



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2279/2013

Views adopted by the Committee at its 115th session (19 October-6 November 2015)

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| <i>Submitted by:</i> | Arkadiusz Zoltowski |
| <i>Alleged victim:</i> | The author and his son, Nikita Zoltowski |
| <i>State party:</i> | Australia |
| <i>Date of communication:</i> | 21 January 2013 |
| <i>Document references:</i> | Special Rapporteur's rule 97 decision, transmitted to the State party on 29 July 2013 (not issued in document form) |
| <i>Date of adoption of Views:</i> | 5 November 2015 |
| <i>Subject matter:</i> | Removal of child from Poland to Australia without the father's consent |
| <i>Procedural issues:</i> | Exhaustion of domestic remedies, sufficient substantiation of claims, incompatibility <i>ratione materiae</i> |
| <i>Substantive issues:</i> | Fair trial, arbitrary or unlawful interference with family, protection of the family, protection of the child, discrimination |
| <i>Articles of the Covenant:</i> | 14, 17 (1), 23 (1), 24 (1) and 26 |
| <i>Articles of the Optional Protocol:</i> | 2 and 5 (2) (b) |



Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)

concerning

Communication No. 2279/2013*

Submitted by: Arkadiusz Zoltowski
Alleged victim: The author and his son, Nikita Zoltowski
State party: Australia
Date of communication: 21 January 2013

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

Meeting on 5 November 2015,

Having concluded its consideration of communication No. 2279/2013, submitted to it by Arkadiusz Zoltowski under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 (4) of the Optional Protocol

1. The author of the communication is Arkadiusz Zoltowski, a Polish and Australian national born in 1959. He is submitting his complaint on his own behalf and on behalf of his son, Nikita Zoltowski, also a Polish and Australian national, born in 2004. He claims to be victim of a violation of articles 14, 17 (1), 23 (1) and 26 of the Covenant. He also claims that his son is a victim of a violation of articles 14, 24 and 26 of the Covenant. The author is not represented. The Optional Protocol entered into force for the State party on 25 December 1991.

The facts as presented by the author

2.1 The author married a Belarusian national and Polish permanent resident in Poland in 2000. The couple lived in Poland and had a child in 2004, who was an Australian citizen by birth. In December 2006, the family moved to Perth, Australia. In September 2009, the

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

author's wife acquired Australian nationality, and in October 2009 the family returned to Poland, where the author's business was based. According to the author, shortly after their return to Poland, his wife wanted to move back to Australia and became verbally "abusive and provocative" about this issue. She also threatened the author with "taking their son away to a place where he would not find him". In the light of these repeated threats, the author hid the child's Australian passport.

2.2 In February 2010, the author initiated proceedings for divorce and child custody in Poland.

2.3 On 5 March 2010, the author's wife filed an emergency passport application for their son with the Australian embassy in Warsaw. The passport was issued on 17 March 2010.¹ The author argues that the consul at the Australian embassy, despite being aware of ongoing divorce and custody proceedings in Poland, advised the author's wife to apply for an emergency passport without the father's consent. The Consul then had the application sent to Canberra with her own recommendation that it be granted. The author adds that his wife alleged that she was a victim of domestic violence in order to obtain this passport.

2.4 On 31 March 2010, the author's wife flew with the child to Australia without the father's consent. The next day, the author filed a complaint with the police in Poland. Following a police investigation, the author found out that his wife and child had gone to the Australian embassy in Warsaw and had been driven from there to the airport by embassy staff.

2.5 As a result of divorce proceedings initiated by the author, the marriage was dissolved by a decision dated 2 August 2010 of the circuit court in Plock, Poland. The court assigned sole custody of the child to the father, establishing the child's residence with the father. In the meantime, on 13 April 2010, the author's wife had filed an application for child custody with the Family Court of Western Australia. On 21 April 2010, that court issued an interim order for the child to live with the mother until further notice.

