

HUMAN RIGHTS COMMITTEE

Kavanagh v. Ireland

Communication No. 1114/2002

25 October 2002

CCPR/C/76/D/1114/2002/Rev.1

ADMISSIBILITY

Submitted by: Mr. Joseph Kavanagh (represented by Mr. Michael Farrell)

Alleged victim: The author

State party: Ireland

Date of communication: 8 July 2002 (initial submission)

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

Meeting on 25 October 2002

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 8 July 2002, is Joseph Kavanagh, an Irish national, born on 27 November 1957, who is currently imprisoned in Mountjoy Prison, Dublin. He claims to be a victim of violations by the Republic of Ireland of article 2, paragraphs 3 (a) and (b), and 26 of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 On 4 April 2001, the Human Rights Committee adopted its Views on Communication 819/1998, holding that the author's right to equality before the law, guaranteed in article 26 of the Covenant, had been violated, in that the Director for Public Prosecutions (DPP) had directed the author to be tried before a Special Criminal Court without providing grounds justifying the selection of that

particular trial procedure in his case.^{1/} The Committee stated in its Views that the author was entitled to an "effective remedy".^{2/} The State party was "also under an obligation to ensure that similar violations do not occur in the future; it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided".^{3/}

2.2 On 28 April 2001, the day after receipt of the Committee's Views, counsel wrote to the Minister for Justice, Equality and Law Reform seeking his release, indicating that in the alternative legal action to vindicate his rights would be pursued. On 30 April 2001, the letter was formally acknowledged.^{4/} As under Irish practice applications challenging an individual's detention are brought as soon as possible, on 3 May 2001, the author applied *ex parte* to the High Court. The application sought his release, the quashing of his conviction, a declaration that s.47(2) of the *Offences Against the State Act 1939* was incompatible with the Covenant and repugnant to the Constitution, the author's release on bail pending the outcome of the proceedings, damages, other relief and costs. The application was grounded on the Committee's Views and a claim that the Government was obliged by the Constitution and the doctrine of legitimate expectation to act on the Committee's Views.

2.3 On 20 and 21 June 2001, the application for leave to seek judicial review was heard in the High Court, with the State opposing the grant of leave. It was argued for the author that, even though the Covenant had not been expressly incorporated into Irish law and thus had not become directly binding at domestic level, the Covenant and/or its principles had become part of customary international law and in that manner binding. It was also argued that by ratifying the Covenant and the Optional Protocol the State party had given rise to a legitimate expectation that it would abide by and implement the Views of the Committee in cases brought before it. The State also sought costs against the author, while the author sought costs for raising (for the first time) a point of considerable public importance.

2.4 On 29 June 2001, the High Court refused leave, holding that the author had not established an arguable case. In the absence of direct incorporation of the Covenant, the Covenant could only be relevant in the domestic legal order through article 29 (3) of the Irish Constitution.^{5/} However, the Court considered that even accepting *arguendo* that the Covenant or its principles had become "generally recognized principles of international law" cognizable in the courts, the only rights conferred were concerning relations between States and not upon individuals such as the author. It made no order as to costs, leaving the author to bear his own costs.

2.5 Once the High Court's Order was made available, on 16 July 2001, the author appealed to the Supreme Court. The appeal was not heard until 13 December 2001 despite requests for expedition as the author was in custody. The State again opposed the author's appeal. The State also sought costs against the author, while the author again sought his costs for raising an issue of public importance. On 1 March 2002, a five-judge bench of the Supreme Court, including the Chief Justice, rejected the author's appeal against the High Court's denial of leave to appeal, holding that the author had not established an arguable case. It found that neither the Covenant nor the Committee's Views could be given domestic effect in Irish law. It stated that the Committee's Views could not prevail over the *Offences Against the State Act*, or over a conviction by a court established under its provisions. The Court made no order as to costs, leaving the author to bear his costs.

2.6 On 8 August 2001 (3 months and 10 days after receipt of the Committee's Views), the Minister for Justice, Equality and Law Reform offered the author £1,000 in acknowledgment of the Committee's Views, without specifying whether it was compensation, a contribution to legal costs, or for some other purpose. It did not indicate the steps being taken to avoid future violations.

2.7 Shortly thereafter, the author received from the Committee's secretariat a copy of the State party's follow-up reply to the Committee's Views in the original communication. The reply informed the Committee of the proposed payment to the author, and enclosed a partial copy of an interim report of a Committee set up separately by the Government to review the Offences Against the State Acts, 1939 to 1998.

2.8 On 22 August 2001, the author returned the cheque to the Minister as totally inadequate and not in any way constituting an effective remedy. He stated that the most appropriate remedy would have been to quash the conviction and order a retrial before the ordinary courts, but as he had already served the bulk of his sentence, he should be released. By letter of 24 August 2001, the Minister acknowledged receipt of the author's letter rejecting the proffered remedy. No further communication from the Minister has transpired. The issue of the cheque did not arise in the court proceedings.

