HUMAN RIGHTS COMMITTEE

P.S. v. Denmark

Communication No. 397/1990

22 July 1992

CCPR/C/45/D/397/1990*

ADMISSIBILITY

Submitted by: P.S. (name deleted)

Alleged victims: The author and his son, T.S.

State party: Denmark

Date of communication: 15 February 1990 (initial submission)

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

Meeting on 22 July 1992,

Adopts the following:

Decision on admissibility **/

1. The author of the communication (initial submission dated 15 February 1990 and subsequent submissions) is P.S., a Danish citizen born in 1960. He submits the communication on his own behalf and that of his son, T.S., born in January 1984. The author claims that he and his son are victims of violations by Denmark of articles 14, paragraphs 2 and 3(c), 17, 18, 21, 22, 23, 24, 26 and 27 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author:

2.1 The author married in 1983. In 1986, he and his wife were separated by decision of the County Authorities of North Jutland, which also decided on joint custody of the son. In 1988 the Municipal Court of Varde pronounced the divorce and awarded custody to the mother. The author appealed to the Court of Appeal and claimed custody of his son. On 10 May 1988, the Court of Appeal

confirmed the Municipal Court's judgment in respect of the custody question.

2.2 During the proceedings, a temporary agreement on the right of access was concluded between the author and his exwife; yet, after discovering that the author had converted to the faith of Jehovah's Witnesses, and that he had taken his son to a rally of Jehovah's Witnesses, the mother requested the County Authorities in Odense to decide on her conditions for granting access to T.S., under which the author had to refrain from teaching the faith of Jehovah's Witnesses to his son. In this context, it is noted that under Danish law, the parent who has custody may decide on the child's religious education.

2.3 On 13 October 1988, a meeting was arranged between the author and his exwife; expert advice on child and family matters was given to both parties, in accordance with relevant Danish legislation. Despite this advice, the author refused to refrain from teaching his son the tenets of his religion. He also rejected the mother's suggestion to limit the right of access to visits at the address of the son's paternal grandmother. By letters of 30 November and 11 December 1988, the author requested the County Authorities of Funen to settle the dispute.

2.4 By decision of 13 December 1988, the County Authorities of Funen determined the extent of time father and son were entitled to spend together, and the conditions under which such visits might take place. In this connection, the County Authorities stated:

"Access to T. is granted on condition that T., while visiting his father, is not taught the faith of Jehovah's Witnesses and that T. does not participate in Jehovah's Witnesses' rallies, gatherings, meetings, missions or similar activities".

Under Danish law, it is possible to stipulate exact conditions for the exercise of visiting rights, but only if such conditions are deemed necessary for the wellbeing of the child. In this case, the authorities found that the child was facing a "loyalty crisis" visàvis his parents, and that if no limitations were imposed on the religious influence he was exposed to during his contacts with the father, his normal development might be jeopardized.2.5 On 17 December 1988, the author appealed to the Directorate of Family Affairs, arguing that the decision of the County Authorities constituted unlawful persecution on religious grounds.

2.6 By letter of 7 January 1989, the author notified the County Authorities that his exwife refused to comply with the access arrangements determined by the authorities. To enforce his right of access, he requested the Sheriff's Court (Fogedretten) of Odense to issue an access order. By decision of 3 February 1989, the Court decided to stay the proceedings on the ground that the author was in no position to make a clear and explicit declaration that he would fully comply with the conditions imposed on his right of access, and that the matter was still pending before the Directorate of Family Affairs.

2.7 By interlocutory judgment of 29 June 1989, the Court of Appeal dismissed the author's appeal against the decision of the Sheriff's Court of 3 February 1989, on the ground that the statute of limitations had expired. By the same judgment, the Court of Appeal dismissed another (interlocutory) appeal of the author, which had been directed against a decision on access of the Sheriff's Court of 19 May 1989. The Court of Appeal contended that the claims could not be put

forward under the procedure used by the author.

2.8 On 19 March 1989, the author informed the Danish Minister of Justice of his case. By decision of 30 March 1989, the Directorate of Family Affairs upheld the County Authorities' decision of 13 December 1988 on the right of access. The author then filed a complaint with the Parliamentary Ombudsman.

2.9 On 27 June 1989, the Sheriff's Court of Odense issued yet another order concerning the enforcement of the author's right of access. It argued that, according to the statements of the mother, the author had disregarded the conditions pertaining to the exercise of his right of access during one of T.S.' visits. The Court again suspended the proceedings on the ground that the question of validity of said conditions was still under review by the Court of Appeal.

