HUMAN RIGHTS COMMITTEE

Fei v. Colombia

Communication No. 514/1992

18 March 1994

CCPR/C/50/D/514/1992*

ADMISSIBILITY

Submitted by: Sandra Fei (represented by counsel)

Alleged victim: The author

State party: Colombia

Date of communication: 22 July 1992 (initial submission)

Documentation references: Prior decision - Special Rapporteur's rule 91 decision, dated 22 September 1992 (not issued in document form)

Date of present decision: 18 March 1994

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The author of the communication is Sandra Fei, of Italian and Colombian citizenship, born in 1957 in Santa Fe de Bogota and currently residing in Basiglio, Italy. She claims to be a victim of violations by Colombia of articles 2, paragraphs 2 and 3, 14, paragraphs 1 and 3 (c), 17, 23, paragraph 4 and 24 of the International Covenant on Civil and Political Rights. She is represented by counsel.

Facts as submitted by the author

2.1 Mrs. Fei married Jaime Ospina Sardi in 1976; in 1977, rifts between the spouses began to emerge, and in 1981 Mrs. Fei left the home; the two children born from the marriage remained with the husband. The author sought to establish residence in Bogota but, as she was unable to obtain

more than temporary employment, finally moved to Paris as a correspondent for the daily newspaper 24 Horas.

2.2 A Colombian court order dating from 19 May 1982 established a separation and custody arrangement, but divorce proceedings subsequently also were instituted by the author before a Paris tribunal, with the consent of her ex-husband.

2.3 Under the Colombian court order of May 1982, the custody of the children was granted provisionally to the father, with the proviso that custody would go to the mother if the father remarried or cohabited with another woman. It further established joint parental custody and provided for generous visiting rights. Mr. Rodolfo Segovia Salas, a senator of the Republic, brother-in-law of Mr. Ospina Sardi and close family friend, was designated as guarantor of the agreement.

2.4 On 26 September 1985, Mrs. Fei's children, during a visit to her mother, were allegedly kidnapped by the father, with the help of three men said to be employees of the Colombian Embassy in Paris, when the author was leaving her Paris apartment. Between September 1985 and September 1988, the author did not have any contact with her children and knew nothing of their whereabouts, as Mr. Segovia Salas allegedly refused to cooperate. The author obtained the good offices of the French authorities and of the wife of President Mitterrand, but these démarches proved unsuccessful. Mrs. Fei then requested the assistance of the Italian Ministry of Foreign Affairs, which in turn asked for information and judicial assistance from the Colombian authorities. The author alleges that the latter either replied in evasive terms or simply denied that the author's rights had been violated. During the summer of 1988, an official of the Italian Foreign Ministry managed to locate the children in Bogota. In September 1988, accompanied by the Italian ambassador to Colombia, the author was finally able to see her two children for five minutes, on the third floor of the American school in Bogota.

2.5 In the meantime, Mr. Ospina Sardi had himself initiated divorce proceedings in Bogota, in which he requested the suspension of the author's parental authority as well as an order that would prohibit the children from leaving Colombia. On 13 March 1989, the First Circuit Court of Bogota (Juzgado Primero Civil del circuito de Bogota) handed down its judgement; the author contends that in essence, the judgement confirmed the terms of the separation agreement reached several years earlier. Mrs. Fei further argues that the divorce proceedings in Colombia deliberately ignored the proceedings still pending before the Paris tribunal, as well as the children's dual nationality.

2.6 Mrs. Fei contends that, since September 1985, she has received, and continues to receive, threats. As a result, she claims, she cannot travel to Colombia alone or without protection. In March 1989, therefore, the Italian Foreign Ministry organized a trip to Bogota for her; after negotiations, she was able to see her children for exactly two hours, "as an exceptional favour". The meeting took place in a small room in Mr. Segovia Salas' home, in the presence of a psychologist who allegedly sought to obstruct the meeting until the very last moment. Thereafter, the author was only allowed to communicate with her children by telephone or mail; she contends that her letters were frequently tampered with and that it was almost impossible to reach the girls telephonically.

2.7 In May 1989, Mr. Ospina Sardi broke off negotiations with the author without providing an explanation; only in November 1989 were the Italian authorities informed, upon request, of the

"final divorce judgement" of 13 March 1989. Mr. Ospina Sardi refused to comply with the judgement. On 21 June 1991, Mr. Ospina Sardi filed a request for the revision of the divorce judgement and of the visiting rights granted to the author, on the ground that circumstances had changed and that visiting rights as generous as those agreed upon in 1985 were no longer justifiable in the circumstances; the author contends that she was only informed of these proceedings in early 1992. Mr. Ospina Sardi also requested that the author be refused permission to see the children in Colombia, and that the children should not be allowed to visit their mother in Italy.

