ZP v Canada, Admissibility, Communication No 341/1988, UN Doc CCPR/C/41/D/341/1988, IHRL 2397 (UNHRC 1991), 11th April 1991, Human Rights Committee [UNHRC]

Date: 11 April 1991
Content type: International Court Decisions
Jurisdiction: United Nations Human Rights Committee [UNHRC]

Citation(s): Communication No 341/1988 (Application No)
UN Doc CCPR/C/41/D/341/1988 (Official Case No)
IHRL 2397 (UNHRC 1991) (OUP reference)
Product: Oxford Reports on International Law [ORIL]
Module: International Human Rights Law [IHRL]

Parties: ZP (Yugoslavia (historical) [yucs])
Canada

Judges/Arbitrators: Francisco José Aguilar Urbina; Nisuke Ando; Miss Christine Chanet; Vojin Dimitrijevic; Omran El Shafei; János Fodor; Kurt Herndl; Rosalyn Higgins; Rajsoomer Lallah; Andreas V Mavrommatis; Rein A Myullerson; Birame Ndiaye; Fausto Pocar; Julio Prado Vallejo; Waleed Sadi; Alejandro Serrano Caldera; S Amos Wako; Bertil Wennergren

Procedural Stage: Admissibility

Subject(s):

Legal representation, right to

Core Issue(s):

Whether the refusal of legal aid to a person appealing a rape conviction was a breach of Article 14(3)(d) of the International Covenant on Civil and Political Rights ('ICCPR').

Whether the fact that the rape trial was not held in public was a breach of Article 14(1) of the ICCPR.

Facts

F1 In 1978 and 1979 ZP was charged with two counts of rape and sentenced to three and seven years' imprisonment. On 30 April 1979 and 29 February 1980 he was found guilty on each of the charges. His appeals were unsuccessful. He alleged that he was denied the right to a fair trial at first instance and on appeal.

F2 He claimed that the trial judge in his second trial refused his request for a public hearing before a jury.

F3 He also stated that he was denied legal aid to pay for representation during the appeal against his second conviction.

F4 Canada claimed that the communication was inadmissible. It argued that he was denied legal aid during his second appeal because his case was found to lack sufficient merit to justify an appeal.

F5 Canada explained that the second trial was held in private due to reasons of public morals, which often occurred during trials concerning sexual abuse.

Held

H1 The UN Human Rights Committee ('HRC') agreed with Canada that ZP had no right to receive legal aid in respect of one of his appeals as 'the interests of justice' did not require it under Article 14(3)(d) of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR'). (paragraph 5.4)

H2 That part of the communication was inadmissible under Article 2 of the Optional Protocol of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('Optional Protocol'). (paragraph 5.4)

H3 The allegations concerning his right to a public trial under Article 14(1) of the ICCPR were insufficiently substantiated and inadmissible. (paragraph 5.6)

H4 The HRC concluded that the communication was inadmissible under Articles 2 and 3 of the Optional Protocol. (paragraph 6)

Date of Report: 30 December 2009

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

Analysis

A1 Article 14(1) generally requires that a trial should be held in public, but the public can be excluded 'for reasons of public morals'. Canada raised the public morals defence in regard to the holding of proceedings in private, implying that such privacy can almost always be justified in sexual abuse cases. The HRC dealt with this claim cursorily, finding that ZP's claim was not sufficiently substantiated for the purposes of admissibility. It is a shame that the HRC did not discuss in more detail the circumstances in which a trial can be held in camera, a departure from the norm dictated in Article 14(1).

A2 The refusal of legal aid for one of the appeals was justified on the basis that the appeal lacked sufficient merit. The HRC felt that this reason justified the refusal of legal aid, so no breach of Article 14(3)(d) arose. However, it seems that the HRC may take a more lenient approach in the case of appeals by persons sentenced to the death penalty: see *Lavende v Trinidad and Tobago*, UN Doc CCPR/C/61/D/554/1993.

