author's counsel again applied for an adjournment, as the author was still in hospital. The vascular surgeon again testified that the author's condition did not allow him to attend court. While expressing doubt about the sincerity of the author, the judge granted the application.

2.8 The case came before the judge again on 9 March 1992. The author, however, contested the court's competence to deal with the case since, in his opinion, the Family Court lacked jurisdiction to determine Aboriginal family and property issues. The judge refused to declare the court incompetent, upon which the author and his counsel withdrew from the proceedings. The judge then proceeded to determine the issues of custody, access and settlement of property on the basis of the remaining material before him, and after hearing the evidence of the wife and the Court Counsellor, who had prepared a family report, custody was awarded to the wife; the author was given the right of access to the children on alternate weekends, during school holidays, etc., and at such other times as mutually agreed upon, provided that in case he was absent during such periods, the author would inform his ex-wife about which family members would supervise the children on his behalf. The judge further ordered the author to pay his ex-wife within two months 75 per cent of the value of the matrimonial home, upon which her title would be transferred to him. In case the author refused or failed to pay her on or before 9 May 1992, he would have to vacate the house within 14 days, and his ex-wife would then be authorized to take care of its sale. Furthermore, the author was ordered to pay his ex-wife's costs in the proceedings and the outstanding costs of the hearings of 28 November 1991 and 3 March 1992.

2.9 On 7 April 1992, the author filed a Notice of Appeal to the Full Court of the Family Court against the orders of 9 March 1992 (which related to the property, access and custody issues). An Amended Notice of Grounds of Appeal was filed on 7 May 1992. The final Notice of Appeal is dated 26 May 1992. The author argued, inter alia, that the Family Court had no jurisdiction in the case and that the trial judge was biased, and raised questions with regard to the Commonwealth Constitution and its interpretation. The appeal was first scheduled to be heard on 6 August 1992, but because of the author's anticipated absence from Australia it was eventually set for hearing on 17 November 1992.

2.10 Pending the appeal, the author applied, on 7 May 1992, to the Family Court for a stay of the orders of 9 March 1992. The stay application was scheduled to be heard on 29 May 1992. The author, however, was not present at that hearing as he was at a meeting of the Aboriginal and Torres Strait Islander Commission in Canberra. It is submitted that the judge made adverse comments in relation to this and did not allow counsel to address the reasons why a stay was sought. The judge then refused to stay the orders. Costs of the hearing were awarded against the author.

2.11 On 8 July 1992, a further application for a stay of the custody and property orders was heard. By judgement of 15 July 1992, the application was dismissed in so far as it related to the custody order; a stay of the order requiring sale of the former matrimonial home was granted until 22 July 1992, on the conditions that the author would vacate the house (so that his ex-wife and the children would live in it pending further order) and pay his ex-wife's costs in the proceedings of 28 November 1991 and 3 March 1992. Again, costs of the hearing were ordered against the author on the grounds that he benefited from free legal representation by the Aboriginal Legal Service, that he was in a better financial position than his ex-wife and that the delays in the proceedings were attributable to him.

2.12 The author explains that he did not pursue an appeal against the judge's decision since such appeal would have to be made to the Full Court of the Family Court, which generally is reluctant to interfere with the interlocutory decisions made by the lower courts.

2.13 It appears that the author again failed to comply with the court's orders within the time specified therein. Instead of vacating the house, he offered to pay his ex-wife the sum provided for in the orders of 9 March 1992, which she rejected. On 24 July 1992, the author requested the court to order his ex-wife to transfer her title and interest in the house to him; his ex-wife filed a cross-application for the author's detention. Both applications were dismissed and the author was ordered to vacate the house, within 24 hours. Costs were also ordered against him. The author then vacated the house which was subsequently put up for sale by his ex-wife in compliance with the orders of 9 March 1992.