2.6 On 18 June 2010, the author filed an application for return under the Hague Convention on the Civil Aspects of International Child Abduction with the Polish central authority, which was forwarded to the Australian central authority. By a decision of 4 February 2011, the Family Court of Western Australia ordered that the author's son be returned to Poland, in accordance with the Hague Convention.

2.7 On 16 February 2011, the author's ex-wife appealed the Family Court's decision to the Full Court of the Family Court of Western Australia, challenging the finding that the child's habitual residence was in Poland. An oral hearing was held by the Full Court on 13 April 2011. The author notes that the outcome was predetermined, as the presiding judge addressed his ex-wife and said: "Don't worry, we will not let anyone take your child away from you."² The author adds that his ex-wife was allowed to present further submissions and was cross-examined but he was not, even though the State Solicitor had indicated that the author could be cross-examined. According to the author, the judges failed to consider the evidence proposed to be given by him, including an airport emigration card signed by the author's ex-wife on which she had stated that she was leaving Australia permanently,

¹ The author provided a copy of a letter from the Director of the Passports Operations Section within the Department of Foreign Affairs and Trade of Australia, dated 9 April 2010, informing the author that his son's passport had been issued according to section 11 of the Australian Passports Act 2005, which allows for a child's passport to be issued without one parent's consent and without a court order under special circumstances, including when the child departed Australia less than 12 months before the application for the passport was made and the Minister considers that a passport should be issued to enable the child's return to Australia.

² The author argues that this statement was not included in the judicial transcript, which he had requested to see.

tickets for one-way flights and their son's statements referring to physical abuse by the mother. The judges ignored this evidence and gave full consideration to the evidence presented by his ex-wife, thereby coming to incorrect factual findings and concluding that the child was habitually resident in Australia. He notes that the Full Court should have returned the case to the Family Court for rehearing.

2.8 On 8 July 2011, the Full Court overturned the Family Court's decision by finding that the Australian central authority should not have accepted the application for the return of a child who was permanently resident in Australia.

2.9 The author's request to appeal the Full Court's decision to the High Court of Australia was rejected by the Australian central authority. Two requests for appeal by the Polish central authority to the Australian central authority were also rejected in 2011. The author's direct application to the High Court for special leave to appeal was also refused, on the grounds that he was not a party to the proceedings. The author notes that, although he was a party to the proceedings before the Family Court in Perth, his name was deleted when the matter was brought before the Full Court.

2.10 On 6 December 2011, the author submitted an application to the Australian central authority requesting access to his son. On 1 November 2012, the central authority responded to the author by asking him to fill out an additional access application. The Hague Convention access application was filed with the Family Court of Western Australia on 2 July 2013 and permanently stayed on 29 January 2014, due to the concurrent domestic proceedings initiated by the author's ex-wife on 13 April 2010.

2.11 On 27 May 2014, the Family Court of Western Australia ordered that all previous parenting orders be discharged and assigned sole parental responsibility for the child to the mother. The Court also ordered that the child live with the mother and that the father be allowed to spend time with the child in Australia, under the supervision of either the mother or an approved agency and on such dates as were agreed with the mother, with no less than two weeks' prior notice in writing.

The complaint

3.1 The author claims that his child's removal from his father and family in Poland amounted to arbitrary interference with the family and home, in violation of article 17 of the Covenant. This forced removal also violated the author's right to enjoy family life, in breach of article 23 (1) of the Covenant. The author adds that the wrongful findings concerning alleged family violence without a proper investigation by the Full Court also amounted to a violation of article 17.

3.2 The author submits that article 14 of the Covenant was violated because he was denied a fair trial by the Full Court, which relied on his ex-wife's accusations, did not properly examine the evidence presented by the author and cross-examined only his ex-wife, thereby breaching the principle of equality of arms. Also, he was not allowed to appeal the Full Court decision on the grounds that he was not a party to the proceedings, thus denying him the opportunity to defend himself against the Full Court's assumptions.

