

HUMAN RIGHTS COMMITTEE

P. L. v. Germany

Communication No 1003/2001

22 October 2003

CCPR/C/79/D/1003/2001*

ADMISSIBILITY

Submitted by: P. L. (not represented by counsel)

Alleged victim: The author

State party: Germany

Date of communication: 10 March 1999 (initial submission)

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

Meeting on 22 October 2003

Adopts the following:

Decision on admissibility

1. The author of the communication is P. L. , an Irish national, who also purports to submit the communication on behalf of his three sons, R. J. L., D. M. L. and T. P. L., who have dual nationality (Irish and German) and were born on 23 May 1984 (R. J. L.), 24 November 1986 (D. M. L.) and on 27 June 1990 (T. P. L.). The author claims that he and his sons are victims of violations by Germany¹ of articles 14, paragraph 1, and 23, paragraph 4, and his sons of a violation of article 24, paragraph 1, of the International Covenant on Civil and Political Rights ("the Covenant"). The author is not represented by counsel.

1.2 On 7 February 2002, the Committee, acting through its Special Rapporteur on new communications, decided to separate its consideration of the admissibility and the merits of the communication.

The facts as submitted by the author

2.1 On 20 November 1994, the author's wife left the family home together with her and the author's three sons. The District Court of Ratingen (Amtsgericht Ratingen), by interim injunction of 25 November 1994, granted her the sole right to determine the domicile of the children and, by decision of 19 March 1996, preliminary sole custody of the children during the time of separation of the spouses. On or about 21 June 1996, the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) rejected the author's appeal against the decision of 19 March 1996. His constitutional complaint against the decisions of the lower courts was dismissed by the Federal Constitutional Court (Bundesverfassungsgericht) on 2 April 1997. On 28 April 1997, the author submitted an application to the European Commission of Human Rights, which was declared inadmissible on 19 January 1998.

2.2 By judgment of 27 October 1998, the District Court of Ratingen pronounced the divorce of the spouses. Custody was granted to the mother, since the Court considered her better placed to ensure the welfare of the children. It based its findings on a hearing of the three sons, each of whom had expressed his preference to stay with the mother. The Court rejected the author's argument that the mother had manipulated the children prior to the hearing, finding that their bonds with the mother were stronger than those with the author, which was considered understandable, given that the children had stayed with the mother throughout the time of separation. The decision to grant sole custody to the mother would also enable the children to retain continuity in schooling and to remain in familiar surroundings. As to visiting rights, the Court granted the author visiting rights twice a month on weekends and for several weeks during the holiday period.

2.3 In his appeal dated 18 December 1998, the author requested the Düsseldorf Higher Regional Court to quash the judgment of the District Court and grant custody to him. He argued that the mother neglected the children, that she was frequently absent, rarely cooked for them, failed to ensure their health care and neglected their bodily hygiene. Allegedly, the children even showed signs of physical abuse. The author reiterated that the mother exercised pressure on the children and manipulated their statements before the courts. In the alternative, if custody was not to be granted to him, the author requested extended visiting rights.

2.4 By decision of 1 March 1999, the Higher Regional Court dismissed the author's appeal without scheduling another hearing of the children. It considered that he was not better placed to ensure the children's welfare than the mother. Unlike the mother, the author had previously failed to cooperate with the Child Welfare Office of Ratingen. Moreover, allocation of sole custody to the mother was required to ensure continuity for the children and was consistent with their express wish to stay with the mother. The District Court's ruling on visiting rights was upheld, in the interest of not further destabilizing the children.

