HUMAN RIGHTS COMMITTEE

Kolanowski v. Poland

Communication No. 837/1998

6 August 2003

CCPR/C/78/D/837/1998

ADMISSIBILITY

Submitted by: Janusz Kolanowski

Alleged victim: The author

State party: Poland

Date of communication: 22 November 1996 (initial submission)

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

Meeting on 6 August 2003

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Janusz Kolanowski, a Polish citizen, born on 13 July 1949. He claims to be a victim of a violation by Poland **(1)** of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted:

2.1 The author has been employed in the Polish police (formerly the Civic Militia) since 1973. In 1975, he completed the School for Non-commissioned Officers of the Police in Pila. He obtained a doctoral degree in "Sciences of Physical Culture" in 1991.

2.2 On 7 January 1991, the author requested the Chief Commander of the Police to appoint him to the rank of officer in the police. His request was denied on 22 February 1991, since he lacked the required "officer" training to be appointed to that rank. The author appealed this decision before the Minister of Internal Affairs, arguing that article 50, paragraph 1, of the Police Act (PA) only required professional training rather than officer's training for policemen with a higher education degree.

2.3 On 24 April 1991, the author had a conversation with the Under-Secretary of State in the Ministry of Internal Affairs concerning his appointment to the higher rank. In a memorandum reflecting the conversation, the Under-Secretary of State expressed his approval for the author's appointment to the rank of an *aspirant*, a transitional rank between that of non-commissioned officers and the rank of officer. However, this approval was annulled by the Chief Commander of the Police on 20 August 1991, on the basis that the author's appointment to the "aspirant rank" by means of an exceptional procedure was unjustified.

2.4 By letter of 26 August 1991 to the General Commander of the Police in Warsaw, the author appealed the rejection of his appointment. On 28 August 1991, he sent a similar complaint to the Under-Secretary of State in the Ministry of Internal Affairs. In his response, dated 16 September 1991, the General Commander of the Police once again informed the author that he did not have the required officer's training. On 29 June 1994, the Minister of Internal Affairs refused to institute proceedings with respect to the rejection of the author's appointment to the aspirant rank, which was not considered an administrative decision within the meaning of article 104 of the Code of Administrative Procedure (CAP).

2.5 On 25 August 1994, the Ministry of Internal Affairs rejected another motion of the author for appointment to the aspirant rank dated 19 July 1994. After the author had unsuccessfully filed an objection to this decision with the Ministry of Internal Affairs, he lodged a complaint with the High Administrative Court in Warsaw on 6 December 1994, challenging the non-delivery of an administrative decision on his appointment. On 27 January 1995, the Court dismissed the complaint, as the refusal to appoint the author to the higher rank was not an administrative decision.

2.6 By letter of 1 March 1995 addressed to the High Administrative Court, the author complained that the Court had failed to give the reasons and the legal provisions on which its decision to dismiss his complaint was based. This motion was rejected by the Court on 14 March 1995. The author subsequently sent a letter to the Minister of Justice, accusing the judges who had decided on his complaint of "perversion of justice". On 30 March 1995, the President of the High Administrative Court, to whom the letter had been forwarded by the Ministry of Justice, informed the author that, while no grounds existed for reopening his case, he was free to lodge an extraordinary appeal against the Court's decision of 27 January 1995.

2.7 On 11 July 1995, the author requested the Polish Ombudsman to lodge an extraordinary appeal with the Supreme Court, with a view to quashing the decision of the High Administrative Court. By letter of 28 August 1995, the Ombudsman's Office informed the author that its competence to lodge an extraordinary appeal was limited to alleged violations of citizens' rights and was

subsidiary in that it required a prior unsuccessful request to an organ with primary competence to lodge an extraordinary appeal with the Supreme Court. The Ombudsman denied the author's request, since it failed to meet these requirements.
2.8 The author then asked the Ombudsman to forward his request to the Minister of Justice. On 13 November 1995, he sent a copy of the request to lodge an extraordinary appeal with the Supreme Court to the Minister of Justice, in the absence of any reaction from the Ombudsman. At the same time, he requested reinstatement to the previous condition, arguing that the expiry of the six-month deadline to appeal the Court's decision of 27 January 1995 could not be attributed to any failure on his part. On 20 February 1996, the Ministry of Justice denied the request to lodge an extraordinary appeal, since the six-month deadline had already expired at the time of the submission of the request (16 November 1995) and because there was no basis for the Minister to act, as the case raised no issues affecting the interests of the Republic of Poland.

