HUMAN RIGHTS COMMITTEE

Lamagna v. Australia

Communication Nº 737/1997

7 April 1999

CCPR/C/65/D/737/1997

ADMISSIBILITY

Submitted by: Michelle Lamagna

Alleged victim: The author

State party: Australia

Date of communication: 30 October 1995

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

Meeting on 7 April 1999

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. Michelle Lamagna, matron and owner of Villa Magna Nursing Care Centre in NSW Australia. No specific violation of the International Covenant on Civil and Political Rights is alleged.

The facts as submitted by the author

2.1 The Government of the Commonwealth of Australia operates a subsidy scheme under the National Health Act 1953 (Commonwealth) ("the Act") by which the proprietors of approved nursing homes are paid a benefit in respect of each approved patient for each day the patient receives nursing care in the home.

2.2 In June 1991 Mrs. Lamagna and her husband, as Lamagna Enterprises Pty, purchased

a nursing home. In 1991/92 the Commonwealth Department of Human Services and Health conducted an audit ("validation") of the subsidies that it had paid to the previous owner of the nursing home in 1986/87 and found an overpayment of subsidies. The system of funding adopted under the Act in 1987 meant that this error had led to additional overpayments in the subsequent years 1987/88 to 1990/91. The amount of these overpayments was determined in 1991/92 to be A$94,912. Also in 1991/92 a further overpayment was found for the 1990/91 financial year. This followed the submission by the previous owner to the Department of the form relating to employment of staff. This arrangement had been agreed upon by the vendor and purchaser in the agreement of sale. This overpayment was calculated to be A$50,404.

2.3 In April 1992 the Department notified Mrs. Lamagna of the amount of overpayments from the 1986/87 to 1990/91 period and that it would recover them from future subsidy payments to her. In July 1992 the Department notified her of the overpayment from the 1990/91 financial year and that it would recover this also from future subsidy payments. Apparently, legal advice received by the Department was that, at that time, overpayments did not constitute a debt that could be recovered through the courts since it was not clear that the assessment of overpayment established a liability on the part of either of the previous proprietor or Mrs. Lamagna.

2.4 Mrs. Lamagna's complaint is that the Department did not disclose to her that these so-called "negative loadings" existed on the nursing home, even though she presented a letter from the vendor to the Department authorizing the Department to disclose all relevant matters to her.

2.5 It is worth noting that the Commonwealth has since amended the law to provide for a compulsory notice to the Government of the sale of a nursing home coupled with a compulsory waiting period of 90 days. This amendment will enable any loadings to be detected by the Department and declared, thus protecting the interests of purchasers. A further amendment is the provision for prospective purchasers to have access to the future fee scale of a nursing home.

2.6 It is apparent that Mrs. Lamagna has explored a range of avenues of review. According to the report of the Ombudsman the first of these was an unsuccessful representation to the Minister of the Department.

2.7 The second was legal action against the Department (Lamagna Enterprises Pty. Ltd. V the Secretary of the Department of Community Services and Health (1993) 40 FCR 235). In this litigation Mrs. Lamagna sought an order setting aside the determination by the Secretary of the new scale of fees for the nursing home which took into account the negative loadings on the nursing home. This legal action was also unsuccessful, the judge finding that the Department had acted lawfully.Upon construction of the Act:

- The principle that allowed the Secretary to take these negative loadings into account was not promulgated for an improper purpose. P13 the Judge cited law (Neviskia Pty Ltd v Minister for Community Services (1987) 17 FCR 407) that it is "open to the Minister to

formulate principles which require the taking into account of negative loadings calculated in accordance with previous savings, and applying those negative loadings to a new proprietor which bears the necessary degree of relationship to an earlier proprietor ... Here, the necessary degree of relationship is readily to be found in the direct contractual connection between the applicant and the former proprietor."

- The Minister was not acting ultra vires in formulating principles which permitted such a method of recovery [copy pp13-14]. The Act allowed this.

2.8 Mrs. Lamagna has taken no further legal action, stating that she cannot afford further action, being near bankruptcy, and that no legal aid is available to her.

2.9 Mrs. Lamagna also made a complaint to the office of the Ombudsman which informed the Department in August 1994 that it believed the Department's administration had been defective and recommended a financial remedy be provided for Mrs. Lamagna. The Department sought legal advice from the Attorney-General's Department which advised that the Commonwealth was not legally liable in respect of the advice it had given. Accordingly, the Department stated that there was nothing more it could do.

2.10 The Ombudsman's Office has subsequently completed a report on the investigation into the matter. The Ombudsman makes several findings: that the legislation in force in 1991/92 was unreasonable, as evidenced by the amendments made to it; that the Department's failure to inform Mrs. Lamagna of the validation process when she consulted it prior to purchasing the nursing home was unreasonable; that the information circulated by the Department did not refer to validations and did not tell intending purchasers of the possibility that the Department might reduce the subsidy payable in consequence of overpayments it may have made to the vendor years before; that, on the balance of probabilities, the Department informed Mrs. Lamagna incorrectly that it would recover any overpayments from the vendor; that in relation to the earlier loading of A$94,912 the Department failed to inform the author of the validation process so she could take adequate steps to protect herself; and that in relation to the second loading, since the author was in fact aware that any loading found for that year would be recovered against the subsidy payable, the Department could not be held responsible for the A$50,404 loading. The Ombudsman accordingly made a recommendation that the Department pay Mrs. Lamagna A$94,912 plus interest charged on her overdraft.

