HUMAN RIGHTS COMMITTEE

Byrne and Lazarescu v. Canada

Communication Nº 742/1997

25 March 1999

CCPR/C/65/D/742/1997

ADMISSIBILITY

Submitted by: Ms. Pamela R. M. Byrne and Ms. Linda E. Lazarescu

Alleged victims: The authors

State party: Canada

Date of communication: 23 April 1996

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

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Pamela Rachelle Mary Byrne and Linda Ellen Lazarescu. They claim that they and their children are victims of a violation by Canada of articles 23, 24 and 26 of the Covenant.

The facts as submitted by the authors

2.1 Mary Byrne separated from her husband in 1986 and the Court ordered her husband to pay two thirds of the child's living expenses, and set the amount at § 575.00 per month in child support. The author states that she pays § 190.00 per month in income tax over this amount, pursuant to paragraph 56(1)(b) of the Income Tax Act. Her husband, on the other hand, enjoys a tax deduction for child support payments, amounting to an Income Tax Refund of § 3,420.00 a year, pursuant to paragraph 60(b) of the Income Tax Act. Thus, in

practice, the author now pays § 490.00 of the child's monthly costs of living, whereas her ex-husband in reality pays only § 290.00 per month, the reverse of what was intended by the Court's decision. She further states that following an accident in 1989 her husband receives § 2,800.00 per month in non-taxable insurance payments.

2.2 Linda Lazarescu separated from her husband in 1983, and the Court ordered her husband to pay about half of the child's maintenance costs. His share was set at § 300.00 per month. The author explains that in 1991, she received § 3,775.00 in child support from her ex-husband. Over this amount, she paid § 1,245.75 of taxes. On the other hand, her ex-husband receives a tax refund over the child benefits he pays of about § 1,585.50. Putting the actual costs for the child at § 9,037.00 a year, she concludes that she pays in reality § 7.437.75 towards maintenance of the child, far more than the 50% the judge intended to have her pay.

2.3 The authors appealed to the Tax Court in 1993, against the inclusion of child support as taxable income. On 18 March 1994, the judge reserved judgment, awaiting the outcome of a similar case at the Federal Court, submitted by Suzanne Thibaudeau. In May 1994, the Federal Court of Appeal found in favour of Thibaudeau, judging that paragraph 56(1)(b) violated the right to equality. On 3 June 1994, the Tax Court found in favour of the authors and ruled that paragraph 56(1)(b) of the Income Tax Act violated their rights under the Canadian Charter of Rights and Freedoms. Subsequently, the authors were informed that their cases were being appealed to the Federal Court of Appeal.

2.4 In the meantime, the Government appealed the judgment in the case of Thibaudeau to the Supreme Court. On 25 May 1995, the Supreme Court decided by majority decision that paragraph 56(1)(b) did not infringe on the equality rights guaranteed by Section 15 of the Charter. On 25 March 1996, the Federal Court, bound by the Supreme Court's decision in Thibaudeau, found against the authors.

2.5 On 18 May 1994, Linda Lazarescu had filed a complaint with the Canadian Human Rights Commission. On 15 September 1995, the Human Rights Commission informed her that, considering all the circumstances, no further proceedings were warranted.

2.6 The authors state that on 6 March 1996, the Minister of Finance, in his annual Budget Speech, promised to change the tax system concerning child support contributions.

The complaint

3. The authors claim that they are discriminated against because of their status as custodial mothers, in violation of articles 23, paragraph 4, and 26 of the Covenant. They further claim that the present Income Tax Act fails to protect the child, by reducing the actual amount of child support paid by the non-custodial parent, thereby putting the child at an economic disadvantage and creating financial insecurity. This is said to constitute a violation of articles 23, paragraph 4, and 24, paragraph 1, of the Covenant.

State party's observations and the authors' comments

4.1 By submission of 17 December 1997, the State party argues that the communication is inadmissible, since the authors cannot claim to be victims of a violation of the Covenant, since they have failed to exhaust domestic remedies and since they have failed to substantiate their claim.