2.9 On 4 March 1996, the author asked the Ombudsman to reconsider his request to submit an extraordinary request to the Supreme Court, arguing that the delay in handling his first request of 11 July 1995 had caused the expiry of the six-month deadline. In subsequent letters, he reiterated doubts over the legality of the examination of his complaint by the High Administrative Court. In his reply, dated 2 September 1996, the Ombudsman rejected the request. He warned the author that his accusations against the judges of the High Administrative Court might be interpreted as constituting a criminal offense.

2.10 In parallel proceedings, the author had been dismissed from police service in 1992, but was reinstated following a decision of the High Administrative Court of 18 August 1993, declaring the dismissal null and void. In 1995, he was dismissed a second time from police service. By decision of 8 May 1996, the High Administrative Court upheld the dismissal, apparently because the author had failed to comply with service discipline. Appeal proceedings against this decision were still pending at the time of the submission of the communication.

The complaint:

3.1 The author claims to be a victim of violations of articles 14, paragraph 1, and 26 of the Covenant, as he was denied access to the courts, on the basis that the refusal to appoint him to the rank of an aspirant was not regarded as an administrative decision and therefore not subject to review by the High Administrative Court.

3.2 He argues that his complaint against the refusal of appointment and the non-delivery of an administrative decision involves a determination of his rights and obligations in a suit at law, since article 14, paragraph 1, must be interpreted broadly in that regard. Moreover, he claims that the bias shown by the judges of the High Administrative Court and the fact that he was deprived of the possibility to lodge an extraordinary appeal with the Supreme Court, either through the Minister of Justice or the Ombudsman, since the Ombudsman's Office had failed to process his request in a timely manner, constitute further violations of article 14, paragraph 1.

3.3 The author contends that the delivery of administrative decisions is required in similar situations, such as in cases of deprivation or lowering of military ranks of professional soldiers or

when an academic degree is granted by the faculty council of a university. Since soldiers and academic candidates can appeal such decisions before the courts, the fact that such a remedy was not available to him is said to constitute a violation of article 26.

3.4 The author claims that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication:

4.1 By *note verbale* of 22 June 1999, the State party submitted its observations on the communication, challenging both admissibility and merits. While not contesting exhaustion of domestic remedies, it submits that the communication should be declared inadmissible *ratione temporis*, insofar as it relates to events which took place before the entry into force of the Optional Protocol for the State party on 7 February 1992.

4.2 Moreover, the State party considers the author's claim under article 26 of the Covenant inadmissible for lack of substantiation. In particular, any comparison between the deprivation and lowering of military ranks of professional soldiers, which is made in form of an administrative decision, under § 1 of the Ordinance of the Minister of Defense of 27 July 1992, and (internal) decisions taken under the provisions of the Police Act is inadmissible, given the limited application of § 1 of the Ordinance to exceptional cases only. Similarly, no parallel can be drawn to the granting of an academic degree by administrative decision, a matter which is different from the refusal to appoint someone to a higher service rank.

4.3 The State party submits that the delivery of administrative decisions is subject to the existence of legislative provisions which require the administrative organ to issue such a decision. For example, the delivery of an administrative decision is explicitly required for the establishment, alteration or termination of labour relationships in the Bureau of State Protection (UOP). **(2)**However, this rule only applies to appointments and not the refusal to appoint UOP officers to higher service ranks. A landmark judgment of 7 January 1992 of the Constitutional Court holds that the provisions of the Border Guard Act of 12 October 1990, which exclude the right to trial in cases about service relationships of Border Guard officers, are incompatible with arts. 14 and 26 of the Covenant. The State party argues that this ruling is irrelevant to the author's case, since the contested provisions of the Border Guard Act concerned external service relationships, which are subject to special legislation requiring the delivery of an administrative decision.