2.5 On 4 April 1999, the author faxed a constitutional complaint to the Federal Constitutional Court, without however enclosing copies of the impugned decisions of the lower courts. At the top of the fax cover, it was stated: "Advance fax [...] (without enclosures)". By letter of 7 April 1999, the Federal Constitutional Court informed the author that so as to comply with the one-month

deadline for lodging a constitutional complaint, a complainant must not only submit but also substantiate the complaint within the one-month period after the final decision of the lower court. This required submission of all relevant documents, in particular court decisions, before the end of that period, even in cases where a complaint was submitted on a preliminary basis for purposes of complying with the deadline. The author was advised that his complaint did not meet these requirements, since the judgments of 1 March 1999 and of 27 October 1998 had not been enclosed with the fax of 4 April 1999. It was therefore impossible for the Court to examine whether these decisions violated the author's constitutionally guaranteed right to protection by the courts. Insofar as the author had submitted the constitutional complaint on behalf of his sons, the letter raised doubts as to whether he was authorized to represent them as a non-custodial parent. It concluded that it was too late for supplementing the complaint, since the one-month period following the service (5 March 1999) of the decision of the Düsseldorf Higher Regional Court had expired on 6 April 1999.²

2.6 On 9 April 1999, the author's complaint, dated 4 April 1999 but carrying the postmark of 6 April 1999, was delivered to the Federal Constitutional Court by post, this time including copies of the relevant court decisions. By letter of 14 April 1999, the author was again advised that the one-month period for lodging a constitutional complaint had expired on 6 April 1999 and that he had failed to substantiate his complaint prior to that date.

2.7 On 16 March 2000, the author applied to the District Court of Ratingen for transfer of the custody of the children to him. He asked the Court to issue an interim order to that effect, and argued that the mother continually failed to take proper care of the children, which was reflected in their poor school performance as well as their deplorable state of health. The author requested the Court to appoint a legal guardian (Verfahrensbetreuer) to represent the interests of his children during the legal proceedings and to schedule another hearing of the children, who allegedly had stated their preference to live with him.

2.8 On 14 June 2000, the author challenged the competent judge on grounds of alleged bias, alleging that she had described his arguments in favour of another hearing of the children as "pure fantasies", attributable to his living in "an unreal world". His motion to have her replaced by another judge was declared ill-founded by the Higher Regional Court of Düsseldorf on 12 July 2000, on the basis that, in family law matters, judges were entitled to express their opinion to the parties, as long as they remained open to new and better arguments and arrangements.

2.9 By decision of 28 September 2000, the District Court of Ratingen rejected the author's motion to transfer custody to him, considering that the ongoing tensions between the ex-spouses were the main cause for the problems the children faced in school. The author himself, by his refusal to cooperate with the youth authorities, as well as his constant criticism of the mother, had himself exacerbated these tensions. Since the children had reiterated their wish to stay with the mother during a second hearing conducted by the Court, it found no reason to review its previous decision to grant sole custody to the mother. The author's immediate appeal against that decision was dismissed by the Higher Regional Court of Düsseldorf on 7 December 2000. No constitutional complaint was lodged in relation to these or any subsequent proceedings.

2.10 On 24 May 2001, the author, seeking extra-judicial relief in his matter, submitted a petition to the Petitions Committee of the German Federal Parliament and, on 8 September 2001, to the Minister of Youth, Family, Women and Health of the State of Northrhine-Westphalia, each time without success.

The complaint

3.1 With regard to his claim under article 14, paragraph 1, the author submits that the courts frequently denied his requests for the children to be heard and ignored evidence presented by him concerning the mother's neglect, if not abuse, of the children. The excessive length of the proceedings had led to the further deterioration of their physical and psychological state. Moreover, the application of the principle of free jurisdiction (Freie Gerichtsbarkeit) permitted the family courts not to apply the procedural rules which would bind all other jurisdictions, thus leaving the judges wide discretion in evaluating evidence and in defining the child's "best interest".

3.2 The author submits that the award of sole custody to his ex-wife disenfranchised him to such an extent that he was not even allowed to speak to the children's doctors or teachers. In the absence of a distinction between custody and legal guardianship under German family law, he was unable to participate in any important decision regarding his sons. Thus, his wife was able to have her sons naturalized in Germany without even informing him. The author considers that this situation is in breach of his right to equality of spouses under article 23, paragraph 4, of the Covenant.