Date of Analysis: 04 January 2011

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 9(2), 14(1), 14(2), 14(3)(a), 14(3)(d), 14(3)(f)

Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Articles 1, 2, 3

Rules of Procedure, UN Doc CCPR/C/3/Rev2, UN Human Rights Committee, 1989, Rule 87

Domestic

Legal Aid Act (Canada)

Cases cited in the full text of this decision:

UN Human Rights Committee

Guesdon v France, UN Doc CCPR/C/39/D/219/1986

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 (first submission dated 12 April 1988 and subsequent correspondence) is Z. P., a Yugoslav citizen formerly residing and employed in Montreal, Canada, at present residing in Yugoslavia. He claims to be the victim of a violation of his human rights by Canada. Although he does not specifically invoke the International Covenant on Civil and Political Rights, it appears from his submissions that his allegations relate to articles 9 and 14 of the Covenant.

The facts as submitted by the author

2.1 The author, a technician in civil engineering, lived in Canada from September 1970 to December 1981, and was employed with a Montreal engineering company as an industrial draftsman. In December 1981, he was deported to Yugoslavia.

2.2 The author was accused of having raped, in 1978 and 1979 respectively, two Canadian women, F. B. and H. R. On 30 April 1979, he was sentenced to three years' imprisonment for the rape of F. B. and on 26 March 1980, he was sentenced to seven years' imprisonment for the rape of H. R. In both instances, Z. P. claimed to be innocent of the charges.

2.3 In the case of F. B., the author was formally charged with rape by the Montreal Urban Community Police on 11 July 1978. Z. P. was assigned to a legal representative, Maître J. C., and asked for a trial by jury. On 20 December 1978, he instead opted for a trial before a single judge. His trial started before the Montreal Court of Assizes (Cour des Sessions de la Paix) on 29 March 1979. On 10 April 1979 he was found guilty as charged and the sentence was pronounced on 30 April 1979. On 8 May 1979, Z. P. applied for leave to appeal against his conviction to the Québec Court of Appeal; two days later, the Court of Appeal granted leave to appeal. On 21 March 1980, the transcript of the proceedings and the evidence before the court of first instance were submitted to the Court of Appeal, which heard the appeal on 19 January 1981 and dismissed it on 13 February 1981. On 13 March 1981, Z. P. sought leave to appeal to the Supreme Court of Canada; the Supreme Court refused leave to appeal on 22 June 1981.

2.4 In the case of H. R., the author was arrested on 25 March 1979 and charged with rape the following day, i.e., three days before the beginning of his trial on the case of F. B. Z. P. was represented by the same lawyer who defended him in the case of F. B., and he again initially asked for a trial by jury. On 23 April 1979, he changed his mind and opted for a trial before a single judge; a trial in camera was ordered at the request of the prosecutor. On 26 April 1979, the author's lawyer, Maître J. C., asked to be removed from the case relating to the rape of H. R., and several lawyers handled later stages of the case.

2.5 On 15 November 1979, Z .P. applied for permission to assume his own representation and entered a plea of not guilty. A lawyer representing the Yugoslav Embassy in Canada acted as his counsel. The case was heard between 15 November 1979 and 28 February 1980; on 29 February 1980, Z. P. was found guilty as charged; sentence was passed on 26 March 1980. On 16 May 1980, the author filed a formal notice of application for permission to appeal against conviction and requested an extension of the deadline as well as a judicial review. His case was heard on 15 September 1980 and dismissed on 26 September 1980. The author then sought leave to appeal to the Supreme Court but his petition was denied on 22 June 1981.

The complaint

3.1 The author claims that he did not have a fair trial in either of the criminal cases against him, and maintains that he is entitled to a re-trial before the Canadian courts.

