HUMAN RIGHTS COMMITTEE

Jensen v. Australia

Communication No. 762/1997

22 March 2001

CCPR/C/71/D/762/1997

ADMISSIBILITY

Submitted by: Mr. Michael Jensen

Alleged victim: Author

State party concerned: Australia

Date of communication: 2 April 1996 (initial submission)

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

Meeting on 22 March 2001

Adopts the following:

Decision on admissibility

1. The author of the communication, initially dated 2 April 1996, is Michael Jensen, an Australian national, born 26 November 1947. He is currently imprisoned at Karnet Prison Farm, Western Australia. He claims to be a victim of a violation by Australia of article 2, paragraphs 3(a) and (c), article 7, article 9, paragraphs 1, 2 and 3, article10, paragraphs 1 and 3, article 14, paragraphs 3(a) and (c), and article 15, paragraph 1, of the Covenant. He is not represented by counsel.

The facts as presented

2.1 On 29 August 1990, the author was convicted in the Supreme Court of Western Australia for raping and sexually assaulting a psychiatric patient in his care in a psychiatric hospital in Western Australia (WA) in 1989 (the WA offences). He was sentenced to nine years in prison. The earliest date the author would be eligible for consideration for parole was 30 November 1994.

2.2 In the course of investigating those offences, the police discovered videotape and photographic evidence in the author's home of further offences involving the author raping and ten times indecently dealing with a seven year old girl and three times indecently dealing with her ten year old sister in Queensland in 1985 ('the Queensland offences'). The author states that the mother of the minors was aware of that conduct at the time, but subsequently declined to lay charges against the author as he had moved to WA.

2.3 On 31 July 1990, while the author was still on remand for the WA offences, the police attempted to interview the author about the video tape and photographic evidence of the Queensland offences. The police informed the author of the contents of the videotape, the victims' identity and that a complaint had been received by police. On the advice of his solicitor, the author refused to take part in the interview. During the interview, police told the author that an application to extradite him to Queensland would be made upon his release from prison.

2.4 At a WA Sentence Planning Conference held in October 1990, the author asked and was told that there were no warrants for his arrest in any State of Australia. On 6 March 1991, the Perth District Court sentenced the author to one year's imprisonment, to be served cumulatively upon his nine year sentence, for four offences of breaking and entering various police stations in Western Australia in attempts to obtain or destroy videotape and photographic evidence of the Queensland offences.

2.5 In September 1991, at another WA Sentence Planning Conference, the author again asked and was told that there were no warrants for his arrest in any State of Australia. On 14 October 1992, the author was shown a copy of a letter dated 13 August 1992 from the Queensland police to the Corrective Services department at Perth, indicating that a warrant had been issued against the author on a charge of rape committed in Queensland in1985. The letter also indicated that extradition proceedings would be commenced upon the author's release from prison. The warrant, which had been prepared in August 1992, was unsigned due to human error and therefore invalid as a matter of law.

2.6 The author's counsel requested a copy of the warrant and full details of all the charges against the author. In January, a copy of a properly issued warrant was provided, dated 7 January 1993, against the author for the offence of rape of a female minor in Queensland in 1985. No factual circumstances were set out in the warrant, and nor were any other offences mentioned.

2.7 On 5 April 1993, the author made an written request to the competent authorities for his interstate transfer to Queensland to face the Queensland charge. On 23 August 1993, the author commenced a Sex Offender Treatment Program in WA. On 14 March and 15 June 1994, the respective authorities in WA and Queensland approved the author's transfer to Queensland. On 30 June 1994, the author completed the treatment program.

2.8 On 15 September 1994, the Freemantle Court of Petty Sessions ordered the transfer of the author to Queensland. The statutory period for a review of that decision expired on 29 September 1994. The following day, on 30 September 1994, the author formally purported to withdraw his application for an interstate transfer on the grounds of delay. On 17 October 1994, the author was transferred to Queensland, and, upon arrival, arrested and charged with rape of a female minor and

additionally thirteen charges of indecent dealing. On 18 October, the author was brought before the Brisbane Magistrates Court in relation to the charges of the previous day, and proceedings were adjourned for hearing of committal proceedings on 1 December 1994.