3.3 The author claims that his son's views were not adequately represented, as the son did not have a representative in court. Therefore, his interests could not be properly determined independently from the mother's interests, in violation of fair trial guarantees and denying him the protection established in article 24 of the Covenant. Additionally, the author argues that the Full Court did not act in the best interests of the child by not considering the child's written statements regarding physical and mental abuse by his mother.

3.4 The author argues that, by refusing to appeal the Full Court's decision, the Australian central authority deprived the author and his son of their right to have their views expressed in court, in violation of articles 14 and 26 of the Covenant. The author

adds that his son was not represented by a children's lawyer or assisted by a court-appointed child psychologist.

3.5 The author argues that the Australian central authority also violated articles 14 (3) (c) and 26 by causing excessive delays in bringing the case to trial and in completing the Hague child access proceedings. The author notes that the response by the Australian central authority, sent a year after he submitted his application for access to his child and requesting him to submit a new form with a new date, was intended only to delay the access proceedings.

3.6 The author also invokes a violation of articles 3 (1), 9 (1) and 12 of the Convention on the Rights of the Child.

State party's observations on admissibility and merits

4.1 In its submission of 17 June 2014, the State party challenges the admissibility of the author's claims. The State party contends that, while the author exhausted available remedies under the Hague Convention procedure, domestic remedies were not exhausted under the Family Law Act 1975 on child custody procedures, in accordance with which the author could have requested the return of his child to Poland.

4.2 The State party contends that the author's claims under article 14 of the Covenant have not been sufficiently substantiated. The author has not alleged any specific breach of this article but has made only general claims about the conduct of the Full Court in relation to assessment of evidence, procedural fairness, equality of arms, denial of justice and impartiality.

4.3 The State party notes that the Full Court dismissed the mother's application to adduce evidence relating to family violence. The Full Court found that the author's child was not habitually resident in Poland and did not make any finding as to family violence. Therefore, this claim is also insufficiently substantiated.

4.4 Regarding the author's allegations under article 14 (3) of the Covenant, the State party submits that the Hague Convention proceedings are not criminal proceedings and, as such, fall outside the scope of the invoked provision.

4.5 With regard to the author's allegations relating to equality of arms, the State party notes that the author was not a party to the Full Court proceedings and that therefore these allegations are not substantiated.

4.6 The State party submits that, should the Committee consider the author's claims under article 14 admissible, these should be dismissed as without merit. The Full Court satisfied the test of the principle of impartiality, which requires that judges be free and perceived to be free from bias. There is no evidence that the Full Court lacked impartiality. With regard to the principle of equality of arms, the State party notes that this principle is irrelevant since the author was not a party to the Full Court proceedings. Finally, the State party notes that the Full Court formed its own views about the relevance of the evidence adduced by the mother in the context of the entire hearing.

4.7 Regarding the author's claims under article 17 of the Covenant, the State party notes that the author has failed to make specific allegations and to substantiate these claims. In particular, the author has not explained how issuing an emergency passport was unlawful or arbitrary. Although the mother alleged family violence, the State party notes that this was not the basis for the issuance of the passport. The passport was issued to allow the child to return to his habitual place of residence and to allow the custody dispute to be resolved by the child's parents in an Australian court. Therefore, the decision to issue the passport was reasonable and objective and in accordance with Australian law.

4.8 With regard to the author's claims under article 23 of the Covenant, the State party notes that the Committee has only ever considered a breach of this article together with a

violation of article 17. The author has not sufficiently substantiated that there were insufficient measures in place to protect his child in the Full Court proceedings. On the merits, the State party notes that the Full Court's order was not arbitrary or unlawful and that the Full Court duly considered the evidence available in delivering its judgement.