3.2 In respect to the first rape charge, the author alleges that:

(a) He was found guilty in the absence of conclusive evidence against him;

(b) The trial judge was wrong to admit as evidence testimony concerning a similar act involving H. R., the victim of the second rape charge;

(c) The trial judge was wrong to admit as evidence contradictory statements made by the victim;

(d) The trial judge wrongly interpreted the author's words addressed to F. B. as threats against her;

(e) The judges of the Court of Appeal similarly failed to see that the words deemed as threats against F. B. could not be used as evidence against him, since F.B. was no longer able to tell the court the content of the presumed threats;

(f) Both the trial judge and the judges on the Court of Appeal were wrong to admit as evidence testimony of a friend of F. B., who merely told the court that she had been informed that F. B. had been raped;

(g) Both the court of first instance and the Court of Appeal should have provided him with an interpreter, because of his insufficient mastery of English and French;

(h) The trial judge, at the conclusion of the trial, effectively acted as a "defence lawyer" for F. B., finding the author guilty on the basis of mere "suppositions".

3.3 In respect of the second rape charge, the author alleges that:

(a) He was framed by the police, who arrested him within a minute after H. R. left his apartment. He adds in this context that the police had already arrived in front of the building when H. R. left his flat;

(b) He was arrested for assault but later charged formally with a different offence, namely rape;

(c) The trial judge was wrong to admit as evidence a number of contradictory statements made by H. R.;

(d) The trial judge first misinterpreted and subsequently misused a statement given by H. R. to the effect that the author had used a pretext to lure her into his apartment;

(e) The trial judge was wrong to admit as evidence contradictory statements made by the arresting officer and the doctor who examined H. R. after the offence, once their evidence had been compared with that of H. R.;

(f) Both the court of first instance and the Court of Appeal should have provided him with an interpreter, because of his insufficient mastery of English and French;

(g) The Montreal Office of Legal Aid wrongly refused to provide him with the assistance of a lawyer during the trial and for purposes of preparing the appeal;

(h) The trial judge wrongly accepted as evidence testimony about a similar act involving F. B., the alleged victim of the first rape offence;

(i) He did not have all the court transcripts in his possession, which should have been made available to him free of charge;

(j) The trial judge refused to allow him to be tried in a public hearing before a jury.

The State party's observations

4.1 The State party submits that the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol. It contends that Z. P. did not sufficiently support his allegations with facts to establish prima facie violations of the Covenant and that his claims, referring merely to violations of "the law of Canada and the Human Rights", do not meet the admissibility criteria of article 2 of the Optional Protocol. It further points out that the author in effect seeks a review of the evaluation of facts and evidence before the Canadian courts, and adds, with reference to the Committee's jurisprudence, that the Committee is not competent to review findings of fact made by national tribunals. To this extent, therefore, the State party considers the communication to be inadmissible as incompatible with the provisions of the Covenant.

4.2 In respect of the author's trial in the case of F. B., the State party notes that virtually all of the author's claims raise issues of fact and evidence. Only his claim that the courts did not provide him with an interpreter might conceivably raise issues under article 14, paragraph 3 (f), of the Covenant. The State party affirms, however, that the author failed to support this allegation adequately. It notes that he could have requested the assistance of an interpreter, or that his lawyer could have made such a request on his behalf; however, the records of both trials show that no request for an interpreter was made. Moreover, the court records reveal that the author was perfectly able to follow the proceedings and to express himself in English and/or in French.

4.3 In respect of the trial case of H. R., the State party reiterates its arguments laid out in paragraph 4.2 above in as much as the author's claim about the absence of an interpreter is concerned. As to his claim concerning the lack of legal assistance during the second trial, the State party points out that the author asked to defend himself during his trial in the court of first instance; furthermore, the records reveal that Z. P. was advised by a lawyer by virtue of a legal aid order and that, accordingly, he was given legal assistance in accordance with the Legal Aid Act. The State party therefore concludes that the author is estopped from arguing that he had to defend himself.