2.9 On 1 December 1994, the author appeared in the Brisbane Magistrates Court and was committed to stand trial in relation to the charges of 17 October 1994. On 8 May 1995, the author plead guilty to one count of rape and thirteen counts of indecent dealing with circumstances of aggravation in the Brisbane District Court. On 7 July 1995, the author was sentenced to five years' imprisonment for the rape, eighteen months imprisonment for each of six counts of indecent dealing and nine months imprisonment of for each of seven counts of indecent dealing, all sentences to be served concurrently. The district court made a recommendation that the author be eligible for consideration for parole after two years imprisonment. The term of imprisonment commenced immediately.

2.10 On 20 July 1995, the author submitted a written application to transfer back to WA on order to be closer to his family. Due to a pending appeal by the prosecution against sentence inter alia on the grounds of manifest inadequacy, the application could not be considered. On 2 April 1996, the author submitted his communication to the Human Rights Committee. On 11 June 1996, the Queensland Court of Appeal increased the sentence on the count of rape to eleven years, while allowing the other concurrent sentences for indecent dealing to stand. The revised sentence was backdated to begin from 7 July 1995, and had the result that five years of the sentences originally imposed for the WA offences would be served concurrently. The court recommended that the author be considered for parole after 29 August 1998.

2.11 On 12 June 1996, the author again submitted a written application to transfer back to WA on welfare grounds. On 13 August 1996, the author commenced a Queensland Sex Offender Treatment Program. On 7 October 1997, the author completed the Queensland treatment program and received the necessary consents for inter-state transfer. On 23 April 1998, the author was transferred inter-state from Queensland back to prison in WA.

2.12 On 31 July and 18 August 1998, the WA Parole Board deferred consideration of the author's case, seeking further information. On 11 September 1998, the Parole Board denied parole due to the risk of re-offending due to the entrenched history of serious sexual offending and limited gains from the sex offender treatment programs. On 13 November 1998, following a further psychological report, and again on 8 April 1999 and 28 April 2000 the Parole Board reconsidered the author's application for parole but denied it. Presently, the author remains in custody, with the Parole Board due to re-examine his case in April 2001.

The complaint

3.1 The author contends that, in violation of article 2, paragraphs 3(a) and (c), he was denied an effective remedy to the violations he allegedly sustained, and alleges in particular that his performance in the treatment programs was improperly evaluated and presented with the result that the Parole Board has denied parole.

3.2 The author contends that the delays in bringing him to trial for the Queensland offences violated his rights under articles 9, paragraphs 1, 2 and 3, and 14, paragraphs 3(a) and (c). He argues that the

police knew of the offences since 1990, that he made repeated attempts to determine whether he was facing charges, that a valid warrant was only issued in January 1993 and for one offence only, and that thirteen further charges were added in October 1994.

3.3 The author alleges that his transfer to Queensland was deliberately delayed until shortly before he was eligible for consideration for parole. That conduct, combined with transferring him to Queensland after his request for a transfer had been withdrawn, meant that his detention in Queensland up to the time of sentencing was legally considered as a continuation of his WA sentence. This would not have been the case if he had been granted parole before facing the charges in Queensland. Accordingly, he considers that his detention was effectively extended by nine months, being the period between the transfer and the beginning of his sentence for the Queensland offences. The author contends that this constituted arbitrary detention under Article 9, paragraph 1.

3.4 The author also contends that the delay first in charging him, then in transferring him to Queensland and in not transferring him back to Western Australia to be close to his family immediately after the Queensland trial was oppressive and led to undue emotional and psychological trauma, including depression and suicidal tendencies, along with insomnia, hair loss and exposure to chemotherapy. He claims that this amounts to a violation of article 7 of the Covenant.

3.5 The author states that while in prison he has followed intensive therapy and that the psychological reports show that he is unlikely to re-offend. The author argues that further imprisonment, after he was ready to be rehabilitated and reintegrated in society, for offences that happened ten years ago, is detrimental to his rehabilitation and has led to heavy emotional and psychological stress. He thus claims a violation of article 10, paragraph 3, of the Covenant.