2.8 The Italian Foreign Ministry was in turn informed that the matter had been passed on to the office of the Prosecutor-General of Colombia, whose task under article 277 of the Constitution it is, inter alia, to review compliance with judgements handed down by Colombian courts. The Prosecutor-General initially ignored the case and did not investigate it; nor did he initiate criminal proceedings against Mr. Ospina Sardi for contempt of court and non-compliance with an executory judgement. Several months later, he asked for his disqualification in the case, on the grounds that he had "strong bonds of friendship" with Mr. Ospina Sardi; the file was transferred to another magistrate. The Italian authorities have since addressed several complaints to the President of Colombia and to the Colombian Ministries of Foreign Affairs and International Trade, the latter having offered, on an unspecified earlier date, to find a way out of the impasse. No satisfactory reply has been provided by the Colombian authorities.

2.9 The author notes that, during her trips to Colombia in May and June 1992, she could only see her children very briefly and under conditions deemed unacceptable, and never for more than one hour at a time. On the occasion of her last visit to Colombia in March 1993, the conditions under which the visits took place allegedly had become worse, and the authorities attempted to prevent Mrs. Fei from leaving Colombia. Mrs. Fei has now herself instituted criminal proceedings against Mr. Ospina Sardi, for non-compliance with the divorce judgement.

2.10 In 1992 and 1993, the Colombian courts took further action in respect of Mr. Ospina Sardi's request for a revision of parental custody and visiting rights, as well in respect of complaints filed on behalf of the author in the Supreme Court of Colombia. On 24 November 1992, the Family Law Division (Sala de Familia) of the Superior Court of Bogota (Tribunal Superior del Distrito Judicial) modified the visiting rights regime in the sense that all contacts between the children and the author outside Colombia were suspended; at the same time, the entire visiting rights regime was pending for review before Family Court No. 19 of Bogota.

2.11 Mrs. Fei's counsel initiated proceedings in the Supreme Court of Colombia, directed against the Family Court No. 19 of Bogota, against the office of the Prosecutor-General, and against the judgement of 24 November 1992, for non-observance of the author's constitutional rights. On 9 February 1993, the Civil Chamber of the Supreme Court (Sala de Casación Civil) set aside operative paragraph 1 of the judgement of 24 November 1992 concerning the suspension of contacts between the author and her children outside Colombia, while confirming the rest of said judgement. At the same time, the Supreme Court transmitted its judgement to Family Judge No. 19, with the request that its observations be taken into account in the proceedings filed by Mr. Ospina Sardi, and to the Constitutional Court.

2.12 On 14 April 1993, Family Court No. 19 of Bogota handed down its judgement concerning the

request for modification of visiting rights. This judgement placed certain conditions on the modalities of the author's visits to her children, especially outside Colombia, inasmuch as the Colombian Government had to take the measures necessary to guarantee the exit and the re-entry of the children.

2.13 On 28 July 1993, finally, the Constitutional Court partially confirmed and partially modified the judgement of the Supreme Court of 9 February 1993. The judgement is critical of the author's attitude vis-à-vis her children between 1985 and 1989, as it assumes that the author deliberately neglected contact with them between those dates. It denies the author any possibility of a transfer of custody, and appears to hold that the judgement of Family Court No. 19 is final ("no vacila ... en oponer como cosa juzgada la sentencia ... dictada el 14 de abril de 1993"). This, according to counsel, means that the author must start all over again if she endeavours to obtain custody of the children. Finally, the judgement admonishes the author to assume her duties with more responsibility in the future ("Previénese a la demandante ... sobre la necesidad de asumir con mayor responsabilidad los deberes que la corresponden como madre de la niñas").

2.14 In December 1993, the author's children, after presumed pressure from their father, filed proceedings pursuant to article 86 of the Colombian Constitution (Acción de Tutela - see paragraph 4.5 below) against their mother. The case was placed before the Superior Tribunal in Bogota (Tribunal Superior del Distrito Judicial de Santa Fé de Bogota). Mrs. Fei claims that she was never officially notified of this action. It appears that the Court gave her until 10 January 1994 to present her defence, reserving judgement for 14 January. For an unexplained reason, the hearing was then advanced to the morning of 16 December 1993, with the judgement delivered on the afternoon of the same day. The judgement orders Mrs. Fei to stop publishing her book about her children's story ("Perdute", "Perdidas") in Colombia.

