YL v Canada, Admissibility, Communication No 112/1981, Communication No R.25/112, UN Doc CCPR/C/27/D/112/1981, UN Doc CCPR/C/27/D/R.25/112, IHRL 3643 (UNHRC 1986), 8th April 1986, Human Rights Committee [UNHRC]

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Parties: YL (Canada [ca])
Canada

Judges/Arbitrators: Andrés Aguilar; Néjib Bouziri; Joseph AL Cooray; Vojin Dimitrijevic; Bernhard Graefrath; Rosalyn Higgins; Rajsoomer Lallah; Andreas V Mavrommatis; Anatoly P Movchan; Birame Ndiaye; Torkel Opsahl; Fausto Pocar; Julio Prado Vallejo; Alejandro Serrano Caldera; Christian Tomuschat; S Amos Wako; Adam Zielinski

Procedural Stage: Admissibility

Subject(s):

Right to fair trial — Exhaustion of local remedies

Core Issue(s):

Whether proceedings regarding a military pension before an administrative tribunal amounted to a ‘suit at law’ for the purposes of Article 14(1) of the International Covenant on Civil and Political Rights (‘ICCPR’).

Whether a person was required to exhaust a remedy for the purposes of admissibility under the Optional Protocol to the International Covenant on Civil and Political Rights if he/she was not informed of the availability of the remedy by the state party.

Facts

F1 On 1 July 1967 YL was discharged from the Canadian army after serving 19 years. He was 36 years old at the time and was deemed to be suffering from mental illnesses which rendered him unfit for service.

F2 Prior to his dismissal, he had applied for a disability pension but his application was denied by the Canadian Pension Commission ('Commission') on 17 July 1967. The Commission held that there was no nexus between his alleged disability and military service as required under the Pension Act, 1952 (Canada). His appeals failed.

F3 Following amendments to the Pension Act in 1971, he submitted three new applications for a disability pension but each application was denied by the Commission. His appeals failed.

F4 YL argued that the proceedings before the Pension Review Board ('Board') were incompatible with his rights under Article 14(1) of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR'). He submitted that the Board was not an independent or impartial tribunal because it was constituted by public servants and members of the government.

F5 Canada argued that the communication was inadmissible because the proceedings before the Board did not fall within the scope of Article 14(1) of the ICCPR; they were not a 'suit at law' as required under that provision.

F6 In response to a request for further information by the UN Human Rights Committee ('HRC'), Canada clarified that the relationship between soldiers and the state was a question of public law. The engagement of members of the armed forces by the state was regulated by a statutory regime.

F7 Canada also argued that YL had failed to exhaust local remedies.

Held

H1 Article 14(1) of the of the ICCPR was limited to criminal proceedings and any 'suit at law'. (paragraph 9.1)

H2 The question of whether a set of proceedings amounted to a 'suit at law' depended on the rights in question or the forum in which it was heard, rather than on the public or private status of the parties to the proceedings. (paragraph 9.2)

H3 Accordingly each communication under Article 14(1) had to be assessed individually to determine whether it fell within the ambit of that provision of the ICCPR. (paragraph 9.2)

H4 YL had initiated proceedings before the Commission, the Entitlement Board, and the Board. He was entitled to appeal against the negative decisions of those bodies to the Federal Court of Appeal for review. Therefore the communication was inadmissible as he had failed to exhaust local remedies. (paragraph 9.4)

H5 Moreover the Federal Court Act (Canada) governing the conduct of judicial proceedings contained relevant provisions to ensure he would be guaranteed the right to a fair hearing. (paragraph 9.5)

H6 The communication was inadmissible. (paragraph 10)

H7 Messrs Graefrath, Pocar, and Tomuschat in a joint separate opinion: The communication was inadmissible. As YL was not informed of his right to appeal against that decision to the Federal Court, YL was not responsible for his failure to exhaust available domestic remedies. (paragraph 2)

H8 The relationship between a Canadian serviceman and the state contained many complex

elements which distinguished that relationship from an ordinary contract of employment. (paragraph 3)

H9 The Board was comprised of members of the executive exercising administrative powers, and was very different to an ordinary court. (paragraph 3)

H10 These differences meant that the proceedings were not 'suits at law' for the purposes of Article 14(1), so the communication was inadmissible for that reason. (paragraph 3)

Date of Report: 31 March 2010

Reporter(s): Alexander Pung; Castan Centre for Human Rights Law

Analysis

A1 The majority did not ultimately decide whether the proceedings before the pension boards were 'suits at law', as they decided the communication was inadmissible for failure to exhaust local remedies. However they seemed to hint that the proceedings were in fact 'suits at law'.