2.14 On 28 August 1992, in the High Court of Australia, before a single judge, the author applied for orders nisi for writs of prohibition and certiorari directed to the Family Court, on the ground that the Family Court had no jurisdiction over Aboriginal people and their children and property. He argued, inter alia, that he is a descendant of the Wiradjuri people who have a long and unbroken tradition of resistance to the "unprovoked aggression, conquest and attempted genocide" to which they have been subjected since the English

invasion, that neither he nor his people has ever asked for Australian citizenship and that neither he nor his people has ever received the protection which is an essential precondition of any allegiance that may be demanded from them or owed by them to the Commonwealth and State authorities which may purport to exercise jurisdiction, management or control over them, their children or property. The author requested the court to expand on its findings in the case of Mabo v. State of Queensland, [1] and to clarify the status of Aboriginal people in the Anglo-Australian legal system, by recognizing the existence of a tradition of Aboriginal law and custom which establishes Aboriginal law concerning matrimonial matters. The judge refused the application, on the ground that there was no realistic prospect that the Full Court of the High Court would find that the Family Court lacked jurisdiction on the grounds, and for the reasons, upon which the author relied.

2.15 As to the exhaustion of domestic remedies, it is submitted that, on 30 October 1992, pending the author's appeal to the Full Court of the Family Court, a Notice of Intervention was filed by the Attorney-General of the Commonwealth, on the basis that the appeal related to matters arising under the Constitution or involving its interpretation, and concerning the public interest. After having been advised by lawyers with experience in family and constitutional matters that the appeal would not be successful in the light of what had been said in the High Court, and in view of the fact that costs had been awarded against him in every previous action in the Family Court, the author decided to withdraw his appeal.

The complaint

3.1 It is claimed that the racism and ethnocentricism allegedly displayed by the Family Court of Australia violated several of the author's rights under the Covenant.

3.2 As to the author's claim under article 14, paragraph 1, counsel submits that the transcripts show that the Family Court lacks the necessary impartiality to hear and determine cases involving Aboriginal people, because of the way in which family law practice in Australia is apparently weighted to an Anglo-Saxon notion of what constitutes a family group. Counsel points out that the laws of evidence as applied by the Family Court had the effect of removing most of the material about the importance of aboriginality as a factor for consideration in a custody and property matter; the court justified the exclusion of this evidence on the grounds of public policy or generality. It is submitted, however, that the court's impartiality was hampered by the laws of evidence and underlying racism which made it decide as it did. Counsel reiterates that the Family Court, by basing itself on Anglo-European notions of culture, family and justice, and by rejecting evidence relating to the author's and his children's aboriginality, violated their right to a fair hearing.

3.3 It is submitted that the author's right to adopt and practice Aboriginal beliefs under article 18, paragraph 1, of the Covenant was violated by the Family Court judges, who made disparaging comments about the initiation ceremony and ruled inadmissible the evidence relating to it. Furthermore, the author's freedom to ensure that his children receive a complete Aboriginal religious and moral education is said to have been violated by the Family Court judges who ruled inadmissible the author's and his family's evidence concerning their Aboriginal beliefs; it is submitted that, therefore, this particular aspect of

the children's lives, following the dissolution of their parents' marriage, was not taken into consideration by the judge who decided on the custody. In this context, it is submitted that at all times during the proceedings the author's ex-wife was given the opportunity to explain along what moral grounds she would raise the children, but that the author was denied such opportunity.

3.4 In respect of article 27 of the Covenant, it is submitted that this provision has been violated because of the way in which the Family Court dealt with the issue of the tribal initiation. The author explains that the nature of the initiation ceremony should never have been broadcast in any forum, as it was sacred knowledge to him and the people of the Arrente Nation. He submits that it was difficult for him to instruct his solicitors to explain the problem which arose out of the initiation ceremony to the judge. The judge, however, by insisting on a full explanation, made it impossible to avoid the sacred knowledge becoming public and, therefore, denied him the right to practice his people's culture in the way he was required to do.