2.15 It is submitted that the author's lawyer was prevented from attending the hearing of 16 December 1993 and from presenting his client's defence. Counsel thereupon filed a complaint based on violations of fundamental rights of the defence with the Supreme Court. On 24 February 1994, the Supreme Court (Sala de Casación Penal) declared, on procedural grounds, that it was not competent to hear the complaint.

2.16 Mrs. Fei notes that apart from the divorce and custody proceedings, her ex-husband has filed complaints for defamation and for perjury/deliberately false testimony against her. She observes that she won the defamation complaint in all instances; furthermore, she has won, on first instance, the perjury complaint against her. This action is pending appeal. It is submitted that these suits were malicious and designed to provide a pretext enabling the authorities to prevent her from leaving Colombia the next time she visits her children.

Complaint

3.1 The author alleges a violation of article 14, paragraph 1, of the Covenant, in that she was denied equality before the Colombian tribunals. She further contends that the courts have not been impartial in their approach of the case. In this context, it is submitted that just prior to the release of the judgement of the Constitutional Court, press articles carried excerpts of a judgement and statements of a judge on the Court that implied that the Constitutional Court would rule in her

favour; inexplicably, the judgement released shortly thereafter went, at least partially, against her.

3.2 The author further alleges that the proceedings have been deliberately delayed by the Colombian authorities and courts, thereby denying her due process. She suspects the tacitly agreed strategy is simply to prolong proceedings until the date when the children become of age.

3.3 According to the author, the facts as states above amount to a violation of article 17, on account of the arbitrary and unlawful interferences in her private life or the interference in her correspondence with the children.

3.4 The author complains that Colombia has violated her and her children's rights under article 23, paragraph 4, of the Covenant. In particular, no provision of the protection of the children was made, as required under article 23, paragraph 4 in fine. In this context, the author concedes that her children have suffered through the high exposure that the case has had in the media, both in Colombia and in Italy. As a result, they have become withdrawn. A report and the testimony of a psychologist used during the proceedings before Family Court No. 19 concluded that the children's relationships deteriorated abruptly because of the "publicity campaign" waged against their father; the author observes that this psychologist was hired by her ex-husband after the children returned to Colombia in 1985, that she received instructions as to which treatment was appropriate for the children and that she literally "brainwashed" them.

3.5 The author alleges a violation of article 24, in relation to the children's presumed right to acquire Italian nationality, and their right to equal access to both parents.

3.6 Finally, counsel argues that the Committee should take into account that Colombia also violated articles 9 and 10 of the Convention on the Rights of the Child, which relate to contact between parents and their children. In this context, he notes that the Convention on the Rights of the Child was incorporated into Colombian law by Law No. 12 of 1991, and submits that the courts, in particular Family Court No. 19, failed to apply articles 9 and 10 of the Convention.

3.7 The author submits that whereas some form of domestic remedies may still be available, the pursuit of domestic remedies has already been unduly prolonged within the meaning of article 5, paragraph 2 (b), especially if the very nature of the dispute, custody of and access to minor children, is taken into consideration.

State party's information and observations

4.1 The State party, in a submission dated 20 November 1992, argues that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies. It explains the proceedings before Family Court No. 19, which were, at the time of the submission, still pending.

4.2 The State party further observes that if the author had wanted to complain about the non-execution of the separation agreement of 19 May 1982, she could have initiated proceedings under what was then article 335 of the Code of Civil Procedure. It is noted that between 1986 and 13 March 1989, the author did not avail herself of this procedure.

4.3 With regard to the author's attitude between 13 March 1989 and 21 June 1991, the State party appears to endorse the contention of Mr. Ospina Sardi that, during this period, the author did not visit her children in Colombia and only maintained telephonic or postal contacts with them. Furthermore, Mrs. Fei did not avail herself of the possibility of an action under article 336 of the Code of Civil Procedure, i.e., to request enforcement of the decision of the First Circuit Court of Bogota. Accordingly, the State party submits, the non-exhaustion of local remedies has two aspects: (a) judicial proceedings remain pending before a family court; and (b) Mrs. Fei did not avail herself of the available procedures under the Code of Civil Procedure.