2.10 In his reply of 1 November 1989 to the author, the Ombudsman acknowledged that the parents' freedom of religion must be taken into consideration, but that this did not exclude consideration of exceptional circumstances, especially where the best interests of the child are concerned, in which case limitations on the exercise of religious freedom could be imposed during contacts with the child. The Ombudsman reiterated that, in the present case, the conditions imposed on the author's right of access should be deemed to be in the best interest of the son. On the other hand, he conceded that the author's freedom of religion must also be taken into consideration, in the sense that only "strictly necessary conditions" could be imposed in this respect. The Ombudsman noticed that the authorities had not found any reason to deny the author contact with the son on account of his being a Jehovah's Witness, even though it was known that the daily life of Jehovah's Witnesses is strongly influenced by their beliefs. Accordingly, the Ombudsman requested the authorities to define exactly the circumstances under which the son's visits might take place.

2.11 On 28 February 1990, after consultations with the author and the mother, the County Authorities formulated the following conditions:

"The right of access shall continue only on condition that the son, during visits to his father, will not be taught the faith of Jehovah's Witnesses. This means that the father will agree not to bring up the subject of Jehovah's Witnesses faith in the company of the child, nor start conversations about this subject. Moreover, the father will agree not to play tapes, show films or read literature about the faith of Jehovah's Witnesses, nor to read the bible or say prayers in conformity with this faith in the presence of the child.

"Another condition of the continued right of access is that the son will not participate in Jehovah's Witnesses' rallies, gatherings, meetings, missions or similar activities. The expression 'or similar activities' means that the son will not be allowed to participate in any other social gatherings ... where texts from the bible are read aloud or interpreted, where prayers are said in conformity with the faith of Jehovah's Witnesses or where literature, films or tapes are presented about the faith of Jehovah's Witnesses".

2.12 On 1 March 1990, the author appealed to the Department of Private Law (the former Directorate of Family Affairs), arguing that he and his son were experiencing continuous persecution and that his rights to freedom of religion and thought had been violated. He submitted another

complaint to the Parliamentary Ombudsman against the decision of the County Authorities. By decision of 10 May 1990, the Department of Private Law upheld the County Authorities' decision of 13 December 1988, as defined on 28 February 1990. It stated, inter alia, that the conditions imposed on the author's right of access were not excessive having regard to his freedom of religion.

2.13 Further submissions from the author reveal that he has continued to petition the authorities. At present, his right to access can only be exercised under supervision, as he has been unwilling to comply with the conditions imposed on him.

The complaint:

3. The author claims violations of:

(a) Article 14, paragraph 2, because his visiting rights allegedly were refused on the mere suspicion that he might do something wrong in the future;

(b) Article 14, paragraph 3(c), as the dispute dates back to August 1986 and has not been settled by the authorities five and a half years later;

(c) Article 17, as the conditions imposed on him by administrative and judicial decisions constitute an unlawful interference with his privacy and family life. On account of said decisions he claims to have been subjected to unlawful attacks on his honour and reputation;

(d) Article 18, because if the authorities had respected its provisions, there would have been no case in the first place;

(e) Articles 21 and 22, as the restrictions to which he and his son are subjected entail violations of the exercise of their rights of peaceful assembly and freedom of association;

(f) Article 23; at no time did the Danish authorities try to protect the family unit;

(g) Article 24, in respect of his son;

(h) Article 26, which is said to follow from the violations of articles 14, paragraphs 2 and 3(c), 18, 21 and 22;

(i) Article 27, which is said to follow from the violation of article 18.

The State party's observations and the author's comments thereon:

4.1 The State party explains the operation of Danish legislation governing separation of spouses, divorce, custody and access to children, and of the relevant administrative and judicial authorities. It adds preliminary comments on the author's grievances.4.2 The State party notes that custody of the son was awarded to the mother, in compliance with Danish legislation and court practice. Accordingly, she has the exclusive right to decide on the son's personal affairs and to act on his behalf. The State party claims that the communication should be declared inadmissible ratione

personae in respect of T.S., on the ground that the author has no standing under Danish law, to act on behalf of his son without the consent of the custodial parent.

4.3 The State party claims that the author has failed to exhaust available domestic remedies. It notes that on 10 May 1990, the Department of Private Law rendered its final decision in respect of the conditions imposed on the author's right of access; with this, only the available administrative procedures were exhausted. Pursuant to section 63 of the Danish Constitutional Act, the author should then have requested from the courts a judicial review of the terms and conditions imposed by the decision.