2.11 Following the failure of the Department to implement the recommendations of the Ombudsman the report was passed to the Office of the Prime Minister and to the Cabinet. In the author's letter of 20.2.96 it appears that the Cabinet has rejected the Ombudsman's recommendations in September 1995. However, a letter from the Office of the Prime Minister, dated 6.2.96, to the Ombudsman, it states that the matter cannot be dealt with before the election held in mid-March) and that work was being done by Departmental officers to prepare advice and an appropriate response for the incoming Government. Mrs. Lamagna appears to have attempted communication with the new Government (letter 21.3.96) though it is not apparent what response, if any, she has had. Her most recent correspondence indicates that she has now had to close the nursing home and is living

abroad.

The Complaint:

3. The author contends that the facts as described above are unfair, unreasonable and unjust treatment constituting a discrimination and consequently a violation of the Covenant, without invoking any specific articles of the Covenant.

State party's observation's and author's comments thereon:

4.1 By submission of June 1997, the State party argues that the communication is inadmissible. It contends that the author has provided no basis for her claim, that she has suffered any injustice within the meaning of the Covenant.

4.2 The State party argues that the communication should be declared inadmissible *ratione personae* on the grounds that Mrs Lamagna as representative of Lamagna Enterprises Pty Limited, lacks standing before the Committee since articles 1 and 2, of the Optional Protocol expressly limit the right to submit a communication to individuals. The state party notes that the author is the proprietor of the Villa Magna Nursing Care Center. She is also a director of the company Lamagna Enterprises Pty Limited which controls Villa Magna Nursing Care Centre. It contends that the Australian Government's action under the National Health Act 1953 to recover overpayments was an action for recovery against the company Lamagna Enterprises Pty Limited and not against the author as a private individual, accordingly, the communication has not been submitted by the author as a private individual but as director of the company Lamagna Enterprises Pty Limited, and should therefore be ruled inadmissible *ratione personae*, reference is made to the Committee's jurisprudence in this respect [1].

4.3 The State party further argues that the communication should be ruled inadmissible *ratione materiae* under article 2, of the Optional Protocol on the grounds that the lawful exercise of a statutory power to recover an overpayment from an incorporated company is not referable to any rights set forth in the Covenant and does not engage the jurisdiction of the Committee.

4.4 Furthermore, the State party submits that, in essence, the author is asking the Committee to rule on whether the National Health Act 1953 is compatible with the Covenant. It argues that it is the Committee's jurisprudence that under the Optional Protocol the Committee cannot examine *in abstracto* the compatibility with the Covenant of laws and practices of a State. It contends that in so far as the communication seeks to raise the compatibility of domestic legislation with the Covenant the communication is inadmissible.

4.5 The State party finally argues that the communication is inadmissible *ratione materiae* under article 3, of the Optional Protocol on the grounds that, in effect the author is seeking a review of the Federal Court's decision in Lamagna Enterprises Pty Limited v. The Secretary of the Department of Community Service and Health. If Lamagna Enterprises Pty Limited wishes to challenge the interpretation of the National Health Act 1953 the proper

course of action would be to investigate the possibility of an appeal to the Full Federal Court on a point of law. To the extent that the author's claim relates to the Federal Court's interpretation of the National Health Act 1953, the author's claim does not come within the competence of the Committee.

4.6 The State party concedes that the Federal Ombudsman recommenced that whilst the negative loadings were valid under the National Health Act of 1953, they were unjust and unreasonable and the author should be refunded for the amounts recovered. However, both the Minister for Finance and the Minister for Family Services, advised the Prime Minister against compensation. It was on this advice that the Prime Minister acted when he informed the Ombudsman's Office, accordingly, on 16 December 1996.

5. In a letter dated 3 October 1997, the author reiterated her claim of unjust and unfair treatment by the state authorities since it was a governmental department which held the monopoly of the information in respect of nursing homes that denied her the information that was later used against her by that same department to claim a debt of over payment made to the previous owner of the nursing home.

Issues and proceedings before the Committee:

6.1 Before considering any claims 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 The Committee notes the State party's contention that the communication should be declared in inadmissible *ratione personae*. In this respect, it notes that the author has submitted the communication claiming to be a victim of a violation of her rights under the Covenant, to be treated justly and fairly, because a governmental department denied her information which it later used against her. However, the author who purchased the nursing as an enterprise is essentially claiming before the Committee violations of the rights of her company, which has its own legal personality. All domestic remedies referred to in the present case were in fact brought before the Courts in the name of the company, and not of the author, furthermore the author has not substantiated that her rights under the Covenant have been violated. Under article 1, of the Optional Protocol only individuals may submit a communication to the Human Rights Committee.[2] The Committee considers that the author, by claiming violations of her company's rights, which are not protected by the Covenant has no standing within the meaning of article 1, of the Optional Protocol, in respect of the complaint related to her company and that no claim related to the author personally has been substantiated for purposes of article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

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

*The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

1/ See Communication 360/1989 (a newspaper publishing company v. Trinidad and Tobago) and Communication No. 361/1989 (A publication and printing company v. Trinidad and Tobago.)

2/ See communication No. 502/1992, (Sharif Mohamed v. Barbados), Inadmissibility Decision, adopted on 31 March 1994.

[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.]