4.4 Additionally, the State party affirms that it cannot possibly be argued that the author was the victim of a denial of justice since:

(a) The judicial authorities acted diligently and impartially, as demonstrated by the separation agreement of 19 May 1992, the divorce judgement of 13 March 1989 and the proceedings before Family Court No. 19;

(b) The State party's judicial authorities were unaware of the non-compliance with the decisions of May 1982 and March 1989 before 21 June 1991, for the reason that, in civil matters, the courts do not initiate proceedings ex officio but only upon the request of the party or the parties concerned;

(c) No omission or failure to act in the case can be attributed to the judicial authorities of Colombia, notwithstanding the complaints filed by the author's representative against, for example, the office of the Procurator-General.

4.5 The State party points to the availability of a special procedure (Acción de Tutela) which is governed by article 86 of the Colombian Constitution of 1991, under which every individual may request the protection of his or her fundamental rights. 1/

4.6 Finally, the State party reiterates that no impediments exist that would prevent Mrs. Fei from entering Colombian territory and from initiating the pertinent judicial proceedings in order to vindicate her rights.

Issues and proceedings before the Committee

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

5.2 The Committee has noted the parties' arguments relating to the issue of exhaustion of domestic remedies. It notes that judicial proceedings in the case were initiated in 1982, and that two of the judicial actions which, according to the State party remain available to the author (see paragraphs 4.1 and 4.5 above), have in the meantime been filed and concluded, without providing the author with the relief sought. Taking into account the provision of article 5, paragraph 2 (b), in fine, regarding unreasonably prolonged remedies, and the fact that the current situation prevents the author and her children, de facto if not de jure, from having regular contacts with each other, and considering that after more than 11 years of judicial proceedings, judicial disputes about custody of

and access to the children continue, the Committee considers the delays to be excessive. In this context, it observes that in custodial disputes and in disputes over access to children upon dissolution of a marriage, judicial remedies should operate swiftly. In the circumstances, the Committee is not precluded by article 5, paragraph 2 (b), from considering the author's claims.

5.3 In respect of the alleged violation of article 24, the Committee begins by noting that this violation would have to be claimed on behalf of the author's children, in whose name the communication has, however, not been submitted. Furthermore, the Committee finds that, on the basis of the information before it, this allegation has not been substantiated for purposes of admissibility.

5.4 As to claim of a violation of article 14, paragraph 3 (c), the Committee notes that the right to be tried without undue delay relates to the determination of criminal charges. Since criminal charges are not at issue in the author's case, with the exception of those mentioned in paragraph 2.14 above in respect of which delay has not been claimed, the Committee concludes that this claim is inadmissible ratione materiae, as incompatible with the provisions of the Covenant.

5.5 For the remaining allegations under articles 14, paragraph 1, 17 and 23, paragraph 4, of the Covenant, the Committee considers them to have been adequately substantiated, for purposes of admissibility, by the author, and that they should, accordingly, be considered on their merits.

5.6 The Committee is well aware that both parties have already, at this stage of the procedure, made extensive submissions which would enable the Committee to pronounce itself on the merits of the matter under consideration. At this stage the Committee must, however, limit itself to the procedural requirement of deciding on the admissibility of the communication. Should the State party wish to make a further submission on the merits of the complaint, it should do so within six months of the transmittal to it of the present decision. The author of the communication will be given an opportunity to comment thereon. If no further explanations or statements are received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee will proceed to adopt its Views on the basis of the written information already submitted.

5.7 The Committee notes that the author's counsel has invoked violations of the Convention on the Rights of the Child, and observes that it is not competent to consider any claims made under this Convention.

6. The Human Rights Committee therefore decides:

(a) That the communication is admissible in so far as it appears to raise issues under articles 14, paragraph 1, 17, and 23, paragraph 4, of the Covenant;

(b) That any further explanations or statements which the State party may wish to make to clarify the matter and the measures taken by it should, in accordance with article 4, paragraph 2, of the Optional Protocol, reach the Human Rights Committee within six months of the date of transmittal to it of this decision. Should the State party not intend to make a further submission, it is requested to so inform the Committee as soon as possible to permit an early disposition of the matter;

(c) That any further explanations or statements received from the State party shall be communicated by the Secretary-General, pursuant to rule 93, paragraph 3, of the Committee's rules of procedure, to the author, with the request that any comments which she may wish to make should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) That this decision shall be communicated to the State party, to the author and to her counsel.

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

1/ Article 86 of the Constitution stipulates:

> "Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma o por quien actue en su nombre, la protección inmedita de sus derechos constitucionales fundamentales ..."

The proceedings leading to the judgement of 28 July 1993 of the Constitutional Court were in fact proceedings instituted under article 86 of the Constitution.