3.5 Finally, the author claims that the Court's rejection of the elders' evidence on the Aboriginal family kinship structure amounts to a violation of article 23, paragraph 1, since this shows that the Aboriginal family unit was not afforded any kind of protection in the proceedings. In this connection, the author states that he and his family had attempted to accept a European woman into their family, and not vice versa.

State party's observations on the admissibility of the communication

4.1 In February 1995, the State party submitted its observations on the admissibility of the communication. The State party requests the Committee to ensure that its decision concerning the communication will not contain any material identifying the author and his ex-wife, in order to protect their three children.

4.2 The State party explains that under Australian law the Family Court has jurisdiction over matters concerning matrimonial causes and dissolution of marriages of Australian citizens and residents, as well as over matters relating to children, including custody and access. The State party notes that the author, although having raised the question of jurisdiction of the Family Court in the domestic system, does not raise this issue for consideration by the Committee under the Optional Protocol. The State party further notes that the author in his answer to the filing of his wife's case in 1990 admitted jurisdiction, and that later he did not present evidence in support of his contention that there was a subsisting Aboriginal marriage, nor did he suggest any other court that might have been competent to hear the matter. The State party explains that there is no judicial recognition of any Aboriginal laws, customs or traditions relating to marriage, but that the author and his wife had entered into a marriage under the Marriage Act 1961, providing the basis for the Family Court's jurisdiction.

4.3 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this connection, the State party notes that the author withdrew from the proceedings at an early stage at first instance and subsequently withdrew his appeal to the Full Court of the Family Court. In this context, the State party submits that it would have

been open to the author to argue before the Full Court that a miscarriage of justice had occurred on the basis that relevant matters had been given insufficient weight. As regards the author's argument that he had been advised that his appeal would not be successful, the State party recalls that doubts about the likelihood of success of remedies do not absolve an author from exhausting them.

4.4 The State party further argues that the part of the communication relating to the Family Court hearing of 28 November 1991 is inadmissible ratione temporis since the Optional Protocol only entered into force for Australia on 25 December 1991.

4.5 As regards the author's claim under article 14, paragraph 1, of the Covenant that the Australian laws of evidence were used to exclude material highlighting the importance of aboriginality, the State party submits that the laws of evidence applied by the Family Court have as their guiding principle the welfare of the children and that this allows for the presentation of material regarding the importance of the Aboriginal cultural heritage in the upbringing of an Aboriginal child. The State party submits that in the instant case such material was indeed presented and taken into account by the Court. In this context, the State party rejects the author's claim that most of the evidence relating to aboriginality was struck out and explains that parts of the evidence presented by the author were ruled inadmissible by the Court on the grounds that they were irrelevant, argumentative, speculative, too general or related to matters of belief. [2]

4.6 Concerning the author's request for an adjournment because of his hospitalization, the State party states that it appears from the hearing on 3 March 1992 that the author had been hospitalized on 2 March on the basis of his own opinion that his condition had worsened; the medical doctors who gave evidence at the hearing had not seen or examined the author since 27 February 1992, when no hospitalization was deemed necessary. In the light of the evidence, the State party argues that the author has not substantiated his allegation that the decision of the judge to refuse the application for adjournment was biased. The State party adds that the adjournment was granted, a day later, after the surgeon gave evidence that he had examined the author and that he was of the opinion that the medication prescribed would affect his ability to concentrate.

4.7 In so far as the author claims that the division of the property was unfair and showed the judge's bias against him, the State party explains that in considering a property order the Court has to ascertain the past contributions of the parties as well as their future needs and requirements. In the instant case, the judge considered that both parties had made considerable contributions towards the marriage, but that the husband had a greater (approximately five times as much) capacity for earning an income than the wife and was entitled to superannuation whereas the wife was not. The State party submits that, in the light of the above, and taking into account that the mother would have to provide for the daily care of the children, the distribution of the matrimonial income was reasonable and does not show any bias. As regards the author's statement that the matrimonial house was "Aboriginal land", the State party states that, although original native title to land is recognized under certain conditions, in the author's case such a title did not exist. Furthermore, the State party notes that the author was given the opportunity to retain the house under the original orders

of 9 March 1992. Only because he failed to comply with those orders was the house finally sold.