3.6 Finally, the author states that due to new legislation in Queensland, his sentence of 11 years' imprisonment with a three year non-parole period has been altered to an eight year and eight month non-parole period. He considers that now would make him eligible for release at the earliest in April 2004. The author claims that this constitutes a violation of article 15.

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

4.1 In terms of the alleged breaches of article 2, the State party understands that those rights to remedy are accessory in nature and apply consequent to a violation of a specific right in the Covenant. As the State party does not view any other violation as having been established, it argues that the author has failed to substantiate a claim of violation of article 2.

4.2 In terms of the alleged breaches of articles 7 and 10, paragraph 1, the State party refers to the Committee's jurisprudence for the proposition that for punishment to violate the Covenant it must humiliate, debase and in any event entail elements beyond the mere deprivation of liberty. The State party argues that at all points the author was lawfully deprived of his liberty and any mental suffering was ancillary to that. The State party states that, contrary to the author's allegations, clinical notes for the WA imprisonment show only periodic anxiety and mild depression from time to time, rather than chemotherapy, hair loss, insomnia or generally extreme psychological or emotional trauma. Similarly, during the Queensland imprisonment, a review showed possible depression as the only medical difficulty, and that pharmacological treatment was unnecessary.

Accordingly, the State party considers this portion of the claim does not raise an issue in terms of the rights claimed, and is furthermore insufficiently substantiated. It therefore should be rejected as inadmissible.

4.3 In terms of the alleged violations of article 9, the State party records its understanding that the concept of 'arbitrariness' in paragraph 1 encompasses elements of inappropriateness, injustice and lack of predictability. It also argues that the right in paragraph 2 to be promptly informed of charges relates only to the stage of arrest. Furthermore, the requirement that a person arrested or detained on criminal charges is promptly brought before a judge in paragraph 3 relates again to the time a person is arrested or detained on those particular charges.

4.4 The State party notes that, under its law, a person may be transferred from one State to another to face criminal charges once a person has been released from prison finally or on parole ('extradition') or alternatively at any time when a prisoner requests a transfer ('interstate transfer'). The State party notes that in July 1990 the author was informed that an application to extradite him to face the Queensland charges would be made upon his release from prison, but the author refused to answer questions concerning the offences. The State party observes that because the author was not due for consideration for parole until November 1994 at the earliest, the State party did not consider there was urgency in executing a warrant for the author's arrest. An invalid warrant was obtained in August 1992, and then a valid one in January 1993. At that point, in April 1993, the author requested to be transferred to Queensland to face the charges. Following the obtaining of the relevant authorities' consent in both States, a court hearing was held on whether a transfer order should be made.

4.5 The State party notes that its law provides that the court is not to make such an order, if on application of the prisoner, it is satisfied that it would be harsh or oppressive or not in the interests of justice for the transfer to proceed. The author had legal representation in this case, and the option to seek a review for a period of 14 days. Upon the expiry of that period, the Court's order was final and the author's withdrawal of his transfer request thereafter had no legal effect.

4.6 The State party accepts that the original warrant only noted one charge, and that the author was arrested on twelve more minor charges at the time of his arrival in Queensland. The State party states however that it is not unusual to issue a warrant on one charge, in this case the most serious one, while other charges are still being considered on the basis of what evidence might be available at that time. On the day the author arrived in Queensland in October 1994, the author was served with all thirteen warrants. The next day he was brought before a Court. In December 1994, a preliminary hearing was held in December 1994 and a full hearing in March 1995. Finally, the State party notes that in the author's case, as usually occurs, the new sentence handled in Queensland was and is being served concurrently with the original sentence.

4.7 In relation to parole, the State party states that the WA Parole Board never had the question of the author's parole referred to it because the author had applied for the interstate transfer to Queensland. In any event, there is no automatic entitlement to parole at the time the question falls for consideration. An assessment is carefully made at the time as to the individual's progress and risk to the community at that time.

