HUMAN RIGHTS COMMITTEE

Foin v. France

Communication No. 666/1995

11 July 1997

CCPR/C/60/D/666/1995 *

ADMISSIBILITY

Submitted by: Frédéric Foin [represented by François Roux, lawyer in France]

Victim: The author

State party concerned: France

Date of communication: 20 July 1995 (initial submission)

Documentation references: List - CCPR/C/CL/R.62/Add.2
Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 16 November 1995 (not issued in document form)

Date of present decision: 11 July 1997

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The author of the communication is Frédéric Foin, a French citizen born in September 1966 and currently domiciled in Valence, France. He claims to be a victim of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. The author is represented by counsel, who has produced a duly signed power of attorney.

The facts as submitted by the author

2.1 The author, a recognized conscientious objector to military service, was assigned to civilian service duty in the national nature reserve of Camargue in December 1998. On 23 December 1989, after exactly one year of civilian service, he left his duty station; he invoked the allegedly

discriminatory character of article 116, paragraph 6, of the National Service Code (Code du service national), pursuant to which recognized conscientious objectors had been required to perform civilian national service duties for a period of two years, whereas military services had not exceeded one year.

2.2 As a result of his action, Mr. Foin was charged with desertion in peacetime before the Criminal Court (Tribunal Correctionel) of Marseille, under articles 398 and 399 of the Code of Military Justice. The challenge of his conviction in a default judgement pronounced on 12 October 1990 led to a new hearing on 20 March 1992 before the Court, which gave him an eight-month suspended prison sentence and ordered the withdrawal of his conscientious objector status (art. 116 (4) of the National Service Code). The Court rejected the author's arguments based in particular on articles 4 (3) (b), 9, 10, and 14 of the European Convention on Human Rights.

2.3 In two preambular paragraphs of its judgement, the Court noted drily that its deliberations could not be influenced by the work or the recommendations of Amnesty International, described as an association of "Masonic origins and obedience"and imbued with an "anti-French" spirit which had stigmatized "alleged human rights violations by invoking an 'atheistic' (sic) European Convention on Human Rights". Furthermore, the Court heavily criticized the French Law of 13 July 1990 on the suppression of racist, xenophobic or anti-Semitic acts or opinions as iniquitous and conducive to strengthening apartheid [1].

2.4 The Court's decision was appealed both by the State Prosecutor (Procureur de la République) and by the author. By a judgement of 18 December 1992, the Court of Appeal of Aix-en-Provence quashed the judgement of 20 March 1992 on the ground that its motivation constituted an abuse of power ("excés de pouvoir") which could not be tolerated in a judicial decision. It dismissed some of the arguments referred to above as "purely personal" and "gratuitous". Notwithstanding, and deciding on the merits of the case, the Court of Appeal found Mr. Foin guilty of the offence of desertion in peacetime and gave him a six-month suspended prison sentence.

2.5 On 14 December 1994, the Court of Cassation rejected the author's further appeal, basing itself on what counsel refers to as "stereotyped arguments". The Court held that the relevant provisions of the European Convention on Human Rights and of the International Covenant on Civil and Political Rights did not prohibit measures requiring conscientious objectors to perform a longer period of national service than persons performing military service, provided the enjoyment or exercise of their fundamental rights and freedoms was not affected.

The complaint

3.1 According to the author, both article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months for civilian service) and article L.2 of the National Service Code in its version of January 1992, which sets the duration of the civilian service at 20 months, violate articles 18, 19 and 26, juncto article 8, of the Covenant in that they double the duration of civilian service in comparison with military service.

3.2 While acknowledging the Committee's views on communication No. 295/1988,[2] where it had been held, in a similar case, that an extended length of alternative service in comparison with

military service was neither unreasonable nor punitive, and where no violation of the Covenant had been found, the author refers to the individual opinions appended to those views by three Committee members, who had concluded that the challenged legislation was not based on reasonable or objective criteria, such as a more severe type of service or the need for special training in order to perform the longer service. The author endorses the conclusions of those individual opinions.

3.3 The author note that the sincerity of the convictions of a conscientious objector in France is subject to a serious examination under articles L.116 (2) to L. 116 (4) of the National Service Code. Each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he refuses, an appeal to the Administrative Tribunal is possible under article L. 116 (3). In such circumstances, the author argues, it cannot be assumed that the length of civilian service was fixed for reasons of administrative convenience, since anyone accepting to perform civilian service twice as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have punitive elements, which are not based on any reasonable or objective criterion.