2.9 By letter of 5 October 2001 (expanding on a letter of 22 August 2001), the author responded to the State party's follow-up reply, detailing why he regarded the proposed remedy as inadequate and ineffective. The author argued that a violation of Covenant rights should be treated analogously to violations of the fundamental rights in the Constitution. The Irish courts had in the past been vigilant to prevent breaches of these rights resulting in convictions, and have accordingly overturned convictions and ordered payment of substantial sums of compensation. The author also provided to the Committee a dissenting opinion (not provided to the Committee by the State party) by the Chair and two members of the committee established to review the relevant legislation, which had found that there was no possible amendment to the Acts which would remedy the violation of the Covenant identified by the Committee in the use of the Acts. In any case, the author states that no decision has been announced on the DPP's powers and he continues to direct trial before the Special Criminal Court without supplying grounds.

2.10 The author observes that in the course of the legal proceedings, the State made no movement towards providing him with any remedy. He states that with the Supreme Court's rejection of his appeal, all domestic remedies have been exhausted.

The complaint

3.1 The author claims a violation of article 2, paragraph 3 (a), in that the State party has not provided him with an effective remedy for the breach of article 26 already found by the Committee, the effects of which are continuing. He relies on a series of cases where the Committee found violations of article 2, paragraph 3, alongside a substantive violation of the Covenant, because the legal system concerned did not provide an effective remedy for the substantive violation.^{6/} He also distinguishes his case from statements by the Committee that article 2 cannot be invoked independently of a substantive violation by pointing out a substantive violation has already occurred and been found by the Committee.

3.2 The author also claims a violation of article 2, paragraph 3 (b), by not ensuring that he could have his right to a remedy determined by the competent authorities, and by not developing the possibilities of judicial remedy for cases such as his. There is no machinery in Irish law to which a person in the author's situation can turn. There was no procedure for making representations/submissions to the Minister as to what might constitute an effective remedy, or for challenging or obtaining an independent review of the Minister's decision. The proposed remedy of £1,000 falls far short of even paying the author's costs in connection with his communication and the subsequent judicial review proceedings. The author submits that the possibility to apply to the Minister for a discretionary *ex gratia* remedy does not satisfy the requirements of article 2, paragraph 3 (b), if "competent authority" means, *inter alia*, an authority acting in accordance with and subject to clearly established, fair and impartial procedures.

3.3 He also argues that, far from developing judicial remedies, the State party's courts have held that the author's arguments seeking a remedy for an established violation of the Covenant did not even raise an arguable issue under Irish law. The author notes that the State party has not changed the law so that the courts could give effect to the Committee's Views and provide an effective remedy. On the contrary, the Government opposed the author's applications to the courts at all levels, and actually sought costs against him for doing so. The Supreme Court's determination that the Covenant cannot prevail over convictions pursuant to the Offences Against the State Act means there is no effective remedy for the violation and its continuing effects.

3.4 He also claims that the State party has again violated, or continues to violate, article 26, both alone and in conjunction with article 2. This is as he is still suffering continuing effects, that is to say imprisonment further to a conviction in force, of the unreasoned and unjustified decision to try him before the Special Criminal Court. His conviction remains in effect and he has been afforded no remedy. He relies on *Pauger v. Austria* (No. 2),^{7/} where the Committee found a repeat violation of article 26 arising out of essentially the same facts as it had already found to constitute discrimination in the first case.

Issues and proceedings before the Committee

4.1 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 the communication is admissible under the Optional Protocol to the Covenant.

4.2 As to the author's claims that he is a victim of a violation of articles 2 and 26 as a result of the failure of the State party to provide him with an effective remedy, the Committee notes that this claim is not based on any new factual developments related to the author's rights under the Covenant, beyond his so far unsuccessful attempt to obtain a remedy that he would consider effective in respect of a violation of the Covenant already established by the Committee. In the circumstances, the Committee considers that the author has no claim under the Covenant that would go beyond what the Committee has already decided in the author's initial communication to it. This part of the communication is therefore inadmissible under articles 1 and 2 of the Optional Protocol.

4.3 As to the author's arguments that the State party continues to send individuals for trial before the

Special Criminal Court, in breach of article 26, without providing appropriate justification for such an action, the Committee observes that this claim is in the nature of an *actio popularis*, relating as it does to further actions taken by the State party in respect of third parties rather than the author himself. It follows that the author is not personally a victim of these new alleged violations of the Covenant complained of, and this portion of the claim is inadmissible under article 1 of the Optional Protocol.

5. The 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 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. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

Notes

1/ Following that direction, he was convicted and sentenced to two terms of 12 years and one term of 5 years' imprisonment, all running from July 1994. His appeal against conviction and sentence was dismissed.

2/ Communication 819/1998, para. 12.

3/ Ibid.

4/ No substantive reply was ever received to this letter.

5/ Article 29 (3) provides: "Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States."

6/ *A. v. Australia* (Communication No. 560/1993, Views adopted on 4 March 1997), *Kelly v. Jamaica* (Communication No. 537/1993, Views adopted on 17 July 1996), *Ex-Philibert v. Zaire* (Communication No. 90/1981, Views adopted on 21 July 1983), *Massiotti v. Uruguay* (Communication No. 25/1978, Views adopted on 26 July 1982).

7/ Communication No. 716/1996, Views adopted on 25 March 1999.