HUMAN RIGHTS COMMITTEE

Maille v. France

Communication No. 689/1996

11 July 1997

CCPR/C/60/D/689/1996 *

ADMISSIBILITY

Submitted by: Richard Maille [represented by François Roux, lawyer in France]

Victim: The author

State party: France

Date of communication: 14 November 1995 (initial submission)

Documentation references: List - CCPR/C/CL/R.63/Add.2
Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 9 April 1996 (not issued in document form)

Date of present decision: 11 July 1997

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 Richard Maille, a French citizen born in December 1966 and currently residing in Millau, France. He claims to be a victim of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. He is represented by counsel François Roux.

The facts as submitted by the author

2.1 From June 1986 to July 1987 the author, a recognized conscientious objector, performed civilian national service duties. On 15 July 1987, after approximately one year of carrying out those duties, he left his duty station, invoking the allegedly discriminatory character of article 116, paragraph 6,

of the National Service Code (Code du service national), pursuant to which conscientious objectors had been required to carry out civilian national service duties for a period of two years, whereas military service for conscripts had lasted one year.

2.2 As a result of his action, Mr. Maille was charged with insubordination in peacetime, pursuant to article 397, paragraph 1, of the Code of Military Justice. By a judgement of 27 January 1992, the Criminal Court (Tribunal Correctionnel) of Montpellier found him guilty as charged and sentenced him to 15 days' imprisonment (suspended). As the author had not completed his civilian service duties, he received an order dated 30 July 1992 to resume those duties; Mr. Maille decided to ignore the order. Accordingly, the Criminal Court of Montpellier resumed proceedings against him and, on 21 April 1994, found him guilty as charged and decided to rescind the decision recognizing him as a conscientious objector. On 23 January 1995, the Court of Appeal of Montpellier confirmed the judgement.

2.3 The author indicates that he did not further appeal to the Court of Cassation because, in the circumstances of his case and given the Court of Cassation's established jurisprudence unfavourable to him such an appeal would be futile. In this connection, he refers to several judgements handed down on 14 December 1994 by the Court of Cassation, which concluded that article 116 (6) of the National Service Code was not discriminatory and did not violate articles 9, 10 and 14 of the European Convention on Human Rights[1]. The author concludes that as no further effective remedy is available to him, he should be deemed to have compiled with the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 According to the author, both article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months of civilian service for conscientious objectors) and article L. 2 of the National Service Code in its version of January 1992 (as amended by Act No. 92-9 of 4 January 1992), which sets the duration of civilian service for conscientious objectors at 20 months, violate articles 18, 19 and 26, juncto article 8, of the Covenant in that they double the duration of service for conscientious objectors in comparison with that for persons performing military service.

3.2 The author acknowledges that in case No. 295/1988,[2] the Committee had held that an extended length of alternative service was neither unreasonable nor punitive, and had found no violation of the Covenant. However, he invokes the individual opinions appended to those views by three members of the Committee, who had concluded that the challenged legislation was not based on reasonable or objective criteria, such as a more severe type of service or the need for special training in order to perform the longer service. The author fully endorses the conclusions of those three members of the Committee.

3.3 The author observes that articles L. 116 (2) to L. 116 (4) of the National Service Code provide for a rigorous test of the sincerity of the convictions of a conscientious objector. Each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he refuses, an appeal to the Administrative Tribunal is possible under article L. 116 (3). In such circumstances, the author argues, it cannot be assumed that the length of civilian service was fixed purely for reasons of administrative convenience, since anyone agreeing to perform civilian service

twice (or almost) as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have a punitive character, which is not based on reasonable or objective criteria.

3.4 In support of his contention, the author invokes a judgement of the Italian Constitutional Court of July 1989, which held that the provision for non-military service lasting eight months longer than military service was incompatible with the Italian Constitution. He further points to a decision adopted by the European Parliament in 1967 which, on the basis of article 9 of the European Convention on Human Rights, suggested that the duration of alternative service should be the same as that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not have a punitive character and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R (87)8 of 9 April 1987). Finally, the author notes that the United Nations Commission on Human Rights has declared, in a resolution adopted on 5 March 1987 [3], that conscientious objection to military service should be regarded as a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In these circumstance, the author submits that requiring him to perform civilian service for a period that is twice as long as that set for military service constitutes unlawful and prohibited discrimination on the basis of opinion, and that the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service constitutes a violation articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party contends that the communication is incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland) that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can not construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that domestic remedies have not been exhausted by the author. In this connection, it submits that the author of the communication has not been exhausted the available judicial remedies since he ha snot appealed the Montpellier Court of Appeal's judgement of 23 January 1995 to the Court of Cassation. The State party further submits that the author has not exhausted all administrative remedies. The argument put forward in this connection is that, by leaving his duty station before having received a reply from the military authorities concerning his request for a reduction in the length of his service, the author violates the provisions of the National Service Code, thus becoming liable to criminal prosecution, and did not wait for the military authorities to refuse his request and then bring the matter before the Administrative Tribunal.

4.3. Lastly, the State party contends that the author does not qualify as a victim. With regard to

articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, quoting the decision on communication No. 185/1984 cited above, that as the author was "not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service", he cannot therefore claim to be a victim of a violation of articles 18 and 19 of the Covenant.