4.4 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the State party submits that every national legal order distinguishes between acts which remain within the internal competence of administrative organs and acts which extend beyond this sphere. The refusal to appoint the author to the rank of an 'aspirant' is of purely internal administrative character, reflecting his subordination to his superiors. As internal acts, decisions concerning appointment to or refusal to appoint someone to a higher service rank cannot be appealed before the courts, but only before the superior organs to which the decision-making organ is accountable.

4.5 The State party emphasizes that article 14, paragraph 1, guarantees the right of everyone to a

fair trial in the determination of his or her rights and obligations in a suit at law. Since this provision essentially relates to the determination of *civil* rights and obligations, the present case falls outside the scope of article 14, paragraph 1, being of purely administrative character. Moreover, the State party argues that the author's complaint against the refusal to appoint him to a higher service rank bears no relation to the determination of a *right*, in the absence of an entitlement of policemen or other members of the uniformed services to request such appointment as of *right*.

Comments by the author:

5.1 By letter of 15 November 1999, the author responded to the State party's observations. He contends that the relevant events took place after the entry into force of the Optional Protocol for Poland on 7 February 1992, without substantiating his contention.

5.2 The author insists that the refusal to appoint him to the rank of an aspirant constituted an administrative decision, citing several provisions of administrative law he considers pertinent. He argues that there is no basis in Polish law which would empower State organs to issue internal decisions. By reference to article 14, paragraph 2, of the Police Act, the author submits that it follows from the subordination of the Chief Commander of the Police to the Minister of Internal Affairs that the Chief Commander was obliged to follow the "order" of the Under-Secretary of State in the Ministry of Internal Affairs to appoint him to the higher service rank. The refusal to appoint him to that rank was also illegal in substance, since he fulfilled all legal requirements for such appointment.

5.3 With regard to the State party's argument that his claim under article 26 is unsubstantiated, the author submits that, even though the special provisions concerning the deprivation and lowering of military ranks of professional soldiers and the granting of academic degrees, which are made by administrative decision, are not applicable to his case, the legislation precluding policemen from appealing decisions on their appointment or non-appointment to a higher service rank is in itself discriminatory.

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

6.2 The Committee has ascertained that the same matter is not being and has not been examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol, and that the author has exhausted domestic remedies, in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

6.3 The Committee takes note of the State party's argument that the communication is inadmissible insofar as it relates to events which took place before the entry into force of the Optional Protocol for Poland on 7 February 1992. Under its established jurisprudence, the Committee cannot

consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. The Committee notes that the author first requested to be promoted in 1991, i.e. prior to the entry into force of the Optional Protocol in respect of the State party. Although the author continued after the entry into force of the Optional Protocol with proceedings to contest a negative decision to his request, the Committee considers that these proceedings in themselves do not constitute any potential violation of the Covenant. However, the Committee notes that subsequent to the entry into force of the Optional Protocol in respect of the State party the author initiated a second set of proceedings aiming at his promotion (see paragraph 2.5) and that any claims related to these proceedings are not inadmissible *ratione temporis*.

6.4 As to the author's claims under article 14, paragraph 1, the Committee notes that they relate to the author's efforts to contest a negative decision on his request to be promoted to a higher rank. The author was neither dismissed nor did he apply for any specific vacant post of a higher rank. In these circumstances the Committee considers that the author's case must be distinguished from the case of *Casanovas v. France* (Communication 441/1990). Reiterating its view that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties, the Committee considers that the procedures initiated by the author to contest a negative decision on his own request to be promoted within the Polish police did not constitute the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Consequently, this part of the communication is incompatible with that provision and inadmissible under article 3 of the Optional Protocol.

6.5 In relation to the alleged violations of article 26, the Committee considers that the author has failed to substantiate, for purposes of admissibility, any claim of a potential violation of article 26. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

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

[Done 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. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, 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. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

Pursuant to Rule 85 of the Committee's rules of procedure, Mr. Roman Wieruszewski did not participate in the adoption of the views.

Notes

1. The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 18 June 1977 and 7 February 1992.
2. See § 33 of the Ordinance of the Prime Minister of 10 January 1998 concerning the service of officers of the UOP.