4.4 As to the issue of legal assistance for purposes of the appeal in the second trial, the State party explains that the author's request for legal aid was refused in the light of the representations he made to the Legal Aid Board, the evidence presented during the trial and the verdict of the court of first instance. Since the author did not present any facts to the effect that he had any arguable grounds of appeal, the Board concluded that he was not entitled under the Legal Aid Act to receive such aid for the purpose for which he had requested it. The State party adds that article 14, paragraph 3 (d), does not require a hearing in the physical presence of the applicant in order to determine his legal aid entitlements; in the author's case, a telephone conversation sufficed.

4.5 In respect of the claim that the author was unable adequately to prepare his defence owing to the alleged unavailability of relevant court documents, the State party contends that the author is merely complaining of his own omission. In fact, by letter dated 31 August 1981 drafted in adequate French, after he had exhausted his domestic remedies, Z. P. expressed interest in obtaining copies of the court transcripts and the court tapes. The State party submits that if the author had considered it essential for his defence to be in possession of the transcripts, it was his responsibility to request them.

4.6 With regard to the author's claim that he was entitled to a public trial before a jury, the State party notes that Z. P. himself, on 23 April 1979, opted for a trial before a single judge. Furthermore, it point out that article 14, paragraph 1, stipulates that the public may be excluded from all or part of a trial for reasons of morals — a request frequently made and granted in sexual abuse cases — and submits that the author has failed to adduce a single argument in favour of a public trial.

4.7 Finally, in respect of the allegation that there was a contradiction between the charge against the author at the time of the arrest and the charge under which he was tried, the State party submits that both articles 9, paragraph 2, and 14, paragraph 3(a), were complied with, since what matters for legal qualification of the offence is the information contained in the police report prepared after the arrest. Both the application to institute proceedings against Z. P., dated 25 March 1979 (the day of the arrest), and the written information submitted to the judge on 26 March 1979 refer to a rape charge.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, determine whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that many of the author's allegations, both in connection with the case of F. B. and H. R., relate to the evaluation of facts and evidence by the trial judge. The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review alleged errors by the judge in the conduct of a trial, unless it is apparent from the author's submission that the conduct of the trial was clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author has not shown that the conduct of the trials in question suffered from such defects. In this respect, therefore, the author's claims of unfair trials do not come within the competence of the Committee and, in that sense, fall outside the scope of protection provided by article 14, paragraph 1, of the Covenant. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.3 With respect to the claim that the author was denied the services of an interpreter, the Committee finds that Z. P. has failed to substantiate his claim sufficiently, for purposes of admissibility. The material before the Committee shows that the author could express himself in adequate English and French, and that he did not apply for an interpreter during the trial. The Committee reaffirms in this context that the requirement of a fair hearing does not obligate States parties to make the services of an interpreter available ex officio or upon application to a person whose mother tongue differs from the official court language, if the person is capable of expressing himself adequately in the official language. 1/

5.4 In respect of the claim that the author was refused legal aid for his appeal in the case concerning H. R., the case file reveals that the Montreal Legal Aid Board did examine the author's request, but concluded that the interests of justice did not require the assignment of legal aid. Accordingly, the author has not sufficiently substantiated his allegation, for purposes of admissibility, and this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.5 As to the alleged violation of article 14, paragraph 3(b), the Committee notes that the first time the author complained about the unavailability of the trial transcript was over two months after being denied leave to appeal by the Supreme Court. In the circumstances, he is estopped from invoking an ex posto facto violation on his right to adequate time and facilities for the preparation of his defence. The Committee concludes that this part of the communication is inadmissible as an abuse of the right of submission pursuant to article 3 of the Optional Protocol.

5.6 Finally, with regard to the claims of a violation of article 14, paragraph 1 (entitlement to a public hearing), and article 9, paragraph 2, the author has not sufficiently substantiated his allegation, for the purposes of admissibility, and this part of the communication is also inadmissible under article 2 of the Optional Protocol.

6 . The Human Rights Committee therefore decides:

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

(b) This decision shall be communicated to the State party and to the author of the communication.

Footnotes:

1/ See views in communication No. 219/1986, para. 10.2, (Guesdon v. France), adopted on 25 July 1990.