A2 The minority found that the communication was not inadmissible for a failure to exhaust local remedies, as YL had not been informed of the availability of judicial review. Generally the HRC has held that ignorance of the law in such circumstances is no excuse. See *APA v Spain*, UN Doc CCPR/C/50/D/433/1990, *CP and MP v Denmark*, UN Doc CERD/C/46/D/5/1994, and *Barbaro v Australia*, UN Doc CERD/C/51/D/7/1995. One is only excused from exhausting remedies in the case of ignorance if the cause of that ignorance is somehow imputable to the state: see *Griffin v Spain*, UN Doc CCPR/C/53/D/493/1992 and *Muhonen v Finland*, UN Doc CCPR/C/24/D/89/1981.

A3 The minority found that the proceedings were not suits at law. They focused on the nature of the forum in which the proceedings were heard, and on the nature of the relationship between the state and its soldiers as defined under Canadian law. The majority signalled a broader and preferable approach in focusing on the nature of the tribunal *or* the nature of the rights at issue.

A4 On the complex issue of a suit at law, see, eg, General Comment no 32, UN Doc CCPR/C/GC/32, UN Human Rights Committee, 2007, *Casanovas v France*, UN Doc CCPR/C/51/D/441/1990, *JL v Australia*, UN Doc CCPR/C/45/D/491/1992, *Deisl v Austria*, UN Doc CCPR/C/81/D/1060/2002, *Kolanowski v Poland*, UN Doc CCPR/C/78/D/837/1998, *Kibale v Canada*, UN Doc CCPR/C/93/D/1562/2007, *Zundel v Canada*, UN Doc CCPR/C/89/D/1341/2005, and *Kazantzis v Cyprus*, UN Doc CCPR/C/78/D/972/2001.

Date of Analysis: 10 November 2010
Analysis by: Sarah Joseph; Castan Centre for Human Rights Law

Instruments cited in the full text of this decision:

International

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Articles 14(1), 26,53

Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Article 2

Provisional Rules of Procedure, UN Doc CCPR/C/3Rev1, UN Human Rights Committee, 1979, Rule 86

Domestic

Pension Act, 1952 (Canada)

Federal Court Act (Canada), Article 28(1)

Cases cited in the full text of this decision:

Canadian domestic courts

War Amputations of Canada v Pension Review Board, (1975) CF 447

To access full citation information for this document, see the Oxford Law Citator record

Decision - full text

Decision on Admissibility

1 . The author of the communication (initial letter dated 7 December 1981 and further letters dated 26 June 1982, 27 February 1983, 10 June 1983, 13, 14, 19 and 20 June 1984, 9 December 1984, 6 and 30 January 1985, 8 and 14 February 1985 and 27 May 1985), Y. L., is a Canadian citizen, living at present in Cowansville, Province of Quebec, Canada, alleging that he is a victim of a breach by Canada of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. The main facts underlying the author's claims are as follows:

2.1 . On I July 1967, at the age of 36, the author was dismissed from the Canadian Army after 19 years of service. The competent authorities alleged that he suffered from mental disorders. Requests by the author for more specific information about the medical diagnosis were repeatedly declined by the Army.

2.2 . Even before he had been officially discharged, the author . applied for "disability" pension. The Canadian Pension Commission rejected this request by a decision of 17 July 1967. The Commission held that the author's disability neither arose out of, nor was directly connected with, his military service, as required by the Pension Act (1952). On appeal, this decision was confirmed on 31 March 1969.

2.3 . After the Pension Act was amended in 1971, the author renewed his request for a pension. Again, he was unsuccessful. Two consecutive applications to the Canadian Pension Commission were rejected. As a next step in the proceedings, the author applied to an Entitlement Board of the Commission, which, on 9 November 1977, also gave a negative decision. Finally, the author appealed to the Pension Review Board, which, after a hearing on 10 July 1979, confirmed the earlier rulings in its decision of 15 August 1979. The author, who had been represented before the Pension Review Board by Maitre R. A. Pinsonnault, c.r., a member of the Bureau of Pensions Advocates (a government agency made up of civil servants), was not provided with a copy of the Board's decision. Instead, as the State party explained, a copy was transmitted to his lawyer with the indication that it was up to him to decide whether he should show the text to his client. The author did not receive the full text of the decision until January 1983.

2.4 . Since the author had never had access to his medical records, he asked to be provided with all relevant information after his appeal had been definitively rejected. On 7 December 1979, 270 pages of documents were sent to him. However, the relevant medical information had been excluded. Some elements of the medical file were later made available to the author in January 1983, after he had submitted the communication to the Human Rights Committee. To date, however, the author has not had the opportunity to see his medical dossier in its entirety. All his applications to that effect were unsuccessful.