3.3 The author alleges that the failure of the German courts and authorities to put an end to the mother's neglect of the children, ranging from failure to take care of their health and education to instances of abuse, constitutes a denial of their right to the necessary protection by the State, in violation of articles 23, paragraph 4, and 24, paragraph 1, of the Covenant.

3.4 The author claims that he and his sons have exhausted all domestic remedies, since the Higher Regional Court of Düsseldorf, as the highest responsible court, rejected both his appeals on 1 March 1999 and 7 December 2000, respectively. He argues that a constitutional complaint to the Federal Constitutional Court is not an effective remedy in family law matters, because this Court regularly dismisses complaints against custody decisions of lower courts, as it is not competent to adjudicate on family law issues as such.

3.5 The author observes that the same matter is not being and has not been examined under another procedure of international investigation or settlement, since his application to the European Commission on Human Rights, which had been declared inadmissible on 19 January 1998, dealt with the decision of the German courts to grant his ex-wife preliminary sole custody of the children for the duration of the separation, and therefore with proceedings which were entirely different from the final award of custody and the rejection of his request to transfer custody to him, which constituted the subject matter of his communication to the Human Rights Committee.

The State party's submission on the admissibility of the communication

4.1 By note verbale of 4 October 2001,³ the State party submitted its observations on the admissibility of the communication. It challenges admissibility on the basis that the author has not

exhausted all available domestic remedies.

4.2 The State party argues that the author failed to lodge a constitutional complaint with the Federal Constitutional Court against the decisions of the Düsseldorf Higher Regional Court of 1 March 1999 within the one-month period following the impugned decision, as required by section 93 (1)⁴ of the Law on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz). It was not sufficient that the author posted his complaint on 6 April 1999 - the last day of the one-month period -, since a complaint must reach the Court by the end of the legal period; the author's complaint reached the Court only on 9 April 1999 and was therefore not registered.

4.3 In order to meet the deadline the author was not dependent on the postal service, since he was in possession of a fax machine. Therefore, he could simply have faxed his complaint on 5 or 6 April 1999 to the Federal Constitutional Court.

4.4 Moreover, the registrar of the Court, in his letter of 14 April 1999, informed the author that if he wished a judge to decide on the question of admissibility of the complaint, he should so inform the Court. However, the author preferred not to take up this opportunity.

4.5 Lastly, the State party submits that, contrary to the author's view, a constitutional complaint would not have been *a priori* a futile remedy.

Comments by the author

5. By letter of 28 November 2001, the author responded to the State party's observations on admissibility and, by letter of 18 February 2002, furnished additional information. He argues that the State party seeks to absolve itself of its responsibilities by means of a pure technicality (his failure to enclose the relevant court decisions with the complaint faxed on 4 April 1999), despite his repeated efforts to exhaust all remedies available under German law. Apart from his constitutional complaint of 4 April 1999, which reached the Federal Constitutional Court the same day by fax, he had lodged two similar complaints, which were dismissed by the Constitutional Court on 2 April 1997 (see para. 2.1) and on 29 December 1997.

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 The Committee has ascertained that, insofar as the impugned decisions⁵ are concerned, the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. It recalls, in this context, that the author's application to the European Commission of Human Rights dealt with issues other than those before the Committee, namely the judgments of 19 March 1996 and of 21 June 1996, awarding temporary custody to the mother for the duration of the separation (see para. 2.1).