4.2 The State party explains that one of the principles of the Canadian income tax system is that a taxpayer's taxable income is determined by adding together all of his or her sources of income. The system is further based on tax equity, meaning that taxpayers in similar economic situations should pay the same amount of tax. From 1942 until 1 May 1997, Canada's tax treatment of child support for separated parents required the parent receiving child support to include the amount received in his or her income and the support paying parent was allowed to claim the amount paid as deduction (the so-called inclusion-deduction system). According to the State party this tax regime met the requirements of tax equity by ensuring that custodial parents who receive child support pay the same amount of income tax as custodial parents who do not receive support and who support their children with equivalent income drawn from other sources.

4.3 The State party submits that this system also sought to increase the available resources that could be used for the benefit of the children by 'income-splitting', transferring income to a member of the family so that the income may be taxed in the hands of the other at a lower rate. According to the State party, this transfer resulted in a net tax savings for the couple where the recipient parent was subject to a lower marginal tax rate. The majority of custodial parents are said to have benefited from this. Pursuant to provincial family law, lawyers and judges were supposed to consider the tax consequences (by "grossing-up" the amount to account for the tax consequences) when determining the level of child support awarded. The State party acknowledges, however, that parents, lawyers and judges have not always fully or accurately accounted for the tax consequences in determining child support amounts.

4.4 The State party explains that child support paid under orders or agreements made on or after 1 May 1997, is no longer taxed as income to the recipient or tax deductible for the payer. For those orders made prior to 1 May 1997, parents may consent to the application of the new rules. If mutual consent cannot be obtained, then either party may apply to a court to vary their order or agreement so that the new rules apply. In this connection, the State party submits that it would have been manifestly unfair to have retroactively applied the new tax rules to existing child support arrangements.

4.5 The State party argues that the issue raised by the communication is moot since the tax system has changed and the authors may apply for the new rules to be applied to them. The State party points out that this change was announced before the authors submitted their communication to the Committee. According to the State party, any alleged inconsistency with the Covenant has been corrected and the authors are no victims of a violation of a right under the Covenant. In this connection, the State party refers to the Committee's decisions in communications Nos. 478/1991 [1] and 501/1992 [2].

4.6 In so far the authors argue that despite the change in law, they should be entitled to

compensation for the allegedly discriminatory scheme, the State party argues that there is no automatic right to compensation under the Covenant and that the measures taken by the Government have provided a sufficient remedy to the authors. In this context, the State party notes also that under Canadian constitutional law, if legislation is found to be contrary to the Charter, the appropriate remedy is to declare the provision(s) of no force, but as a general rule, damages or compensation are not awarded.

4.7 The State party notes that the facts as submitted by the authors reveal a concern about the adequacy of child support awarded to them in the light of the tax consequences. The State party submits that under Canadian family law, if a custodial parent feels that the amount of child support originally granted by a court is no longer sufficient, he or she may apply to a court for a variance of the child support amount. The State party notes that the authors have sought such variances in the past, but failed to do so in respect of the present claim. Accordingly, the State party argues that the authors have failed to exhaust all domestic remedies available to them.

4.8 The State party further argues that the authors have not sufficiently substantiated their claim by showing a prima facie case that the former tax system violated article 26 of the Covenant. In this connection, the State party refers to the Committee's standard jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination. The State party also refers to the Committee's decision in communication No. 129/1982[3], where the Committee held that the assessment of taxable income is not in itself a matter covered by the Covenant and where there is no evidence substantiating a claim of discrimination with respect to such assessment, the communication is incompatible with the provisions of the Covenant and inadmissible.

4.9 The State party also refers to the Committee's jurisprudence that unfavourable results in the application of general rules do not constitute discrimination. In this context, the State party argues that in the area of financial and social benefit legislation distinctions are often necessary and desirable to achieve a just and proper distribution of State revenue, as recognised by the Committee in the past.

4.10 The State party denies the authors' statement that it has indirectly admitted violating their rights by making changes to the Income Tax Act. It states that the changes were made for policy reasons, and a decision to amend a law does not imply that the law was necessarily incompatible with the Covenant.

4.11 According to the State party, the authors have not substantiated how the inclusion/deduction scheme violates article 26. To the extent that the scheme differentiated between custodial and non-custodial parents, the State party submits that such differentiation was reasonable and justified. In this context, it explains that the intent of the scheme was to achieve tax savings for separated and divorced couples by having the child support amount taxed in the hands of the recipient, who was generally in a lower tax bracket. The income splitting sought to lessen the economic consequences of marital breakdown and to free up more resources for children, as recognised by the majority of the Supreme Court of Canada. Moreover, by permitting a deduction for the child support payer, the payer was encouraged

to make the payments and had greater resources to do so.