4.8 On the basis of the above facts, the State party contends that the author has no claim in relation to any of the three paragraphs of article 9. The author could validly have been detained under the original court sentence until 28 August 2000. He had not been considered for parole at the time of his transfer, much less received parole, and accordingly cannot claim that he was arbitrarily detained. Nor is there any evidence of deliberate delay at any point. As soon as the author was arrested, he was informed of the charges and promptly brought before a judge and then tried, as the Covenant requires. These allegations have not been substantiated by the author, and therefore also should be dismissed as inadmissible.

4.9 In terms of the author's allegation that his treatment has not had as its essential aim of his reformation and social rehabilitation, the State party observes that its penitentiary system has these aims, with a purpose to establish in prisoners the will to lead law-abiding and self-supporting lives after their release and to assist them to become fit to do so. Among a variety of other programs, the Sex Offenders Treatment Programs in both WA and Queensland are aimed at rehabilitating person such as the author and reducing the frequency and extent of re-offending. The author unsuccessfully undertook the WA program, which lead to him then completing the self-paced Queensland program before his transfer back to WA. The possibility of interstate transfer on welfare grounds, as was requested by and granted to the author, is another dimension of a system designed to reform and rehabilitate to the extent possible.

4.10 The State party observes that both the Queensland District Court and Supreme Court found that the author did not successfully complete the WA program. At all times this issue was before the courts, the author was legally represented and had the opportunity to cross-examine. Accordingly, this cannot found an argument for early release. The State party respectfully submits that the question of successful completion, or otherwise, of the program is a question of fact beyond the Committee's role. The State party further notes that it was not unreasonable to require the author to finish the Queensland program, in view of his earlier failure, before consideration was given to his transfer back to Queensland. The State party's submissions predate the evaluation of the author's performance in the Queensland program by the Parole Board and others. The State party accordingly argues that the author has not substantiated his claim in this regard and it should be dismissed as inadmissible.

4.11 In terms of the author's contentions that his rights under article 14 were violated, the State party records that the Committee's General Comment on article 14 sets out that the right to be promptly informed of a charge requires that information to be given as soon as the charge is first made by the competent authority, that is, when the competent authority decides to take procedural steps against a suspected person or publicly names him as such. The European Court of Human Rights also has interpreted analogous due process rights to begin with the charge, or official notification given to an individual of an allegation that he has committed a criminal offence.

4.12 The State party argues, in relation to article 14, paragraph 3(a), that the facts disclose a reasonable and proper effort being made to inform the author at all stages of investigation of the nature and cause of any charges against him. The author was aware since 1990 that the 1985 Queensland offences were being investigated. The author was made aware of the nature of the charges at the time he was first publicly named as being suspected of having committed those crimes, that is on 7 January 1993 when the warrant for his arrest on one charge of rape was issued.

That was the most serious of the offences for which the author would later stand trial. The State party accordingly submits that this allegation has not been substantiated by the author and should be dismissed as inadmissible.

4.13 Concerning the author's contention of a violation of article 14, paragraph 3(c), the State party rehearses the facts of the case. The State party emphasises that the author refused to co-operate with the police investigation in1990. The earliest date the author could have been extradited upon conclusion of sentence was 11 November1994, but a warrant was issued in January 1993. After the author's request for transfer in May 1993, the author completed a treatment program, gained the necessary consents and was transferred in October 1994. He was immediately arrested and charged, and brought before a Court the next day. Over the next six weeks the author was provided legal counsel to prepare his defence. In December 1994, the author was committed to stand trial in June 1995, but in May 1995 the author plead guilty on all charges. In July 1995, he was sentenced, with the appeal being disposed of in July 1996.

4.14 The State party submits that the conduct of the authorities was determined by law, effected according to law and without irregularities, and did not contribute to any unnecessary delay in the trial of the author. The State party submits the time from being charged on 17 October 1994 to being sentenced on 7 July 1995, with the sentence being increased on appeal on 11 June 1996, is not an unreasonable time in the circumstances of this communication.

4.15 Finally, in relation to article 15, the State party points out that recent amendments to the Queensland sentencing regime are prospective only and do not affect the author. Accordingly, he has failed to substantiate a claim under article 15, and that portion should be dismissed as inadmissible.