3.1 . The author now challenges the proceedings that took place before the Pension Review Board as violating guarantees under article 14, paragraph 1, of the Covenant. He maintains that for several reasons he was not grantees "a fair public hearing by a competent, independent and impartial tribunal" in the sense contemplated by that provision. He claims that, first of all, he should have been informed in detail of the exact nature of the mental disease from which he was alleged to be suffering. In addition, he states that he was not allowed to attend the hearing before the Board. His lawyer, who had been appointed and paid by the Canadian Government, also refused to discuss fully with the author the medical aspects of the case. Finally, the author asserts that the Board does not qualify as an independent and impartial tribune I since it is made up of civil servants of the executive branch of government.

3.2 . The author claims that the refusal to grant him access to his medical file amounts to a violation of article 26 of the Covenant.

4 . The Canadian Government requests that the communication be declared inadmissible. As far as the proceedings before the Pension Review Board are concerned, it contends primarily that the complaints of the author are outside the scope of application of the Covenant *ratione materiae* because those proceedings did not constitute a "suit at law" as envisaged under article 14, paragraph 1, of the Covenant. In addition, and also with regard to the alleged violation of a right to access to the complete personal dossier, it claims that domestic remedies have not been exhausted. It states that the decision of the Pension Review Board could have been challenged before the Federal Court of Appeal, under article 28 (1) of the Federal Court Act. Finally the Government rejects as unfounded the author's objections to the proceedings before the Pension Review Board.

5 . The Working Group of the Human Rights Committee, meeting during the Committee's twenty-third session on 9 November 1984, considered that, despite the detailed information provided by the author and by the State party, the Committee did not yet have at its disposal all the legal and factual elements required for its decision on the admissibility of the communication. In particular, it considered that the decision might require a finding as to whether the claim which the author pursued, in the last instance before the Pension Review Board vas a "suit at law" within the meaning of article 14 paragraph 1, of the Covenant. The Working Group of the Committee therefore requested the author and the State party to respond to the best of their abilities, to the following questions:

(a) How does Canadian domestic law classify the relationship b*etween a member of the Army and the Canadian State? Are the rights and obligations deriving from such a relationship considered to be civil rights and obligations or rights and obligations under public law?*

(b) *Are there different categories of civil servants? Does Canada make a distinction between a statutory regime (under public law) and a contractual regime (under civil law)?*

(c) *Is there a distinction, in Canadian domestic law, between persons employed by private employers under a labour contract and persons employed by the Government?*

(i) *Has any decision the Pension Review Board ever been challenged before the Federal Court of Appeal?*

(i i) *What has been the outcome of such proceedings, if any?*

(iii) *Do decisions rendered by the Pension Review Board explicitly mention that they may be challenged before the Federal Court of Appeal?*

(i v) *Did the decision of the Pension Review Board of 15 August 1979 in the present case contain such an indication?*

(v) *Did the counsel appointed by the Government of Canada to protect the author's interests know that the remedy provided for in article 28 (1) of the Federal Court Act could be resorted to in the proceedings under consideration?*

6.1 . In its submission of 22 January 1985, in reply to the Committee's interim decision, the State party explained that within the Canadian legal system the relationship between a member of the armed forces and the Crown was classified as a matter of public law. Soldiers were placed under a statutory regime as opposed to a contractual arrangement. This meant, *inter alia,* that members of the armed forces could not recover their pay through the ordinary courts.

6.2 . In regard to the actual exercise of the remedy ranted under article 28 (1) of the Federal Court Act, the State party points out that, since 1970, 10 decisions of the Pension Review Board have been the subject of applications for review. Six of those appeals had been referred to the Federal

Court of Appeal in 1984 and were still pending, but in one case (*War Amputations of Canada v. Pension Review Board* [1975] C.F. 447) a decision had been handed down in 1975.

6.3 . In addition, the State party states that Maitre R. A. Pinsonnault, c.r., who was representing the author in the proceedings before the Pension Review Board, was well aware of the remedy under article 28 (1) of the Federal Court Act. As to the reason why Maitre Pinsonnault had not suggested that the author avail himself of that remedy, the State party points out that the members of the Bureau of Pensions Advocates are not entitled to represent parties before the Federal Court of Appeal.

7.1 . Responding to the interim decision of the Committee, the author transmitted a letter from the National Defence Headquarters, dated 7 February 1985, in which it was indicated that the rights and obligations of the members of the armed forces "relate to public law as opposed to private civil law".

7.2 . Concerning the remedy provided for under article 28 (1) of the Federal Court Act, the author furnished the Committee with the letter dated 15 August 1979, by which the Pension Review Board itself informed him of the outcome of the proceedings before that body. As to the legal force of the decision of *15* August 1979 and as to available remedies, the letter contained a paragraph which read as follows:

It is to be noted that the decisions of the Board are final and enforceable for the purposes of the Pension Act. However, the Pension Review Board may, if new facts are brought to its attention or if it discovers an error in the exposition of the facts or in the interpretation of a rule of law, quash or amend that decision.