4.4 The State party also observes that the courts may directly rule on the alleged violations of Denmark's international obligations under the International Covenant on Civil and Political Rights. It concludes that, as the author failed to submit his complaint to the Danish courts, the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol.

4.5 In his comments on the State party's submission, the author states, inter alia, that he does not want to seize the courts because of the unnecessary expenditure of taxpayers' money and for reasons of time and stress. He also expresses his doubts about the effectiveness of a trial in his case.

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, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has taken notice of the State party's contention that the author has no standing to act on behalf of his son, as Danish law limits this right to the custodial parent. The Committee observes that standing under the Optional Protocol may be determined independently of national regulations and legislation governing an individual's standing before a domestic court of law. In the present case, it is clear that T.S. cannot himself submit a complaint to the Committee; the relationship between father and son and the nature of the allegations must be deemed sufficient to justify representation of T.S. before the Committee by his father.

5.3 As regards the author's claims of a violation of articles 14, 21, 22 and 27, the Committee considers that the facts as submitted by the author do not raise issues under these articles. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.4 With regard to the author's allegations of violations of articles 17, 18, 23, 24 and 26, the Committee observes that article 5, paragraph 2(b), of the Optional Protocol precludes it from considering a communication unless it has been ascertained that domestic remedies have been exhausted. In this connection the Committee notes that the author has only exhausted administrative procedures; it reiterates that article 5, paragraph 2(b), of the Optional Protocol, by referring to "all available domestic remedies", clearly refers in the first place to judicial remedies.[1] The Committee recalls the State party's contention that judicial review of administrative regulations and decisions, pursuant to section 63 of the Danish Constitutional Act, would be an effective remedy available to the author. The Committee notes that the author has refused to avail himself of these remedies,

because of considerations of principle and in view of the costs involved. The Committee finds, however, that financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them. Accordingly, the author has failed to meet the requirements of article 5, paragraph 2(b), in this respect.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol;

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

[Done in English, French, Russian and Spanish, the English text being the original version.]

Footnotes

* All persons handling this document are requested to respect and observe its confidential nature.

*/ Made public by decision of the Human Rights Committee.

**/ An individual opinion by Mr. Bertil Wennergren is appended.

1/ Communication No. 262/1987 (R.T. v. France), declared inadmissible on 30 March 1989, para. 7.4.

Appendix

Individual Opinion

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision on communication No. 397/1990 (P.S. v. Denmark)

The author's communication concerns the modalities of contacts with his son Tue, now eight years old, as well as the position of the Danish authorities on this matter since 1986.

The Parliamentary Ombudsman became involved in this matter following a complaint by the author. In his decision of 1 November 1989, the Ombudsman accepted in principle the standpoint of the administrative authorities, namely that limitations on the author's exercise of his religious freedom during his contacts with his son were necessary. Against this background he merely requested the authorities to define the conditions more precisely, particularly with regard to the terms "teach" and "or similar activities". The author claims that the Ombudsman's decision, in conjunction with the administrative decisions in his case, violated his rights under article 18 of the Covenant.

The State party, in its observations, informed the Committee about the Ombudsman's status and functions, but did not address the content of the Ombudsman's decision nor its role in the process. It may well be that the State party deemed the Ombudsman to be a supervisory body who did not participate in the process. However, even if it were true that the Ombudsman's decisions are supervisory decisions and that they are not legally binding as such, they have considerable de facto effects on an administrative process. Had the Ombudsman found that the limitations on the author's exercise of his freedom of religion imposed by the administrative authorities were excessive, he would have informed the administrative authorities and requested them to reconsider their position accordingly. In principle they would have had to comply, as they complied with the decision of 1 November 1989. By endorsing the authorities' standpoint, the Ombudsman de facto prevented them from reconsidering and modifying their standpoint. And the Ombudsman is not independent to such an extent that the State party would not be responsible for his actions.

The [First] Optional Protocol allows "communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant". The author claims that he is a victim of a violation committed by the Ombudsman. Given the effects the Ombudsman's decision must be assumed to have had, I come to the conclusion that said claims may raise issues under the Covenant,first under article 18 but equally under article 19, as the conditions prescribed also limited the author's freedom of expression. There are no remedies available against a decision of the Parliamentary Ombudsman. The communication therefore is, in my opinion, admissible as far as it regards claims directed against the Ombudsman; otherwise I am in full agreement with the Committee's decision. I do however want to add that, had the communication been declared admissible, further attention should have been given to the issue of standing of the author, in respect of his son. I consider that from some points of view the author might be said to have interests that conflict with those of the son, and which might disqualify him from representing his son.