

ICCPR Case Digest

CCPR/C/112/D/2131/2012

Communication
No. 2131/2012

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Leven v. Kazakhstan

Requiring registration as a foreign missionary to participate in church services violates the Covenant.

Substantive Issues

- Freedom of religion
- Discrimination

Relevant Articles

- Art. 18(1),(3)
- Art. 2(1)
- Art. 26

Violations

- Art.18

Facts

The author, a German citizen born in Kazakhstan and a Kazakhstan resident, applied in 2009 for Kazakh citizenship, and in December 2009 he received permission for release from German citizenship with a view to obtaining Kazakh citizenship. While he was waiting for his application for citizenship to be approved, he was convicted in October 2009 by Esil District Court of conducting missionary activity without registration (under the Code of Administrative Violations) and was sentenced to a fine and to expulsion from Kazakhstan. The Court ruled that, since the author was a German citizen, his activities (participating in services in the Evangelist Christian Baptist Church and reading sermons) constituted missionary activity under the Law on Freedom of Religion and Religious Unions. The author appealed his conviction and claimed that he was not conducting missionary activity but simply participating in the church services, and that even if he had wanted to register as a foreign missionary that would have been impossible, since he had no accreditation from any church or organization outside of Kazakhstan. In November 2009, the Akmolin Regional Court overturned the first instance decision, but the Supervisory Plenum of Akmolin Regional Court revoked the decision and confirmed the author's conviction. In December 2009, the author filed an application for supervisory review with the General Prosecutor's Office, which was rejected on 26 January 2010. The author submits that his permanent residence permit expired on 5 January 2010 and that in June 2010 the Kazakh migration police took his document away from him. At the time of submission (January 2012) he was under threat of immediate deportation and being separated from his family. He was denied Kazakh citizenship.

The author claims to be a victim of violations by Kazakhstan of his rights under article 18 (1) and (3) read together with article 2 (1) because he was denied his right to

freely manifest his religion in worship, observance and practice in community with others. He submits that limitations on freedom of religion under article 18 are not in line with the Covenant. He maintains that the State did not justify the limitation on his freedom of religion, and that the punishment imposed on him for practicing was disproportionate. He further maintains that his actions did not threaten public safety, order, health, or morals, nor did they violate the fundamental rights and freedoms of others.

The author further submits that Kazakhstan violated its obligation under article 26 of the Covenant to refrain from discriminating against him on the basis of his religious beliefs, because he was refused citizenship and is under threat of deportation and separation from his family, only because he is a member of a particular religious denomination and was participating in Evangelist Christian Baptist Church services. The author is not challenging the fact that his residence permit was annulled lawfully but that if he had not been tried and convicted for praying and conducting religious services together with others, he would have already received Kazakh citizenship.

Committee's View

Consideration on admissibility

With regard to domestic legal remedies the Committee observes that even if the author could have appealed the decision regarding his deportation, this would not have addressed his claim that his conviction for the administrative offence of missionary activities was a violation by the State party of his right to manifest his religion and not to be discriminated against.

Regarding the author's submission that the acts of the State party resulted in violation of its obligations under article 2 (1) of the Covenant, the Committee recalls its jurisprudence, which indicates that the provisions of article 2 lay down general obligations for States parties, and do not afford any separate individual right that can be invoked, in conjunction with other provisions of the Covenant, in a claim under the Optional Protocol. The Committee therefore considers that the author's claims in that regard are incompatible with article 2 of the Covenant and inadmissible under the Optional Protocol.

The Committee considers that the author has sufficiently substantiated his claims under articles 18 and 26 of the Covenant, for purposes of admissibility.

Consideration of merits

In relation to the author's claim under article 18 of the Covenant, the Committee recalls that the right to freedom to manifest one's religion or beliefs may be subject to certain limitations, but only those prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. In the present case, the Committee considers that the conviction and

sentence to a fine and deportation (for preaching and conducting religious rituals among the followers of the church) and the resulting loss of his residence permit, constitute limitations of the right to freedom of manifest one's religion. The Committee, thus, addresses the question of whether those limitations were necessary and proportionate. The Committee notes that the State party has not advanced any argument as to why it is necessary for the author to register as a foreign missionary for preaching and conducting religious rituals, other than by citing a provision of domestic law. The Committee concludes that the limitation has not been shown to serve any legitimate purpose identified in article 18 (3) and neither has the State party shown that this limitation is proportionate to any legitimate purpose that it might serve, and therefore finds that the author's rights under article 18 (1), have been violated. In the light of the finding that there has been a violation of article 18 of the Covenant, the Committee decides not to pronounce on a possible violation of article 26 of the Covenant.

Recommendation

The Human Rights Committee recommends the State party to:

1. Provide the author with an effective remedy, including reimbursement of any legal costs incurred by him.
2. Take steps to prevent similar violations in the future.

Deadline to Submit the Report on the Implementation of the Recommendations

180 days from the adoption of the views.

Individual Opinions

Gerald Neuman (concurring)

The committee member considers that *"the Committee does not need to combine article 18 with States' basic obligation under article 2 (1), in order to find a violation, and if the Committee added such a violation in the present case, it would have to add redundant violations involving article 2 (1), in every instance in which it finds a violation of a substantive right"*. For G. Neuman, this would make no practical contribution to the protection of human rights. At the same time, he considers that the Committee's Views (in particular paragraph 8.4) *"does not call into question the Committee's traditional practice of recognizing discrimination with respect to a right protected by articles 6 to 27 of the Covenant as raising issues under the final phrase of article 2 (1), in conjunction with that substantive right"*, and that the author's submissions do not appear to assert a claim of that kind.

Fabián Omar Salvioli

The committee member does not agree with the following sentence of paragraph 8.4 of the Views that the provisions of article 2 (1) “do not afford any separate individual right that can be invoked in conjunction with other provisions of the Covenant in a claim in a communication under the Optional Protocol”. Mr Salvioli considers that the reference made by the Committee to the jurisprudence (cited in footnote 5 of the Views) is incomplete, and that this jurisprudence indicates that article 2 alone may not give rise to a claim in a communication under the Optional Protocol, but does not say that the provisions of article 2 may not be invoked in conjunction with another provision of the Covenant. It therefore follows from the jurisprudence that, a *contrario sensu*, the provisions of article 2 can be invoked in conjunction with a right set forth in articles 6 to 27 of the Covenant; otherwise, there would not be a vast body of jurisprudence in which the Committee has established the international responsibility of States parties for violations of article 2 (3), read in conjunction with other provisions.

At the same time, he considers that the General Comment on article 2 of the Covenant “*does not make any differentiation among the different paragraphs of article 2 in terms of the possibility of invoking or applying them, and the Committee should therefore not arrive at a conclusion that indicates otherwise. Moreover, the Committee also has jurisprudence regarding article 2 (1) (Toonen v. Australia) where it found the State liable for a violation of article 17, read in conjunction with article 2 (1), of the Covenant*”. He submits that in the present case against Kazakhstan, no act of discrimination on the basis of nationality or any other ground has been proven, and that this is the reason for the Committee not to pronounce on possible violations of article 26, or article 2 (1), of the Covenant, rather than the reasoning advanced in paragraph 8.4 of the Committee’s Views.