6.3 The Committee has noted the parties' arguments relating to the question of exhaustion of domestic remedies. In particular, it notes the State party's observation that, in order for a complainant to comply with the one-month deadline following service of the final decision of the lower courts, a constitutional complaint must reach the Federal Constitutional Court before the end of that period, and that all relevant documents, in particular the impugned court decisions, must accompany the complaint in substantiation thereof in order to enable an examination by the Constitutional Court as to whether the complainant's constitutional rights have been violated. It has noted the author's argument that he made repeated efforts to exhaust domestic remedies, by lodging three constitutional complaints relating to the same subject matter, despite the alleged ineffectiveness of this remedy in family law matters.

6.4 The issue before the Committee is whether, for purposes of exhausting all available domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, the author was required to lodge a constitutional complaint against the decisions of the Ratingen District Court of 27 October 1997 and of 28 October 2000, as well as the decisions of the Düsseldorf Higher Regional Court of 1 March 1999 and of 7 December 2000, and, if so, whether he pursued this remedy in accordance with the procedural requirements prescribed by law.

6.5 The Committee observes that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, in order to fulfill the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are *de facto* available to the author.⁶ The Committee notes that the author's constitutional complaints of 29 July 1996 and of 15 July 1997, which were dismissed by the Constitutional Court on 2 April 1997 and 29 December 1997, respectively, related to legal proceedings different from the final award of custody to his ex-wife, which was the subject matter of the complaint faxed to the Constitutional Court on 4 April 1999. The dismissal of these constitutional complaints was therefore without prejudice to the prospect of success of the latter complaint. Moreover, the Committee notes that the author has failed to substantiate his contention that a constitutional complaint is generally ineffective in family law matters. The Committee concludes that, to exhaust all available domestic remedies, the author should have availed himself of the opportunity of lodging a constitutional complaint against the decisions of the German courts granting final custody to his ex-wife and rejecting subsequent applications for transfer of custody. Such a complaint could not *ipso facto* be considered an ineffective remedy, in the specific circumstances of the case.

6.6 As to whether the author pursued this remedy in accordance with the procedural requirements prescribed by law, the Committee notes that he failed to furnish copies of the decisions of the Ratingen District Court of 27 October 1998 and of the Düsseldorf Higher Regional Court of 1 March 1999 (award of post-divorce custody to the mother), when he faxed his complaint to the Federal Constitutional Court on 4 April 1999. These documents reached the Court only on 9 April 1999, after the expiry of the legal one-month deadline on 6 April 1999. That the author was not, at that point, represented by counsel and that he was possibly unaware of this requirement cannot justify his failure to comply with the procedural prerequisites of section 93 (1) of the Law on the Federal Constitutional Court.⁷

6.7 Insofar as the author claims that the rejection of his application for transfer of custody, on 28 September 2000, by the Ratingen District Court and, on 7 December 2000, by the Düsseldorf Higher Regional Court violated his and his sons' rights under articles 14, paragraph 1, 23, paragraph 4, and 24, paragraph 1, of the Covenant, the Committee notes that the author did not lodge a constitutional complaint against these decisions.

6.8 In the light of the foregoing, the Committee concludes that the author failed to exhaust all available domestic remedies.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the author, and, for information, to the State party.

[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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1. The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for the State party respectively on 23 March 1976 and 25 November 1993.
2. Undisputedly, 5 April 1999 was a public holiday in Germany.
3. After numerous additional submissions had been received from the author, the communication was transmitted to the State party on 7 August 2001, under rule 91 of the Committee's Rules of Procedure.
4. Section 93 (1) of the Law on the Federal Constitutional Court provides, in pertinent part, that "[t]he constitutional complaint must be lodged and substantiated within one month".

5. The communication only relates to the decisions of the Ratingen District Court of 27 October 1997 and of 28 October 2000, as well as the decisions of the Düsseldorf Higher Regional Court of 1 March 1999 and of 7 December 2000. See para. 3.6.

6. See Communication No. 433/1990, *A.P.A. v. Spain*, Decision on admissibility of 25 March 1994, UN Doc. CCPR/C/50/D/433/1990, 28 March 1994, at para. 6.2.

7. See *ibid.*