7.3 . in letters which the author received from Maitre Pinsonnault (dated 22 August 1979) and which his lawyers received from the Chief Pension Advocate of the Bureau of Pensions Advocates (dated 17 September 1979) after the final decision of Pension Review Board, no mention was made of the possibility of an appeal to the Federal Court of Appeal. Both of these letters confined themselves to discussing the possibilities of reopening the proceedings before the Pension Review Board.

8 . Before considering the merits of any claim contained in a communication, the Human Rights Committee must determine whether the communication is admissible under the Optional Protocol to the Covenant.

9.1 . With regard to the alleged violation of the guarantees of "a fair and public hearing by a competent, independent and impartial tribunal established by law", contained in article 14, paragraph 1, of the Covenant, it is correct to state that those guarantees are limited to criminal proceedings and to any "suit at law". The latter expression is formulated differently in the various language texts of the Covenant and each and every one of those texts is, under article 53, equally authentic.

9.2 . The *travaux preparatoires* do not resolve the apparent discrepancy in the various language texts. In the view of the Committee, the concept of a suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.

9.3 . In the present communication, the right to a fair hearing in relation to the claim for a pension

by the author must be looked at globally, irrespective o@ the different steps which the author had to take in order to have his claim for a pension finally adjudicated.

9.4 . The Committee notes that the author pursued his claim successively before the Canadian Pension Commission, an Entitlement Board of the Commission and, finally, the Pension Review Board. It is clear from the observations made by the State party on the author's communication that the Canadian legal system subjects the proceedings in those various bodies to judicial supervision and control, because the Federal Court Act does provide the possibility of judicial review in unsuccessful claims of this nature. It would be hazardous to speculate on whether that Court would or would not have, first, quashed the decision of the Board on the grounds advanced by the author and, secondly, directed the Board to give the author a fair hearing on his claim. The fact that the author was not advised that he could have resorted to judicial review is irrelevant in determining the question whether the claim of the author was of a kind subject to judicial supervision and control. It has not been claimed by the author that this remedy would not have complied with the guarantees provided in article 14, paragraph 1, of the Covenant. Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

9.5 . In the view of the Committee, therefore, it would appear that the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.

10 . The Committee, therefore, concludes that the author has no claim under article 2 of the Optional Protocol and decides:

The communication is inadmissible.

Appendix
Individual Opinion
Submitted by Messrs. Bernhard Graefrath, Fausto Pocar and Christian Tomuschat concerning the admissibility of communication No. 112/1981, Y. L. v. Canada.

Mr Bernhard Graefrath, Mr Fausto Pocar and Mr Christian Tomuschat

1 . We concur in the view expressed by the majority of the Committee that the communication is inadmissible. But we do not share the reasons on which that view is based.

2 . The majority view stresses in paragraph 9.4 that the Canadian legal system, in accordance with article 14, paragraph 1, of the Covenant, provides sufficient protection for a claim of the kind pursued by the author, because an appeal could be made to the Federal Court of Appeal. However, the availability of this legal remedy cannot be held against the author. In the letter by which the Pension Review Board informed the author of its decision as being final and enforceable, no mention was made of the possibility of such an appeal to a judicial body. Moreover, the lawyers who acted for the author and who are civil servants specifically appointed to represent claimants before the Pension Review Board did not advise the author accordingly. Under these circumstances, Canada is estopped from asserting that either, procedurally, the author has failed to exhaust local remedies or that, substantively, the requisite guarantees under article 14, paragraph 1, of the Covenant have been complied with.

3 . However, the dispute between the author and Canada does not come within the purview of article 14, paragraph 1, of the Covenant.

The guarantees therein contained apply to the determination both of any criminal charge and of rights and obligations in a suit at law. Whereas this phrase in its English and Russian versions refers to proceedings, the French and the Spanish texts rely on the nature of the right or obligation which constitutes the subject-matter of the proceedings concerned. In the circumstances of the present case, there is no need to clarify the common meaning to be given to the different terms used in the various languages which, under article 53 of the Covenant, are equally authentic. It is quite clear from the submissions of both the State party and the author that in Canada the relationship between a soldier, whether in active service or retired, and the Crown has many specific features, differing essentially from a labour contract under Canadian law. In addition, it has emerged that the Pension Review Board is an administrative body functioning within the executive branch of the Government of Canada, lacking the quality of a court. Thus, in the present case, neither of the two criteria which would appear to determine conjunctively the scope of article 14, paragraph 1, of the Covenant is met. It must be concluded, therefore, that proceedings before the Pension Review Board, initiated with a view to claiming pension rights, cannot be challenged by contending that the requirements of a fair hearing as laid down in article 14, paragraph 1, of the Covenant have been violated,

Bernhard Graefrath

Fausto Pocar

Christian Tomuschat