4.12 The State party acknowledges that in Canada the vast majority of custodial parents are women and that there are significant problems in ensuring that the non-custodial parents live up to their child support obligations. The State party also acknowledges that there are serious financial consequences due to marital breakdown and that judges and lawyers do not always determine adequate amounts for child support. However significant these problems may be, their root causes do not lie with the tax treatment of child support, according to the State party.

4.13 With regard to the authors' argument that they are paying a disproportionate share of the costs associated with raising their children, the State party notes that this result likely has more to do with inflationary costs and changes in the financial circumstances of their former spouses than with the tax treatment of child support. The State party reiterates that where a parent feels that she is paying un unfair share of child support, she may apply to court to have the child support award varied to achieve a fairer result. The State party concludes that the application of the Income Tax Act to the authors' cases does not amount to a violation of article 26 of the Covenant. If the inclusion/deduction system created a difference in treatment, this differentiation is said to have been based on reasonable and objective criteria.

4.14 The State party submits that the authors have not in any way substantiated their claim under articles 23 and 24 of the Covenant.

5.1 In reply to the State party's submission, the authors maintain that their communication is admissible. They state that they have given the State party every opportunity to correct the injustice of the taxation of child support. The new legislation does not address the past injustice to custodial mothers, since if they want to change the terms of the support agreement, they would have to return to Court, at substantial cost. They maintain therefore that they are victims of violations by the State party.

5.2 Further, they submit that they have exhausted all domestic remedies. They state that they are not willing to enter into new arrangements with their ex-husbands for the sole purpose of a variance for taxation. In this context, they argue that the money which is given by their ex-husbands is for the support of their children and should therefore not count as taxable income. Moreover, they submit that a variance at this time would lower the support payments substantially, in accordance with the new Child Support Guidelines developed by the State party under the new law. They further argue that they can ill afford the legal fees associated with a court action.

5.3 Ms. Lazarescu states that her son is now living on his own, and that she no longer receives child support payments.

5.4 The authors conclude that the State party has admitted the discrimination under the old law by changing it.

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 it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the authors claim that the tax system applied to them, which taxes child support payments as income, is discriminatory, since it results in them paying more towards the costs of raising the children than their former spouses. The State party on the other hand, has argued that the system is not discriminatory and aims at making more money available for child support payments. Be this as it may, the law in question has been amended by the State party and the tax system at issue in this communication has been removed for maintenance agreements as of 1 May 1997, whereas custodial parents who receive child support payments as a result of an agreement of before that date, can apply to the Court for a variance of the agreement in accordance with the new tax system. The authors have declined to make use of this opportunity because of the costs involved and also because of their estimation that the child support payments under the new system would amount to less than what they hitherto received.

6.3 The Committee notes that the authors' main grievance is that as a result of taxation they have paid more towards the maintenance of the child than their former spouses. The Committee observes that the proportional contributions of parents in paying child maintenance are set by the Family Court, not by the tax authorities. In the opinion of the Committee the alleged unequal payments in the authors' cases were the result of the interaction between the child support order providing for the payments and the application of the Income Tax Act. This is to be taken into account by the Court in determining the level of payments. It is not for the Committee to reevaluate the determination of payments by the domestic Courts. In this context, the Committee notes that if the Court did not take the tax consequences into account, as has been suggested by the authors, the authors could have applied for a variance of the order on this basis.

6.4 The Committee concludes that the facts submitted by the authors do not substantiate their claim that they have been a victim of a violation of article 26, nor of articles 23 and 24 of the Covenant.

7. Accordingly, the Committee decides:

a) that the communication is inadmissible under article 2 of the Optional Protocol;

b) that this decision shall be communicated to the State party and to the authors.

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*The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr, Hipólito Solari Yrigoyen, Mr. Roman

Wieruszewski and Mr. Abdallah Zakhia.

**/ Pursuant to rule 85 of the rules of procedure, Committee member Mr.Maxwell Yalden did not participate in the examination of the present communication.

1/ A.P.L. v.d.M. v. the Netherlands, declared inadmissible on 26 July 1993.

2/ J.H.W. v. the Netherlands, declared inadmissible on 16 July 1993.

3/ I.M. v. Norway, declared inadmissible on 6 April 1983.