4.4 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the author complains of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria" (see the Committee's views on communication No. 196/1985, Gueve v. France). The State party argues in this connection that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army, and that a longer period of alternative civilian service constitutes a test of sincerity of conscientious objectors designed to prevent conscripts from claiming conscientious objector status for reasons of comfort, ease and security. The State party quotes the Committee's views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the eight-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the author is based on the principle of equality, which requires different treatment of different situations.

4.5 For all of these reasons, the State party requests the Committee to declare the communication inadmissible.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the author cites the Committee's General Comment No. 22 (48), where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service". According to the author, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 The author claims that the problem posed in his case lies not in the possible infringement of conscientious objectors' freedom of belief by French legislation, but in the conditions for the exercise of that freedom, since alternative civilian service is twice the length of military service, without this being justified by any provision to protect public order, in violation of article 18, paragraph 3, of the Covenant. The author invokes in this context the Committee's General Comment No. 22 (48), which states that "limitations imposed must be established by law and must not be

applied in a manner that would vitiate the rights guaranteed in article 18. (...) Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner", and concludes that requiring conscientious objectors to perform alternative civilian service which is twice the length of military service constitutes a discriminatory restriction on the enjoyment of the rights set forth in article 18 of the Covenant.

5.3 As to the question of the exhaustion of domestic remedies, the author states that an appeal to the Court of Cassation against the Court of Appeal's decision on 23 January 1995 would have been futile as it would have had no reasonable chance of success in view of the Court of Cassation's established jurisprudence on the matter. In this connection, the author cites three judgements of the Court of Cassation (judgements of 14 December 1994 in the Paul Nicholas, Marc Venier and Frédéric Foin cases), where the Court held that article 116 (6) of the National Service Code fixing the length of military service and alternative forms of service was not discriminatory. The author therefore concludes that he has exhausted all effective domestic remedies in respect of the proceedings brought against him. With regard to the non-exhaustion of administrative remedies, the author maintains that such remedies were not open to him inasmuch as, not having been notified of any administrative decision, he could not bring the matter before the Administrative Tribunal.

5.4 Concerning the alleged violation of article 26, the author claims that requiring a period of civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the author argues that there is no justification for making civilian service twice the length of military service; in fact, unlike in the Järvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under arts L. 116 (2) and L. 116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces following an examination which may result in refusal. Nor is it justified in the general interest or as a test of the seriousness and sincerity of the beliefs of the conscientious objector. Indeed, the mere fact of taking special steps to test the sincerity and seriousness of the beliefs of conscientious objectors in itself constitutes discrimination based on the recognition of a difference of treatment between conscripts. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground. In conclusion, the author considers that there is a difference of treatment for conscientious objectors which is not based on any reasonable and objective criterion and which therefore constitutes a violation of article 26 of the Covenant.

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 has taken note of the State party's arguments concerning the incompatibility of the communication ratione materiae with the provisions of the Covenant. In this regard, the Committee considers that the matter raised in the communication does not concern a violation of the right to conscientious objection as such.

6.3 Concerning the requirement of exhaustion of available domestic remedies, the Committee takes note of the fact that the author has not exhausted all the judicial remedies that were open to him. However, the Committee observes that an appeal by the author to the Court of Cassation against the Court of Appeal's judgement of 23 January 1995 would undoubtedly have been rejected by the Court of Cassation, inasmuch as it has dismissed appeals based on the allegedly discriminatory nature of article 116 (6) of the National Service Code. The Committee therefore considers that effective judicial remedies have been exhausted by the author. From these legal precedents, it may be concluded that an appeal by the author to the Court of Cassation would have had no chance of success.

6.4 As to the argument of the State party that the author has not exhausted all administrative remedies, the Committee notes that it does not appear from the State party's observations that any administrative decision was taken against the author, and that consequently no administrative remedy was immediately available to him at the time of the interruption of his civilian service. Nevertheless, the Committee notes that by not waiting for the military authorities to respond to his decision to interrupt his civilian service after one year, and by choosing to leave his post after merely notifying those authorities, the author voluntarily did not avail himself or administrative remedies although, as the State party underlines in its observations, it was open to him to lodge an administrative appeal by virtue of the Council of State's Nicolo judgement of 20 October 1989 challenging the applicability of a law as being contrary to the State party's international commitments to protect human rights. Notwithstanding this argument, however, the Committee notes that administrative remedies are no longer available to the author of the communication at this stage of the proceedings. The Committee therefore concludes that it is not prevented by article 5, paragraph 2 (b), of the Optional Protocol from dealing with the communication.

6.5 The Committee considers that the author has sufficiently demonstrated, for the purposes of admissibility, that the communication may raise issues under provisions of the Covenant.

7. The Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments he may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner 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 his counsel.

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

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

1/ Judgements of 14 December 1994 in the Foin and Nicolas cases.

2/ Järvinen v. Finland, views adopted on 25 July 1990, paras. 6.4 to 6.6

3/ E/CN.4/1987/L.73 of 5 March 1987.