Author's response to the State party's observations with regard to the admissibility of the communication

5.1 With respect to article 2, the author repeats allegations of deliberate concealment and fabrication by the authorities of his performance in the treatment program, and thus submits that a case has been made out.

5.2 In relation to his claim under article 7, the author argues that deliberately false reports have increased his sentences beyond what was warranted. Taken with the delay in trial, the author submits a breach of article 7 is clear.

5.3 Regarding article 9, the author claims that he was not told at the interview in 1990 that charges would be laid upon his release, but only that the police would return for him in 10 years. He was not informed until 1992 that the Queensland charges were outstanding. The author states the Queensland police should not deliberately waited two years before informing the WA authorities of the charges. The author alleges that the police actions deprived him of parole, and accordingly his liberty.

5.4 The author argues that there is no justification for the delay of almost 5 years between the police investigations and charging him on the Queensland offences. Had the charges been laid earlier, the author states he would have been able to deal with the charges at an earlier point of his

imprisonment. The author goes on to object in detail to the sentences imposed on him, and calculates that his claimed successful conclusion of the treatment program would have resulted in parole being granted.

5.5 In terms of article 14, the author states again that at the 1990 interview no charges were mentioned, and there was no reference by the police to specific incidents. He notes that before 1992 he had been assured that no charges or extraditions were pending against him. The delays in processing the transfer to Queensland also unnecessarily prolonged resolution of the Queensland charges.

5.6 The author accepts the State party's submissions in respect to article 15 and withdraws that portion of his claim.

Issues and proceedings before the Committee

6.1 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.

6.2 With respect to the author's contention that the authorities have inflicted torture or cruel, inhuman and degrading treatment contrary to article 7 and otherwise ill-treated the author contrary to article 10, paragraph 1, the Committee refers to its jurisprudence that a claim by a prisoner pursuant to these articles must demonstrate an additional exacerbating factor beyond the usual incidents of detention. In the present case, the author has failed to demonstrate, for the purposes of admissibility, that he has been treated in any way which departs from the normal treatment accorded a prisoner. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

6.3 In relation to the author's claims under article 9, paragraphs 1, 2 and 3, the Committee considers that the facts clearly demonstrate that as soon as the author was arrested on the Queensland offences, he was informed of the charges, brought before a court and then tried within a reasonable time thereafter. The author has accordingly failed to substantiate, for the purposes of admissibility, this portion of the claim, which is inadmissible under article 2 of the Optional Protocol.

6.4 Concerning the author's claims under article 10, paragraph 3, that the application of the penitentiary system in the author's case has not had as its essential aim his social rehabilitation and reformation, the Committee notes the variety of programmes and mechanisms in place in the State party's penitentiary system that are geared towards this end. The Committee considers that the author has failed to substantiate that the State party's assessments of the author's reformative progress, and of the consequences which ought to flow from that, raise issues of compliance with the requirements of article 10, paragraph 3. Accordingly, the Committee is of the view that the author has failed to substantiate, for the purposes of admissibility, his claim of a violation of article 10, paragraph 3, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 In terms of the author's allegations under article 14, paragraphs 3(a) and (c), the Committee observes that the State party's law precluded the prisoner's transfer for trial before his release, which

could have come no sooner than November 1994, unless a request for interstate transfer and appropriate court order was made. The author's request for transfer made after receiving notice of the most serious rape charge in 1993 was accommodated pursuant to an appropriate court order. Upon arrival, he was charged with the main offence and subsidiary offences, tried and convicted within appropriate time. The Committee considers that these facts fail to substantiate, for the purposes of admissibility, a claim under article 14, and this portion of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 With respect to the author's claims under article 2, the Committee considers that the author's contentions in this regard do not raise issues additional to those considered under the other articles which have been invoked, and that those claims have not been substantiated sufficiently for purposes of admissibility.

6.7 Regarding the author's contended violation of Article 15, the Committee notes that the author, in his response to the State party's submissions, retracts this portion of the communication and is not required to consider it further (para 5.6 above).

7 The Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

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