3.4 In support of his contention, the author invokes a judgement of the Italian Constitutional Court of July 1989, which held that civilian service lasting eight months longer than military service was incompatible with the Italian Constitution. He further points to a decision adopted by the European Parliament in 1967 in which, on the basis of article 9 of the European Convention on Human Rights, it had been suggested that the duration of alternative service should not exceed that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not be of a punitive nature and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R (87)8 of 9 April 1987). Finally, the author notes that the United Nations Commission on Human Rights has declared, in a resolution adopted on 5 March 1987 [3], that conscientious objection to military service constituted a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In any event, according to the author, the requirement to perform civilian service that is twice as long as military service constitutes prohibited discrimination on the basis of opinion, and the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service violates articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party contends firstly that the communication is incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland) that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can not construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that the author does not qualify as a victim. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, quoting the decision on communication No. 185/1984 cited above, that as the author was "not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service", he cannot therefore claim to be a victim of a violation of articles 18 and 19 of the Covenant.

4.3 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the author complains of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria" (see the Committee's views on communication No. 196/1985, Gueve v. France). The State party stresses that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army. The State party quotes the Committee's views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the 8-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the author is based on the principle of equality, which requires different treatment of different situations.

4.4 For all of these reasons, the State party requests the Committee to declare the communication inadmissible.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the author cites the Committee's General Comment No. 22 (48), where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service". According to the author, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 The author claims that the problem posed in his case lies not in a possible infringement of conscientious objectors' freedom of belief by French legislation, but in the conditions for the exercise of that freedom, since alternative civilian service is twice the length of military service, without this being justified by any provision to protect public order, in violation of article 18, paragraph 3, of the Covenant. The author invokes the Committee's General Comment No. 22 (48), which states that "limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. (...) Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner", and concludes that requiring

conscientious objectors to perform alternative civilian service which is twice the length of military service constitutes a discriminatory restriction on the enjoyment of the rights set forth in article 18 of the Covenant.

5.3 Concerning the alleged violation of article 26, the author claims that requiring a period of civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the author argues that there is no justification for making civilian service twice the length of military service; in fact, unlike in the Järvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L. 116 (2) and L. 116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces following an examination which may result in refusal. Nor is it justified in the general interest. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground. In conclusion, the author considers that there is a difference of treatment for conscientious objectors which is not based on any reasonable and objective criterion and which therefore constitutes a violation of article 26 of the Covenant.

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 The Committee has taken note of the State party's arguments concerning the incompatibility of the communication ratione materiae with the provisions of the Covenant. In this regard, the Committee considers that the matter raised in the communication does not concern a violation of the right to conscientious objection as such. The Committee considers that the author has sufficiently demonstrated, for the purposes of admissibility, that the communication may raise issues under provisions of the Covenant.

7. The Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated

by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments he may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

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

[Done in English, French and Spanish, the English text being the original version.]

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* All persons handling this document are requested to respect and observe its confidential nature.

1/ The French original reads as follows:

> "ATTENDU que de premiére part, il sied de rappeler que la Justice est et doit être égale pour tous en France; que le Tribunal de céans n'a pas à connaître des travaux, recommendations ou remontrances d'un mouvement étranger 'Amnesty International' de fondement ou obédience maçonnique révélateur d'un courant 'anti-France', stigmatisant de prétendues violations de droits et prêchant une Convention européenne des droits de l 'homme 'athée' ...
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> ATTENDU que le Conseil du prévenu se garde bien ... de dénoncer l'iniquité manifeste et la contradiction d'une loi interne du 13 juillet 1990, loi de circonstance creusant plus avant le divorce entre pay légal et pays réel à raison de l'apartheid créé dans son esprit comme dans sa lettre discriminatoire s'il en était, pour être combattue, en bonne logique cartésienne, par la Déclaration fondamentale des droits de l'homme et du citoyen du 26 août 1789 ...".

2/ Järvinen v. Finland, Views adopted on 25 July 1990, paras. 6.4 to 6.6

3/ Document E/CN.4/1987/L.73 of 5 March 1987.