4.8 As regards the author's claim under article 18(1) of the Covenant, the State party submits that the courtroom discussion of the author's wound resulting from the initiation ceremony did not in any way violate his freedom of religion. In this context, the State party submits that the transcripts show that the judge drew counsel's attention to the fact that the purpose of the hearing was to determine whether the author could attend court, not to dwell on the details of the ceremony. The State party therefore argues that the author has not raised an issue under the Covenant and, alternatively, that he has failed to substantiate his allegations.

4.9 As regards the author's claim under article 18, paragraph 4, the State party notes that the author has been granted regular access to his children and that the court gave serious consideration to the aboriginality of the author and his children, recognizing the role of the extended family and noting that the children's mother had always played an active part in involving the children in their Aboriginal community. The State party submits that, given all the relevant factors taken into consideration by the Court, as well as the fact that the author withdrew from the proceedings and therefore is estopped from complaining that he did not have an opportunity to address the Court on these issues, the Court's decision was reasonable and did not violate the author's right to ensure the religious and moral education of his children.

4.10 The State party also argues that the author's claim under article 23(1) has not been substantiated. The State party submits that the transcript of the hearings shows that the Aboriginal family unit was given reasonable consideration by the Court, while it considered all matters relevant to the best interests of the child, and that the evidence rejected by the Court was of a general nature and did not relate to the author's children in particular. In this connection, the State party explains that the shared parenting arrangement previously agreed upon by the parties did not work, given the failure of the parents to cooperate, and had led to confusion for the children, who had expressed their dissatisfaction with the arrangement. In its orders, the Court did in fact take the nature of the author's extended family into account when providing for the possibility for the children to stay with the family rather than with the author himself if he were not in a position to supervise them.

4.11 Finally, the State party argues that the author has failed to substantiate his claim that the way in which the judge dealt with the issue of tribal initiation breached his rights under article 27 of the Covenant. In this context, the State party points out that the initiation came up in relation to the author's absence in Court and refers to its observations made above.

5. The author's deadline for submitting comments on the State party's observations expired on 3 April 1995. No comments or further correspondence were received, despite a reminder sent by fax on 26 January 1996.

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 Article 5, paragraph 2(b), of the Optional Protocol precludes the Committee from considering a communication if all available domestic remedies have not been exhausted. The Committee notes that it is undisputed that the author withdrew from the proceedings at the first stage at the Family Court, and subsequently, after having filed an appeal, withdrew his appeal to the Full Court against the judgement of the single judge of the Family Court. The Committee has noted the State party's argument that the appeal constituted an effective remedy in the circumstances of the author's case as well as the author's assertion that his appeal would not have been successful and that it would be costly.

6.3 The Committee recalls that mere doubts about the effectiveness of remedies do not absolve an individual from exhausting them. All arguments of the author relating to exclusion of evidence and non-consideration of the Aboriginal family structure should have been raised before the Family Court during the original trial and subsequently on appeal. In the instant case, the author has not shown the existence of special circumstances which prevented him from pursuing the domestic remedies available. The communication is therefore inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

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*/ Pursuant to rule 85 of the Committee's rules of procedure, Committee member Elizabeth Evatt did not participate in the examination of the communication.

1/ The case concerned the status of Aboriginals with respect to Anglo-Australian land rights legislation and litigation; the High Court ruled invalid arguments based upon the "terra nullius" and "protection" principle, finding that Aboriginal law and custom in the Murray Island created a system of native title, which survived colonization.

2/ The State party refers, for instance, to reports concerning the removal of Aboriginal children from their family into an institution or foster home, the effect on the Aboriginal community of bringing up Aboriginal children in non-Aboriginal households and parts of the affidavit evidence considered too general and not related to the specific situation of the author's children.

[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.]