4.9 The State party submits that the author's claims under article 24 are also inadmissible for lack of sufficient substantiation. The Full Court determined that the correct jurisdiction for determining parenting arrangements for the child was Australia. The State party notes that it is not for the Committee to evaluate facts and evidence, unless it is apparent that the court's decision was manifestly arbitrary or amounted to a denial of justice. On the merits, the State party argues that the author's son was given measures of protection, as the Hague Convention proceedings were the appropriate legal framework for dealing with this matter. These procedures involve a determination of the jurisdiction where parenting matters should be resolved and are not intended to be an exhaustive examination of the future care arrangements that are in the best interests of the child. The issue considered by the Full Court was whether or not the child was habitually resident in Poland, in order to determine whether the child should be returned to Poland to have childcare issues determined there. Australian law provides for the appointment of an independent children's lawyer in exceptional circumstances, including when one of the parents raises the child's objections to return. The State party notes that this was not relevant in the determination of the child's habitual residence in the present case.

4.10 With regard to the author's claims related to article 26 of the Covenant, the State party notes that these claims have been insufficiently substantiated and that there is insufficient evidence to indicate that there was differential treatment by the Court towards the author. The State party adds that, in any case, such allegations lack merit, as it is unclear on what basis the author or his child would have been discriminated against.

4.11 The State party submits that the author's claims under the Convention on the Rights of the Child are outside the scope of the Committee's mandate and should be dismissed *ratione materiae*.

Authors' comments on the State party's observations

5. On 20 July 2014, the author submitted his comments on the State party's observations, in which he reiterated his previous arguments. The author notes that his complaint to the Committee did not refer to the custody proceedings in Australia and that therefore he does not have to exhaust such remedies in Australia, which were pursued by his ex-wife. He adds that he has already obtained a final court order from a Polish court on the divorce and custody issues.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee takes note of the State party's argument that, although the author exhausted domestic remedies regarding the return proceedings under the Hague Convention, he failed to exhaust domestic remedies under the Family Law Act 1975 and that he could have also requested the return of his child in the context of that procedure. However, the Committee notes that the author, who was residing in Poland, made

significant efforts, in the form of administrative and judicial actions undertaken both in Poland and in Australia, to gain access to and custody of his son. The judicial actions undertaken in Poland led to a court decision granting him custody of the child in April 2010. As regards the author's actions undertaken in the State party, the Committee notes that these were aimed at both obtaining the return of the child and obtaining access to him, and that both of these avenues were duly exhausted, as acknowledged by the State party. The Committee further observes that custody proceedings initiated in Australia by the author's ex-wife in April 2010 were still pending in January 2014, when the author's access application was stayed, and that the State party has not provided any justification for such a delay, particularly in the light of the matter at stake. In the light of the foregoing, the Committee considers that there is no obstacle to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol.

6.4 The Committee takes note of the author's claims that he and his son were discriminated against by the Australian central authority when it did not allow him to appeal the Full Court's decision overturning the Family Court's order to return the child to Poland, and when it created excessive delays in bringing his child access complaint to trial. The Committee notes the State party's argument that the author failed to substantiate his claim and present sufficient evidence to suggest that there had been differential treatment. The Committee also notes that the author has failed to indicate the grounds under article 26 on which he and his son would have been discriminated against. Consequently, the Committee considers that the author has failed to sufficiently substantiate his claims under article 26 and declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

6.5 The Committee takes note of the author's claims under article 14 (1) of the Covenant, relating to the examination of evidence by the Full Court. The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.³ The Committee considers that the information provided by the author and available in the file does not allow it conclude that this was the case. The Committee also considers that the author has not provided sufficient evidence to support his allegation that the Full Court lacked impartiality. Consequently, the Committee considers that these claims have not been sufficiently substantiated and declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

6.6 As to the author's claims related to undue delays in the context of his child access proceedings, the Committee considers that these claims have been duly substantiated and that the proceedings related to custody and access fall under the category of suit at law, and that therefore the guarantees under article 14 (1) also apply to them. Therefore, the Committee decides to consider this claim on the merits.

6.7 With regard to the author's claims under relevant articles of the Convention on the Rights of the Child, the Committee notes the State party's argument that these fall outside the scope of the Committee's mandate. The Committee therefore declares these claims to be incompatible with the Covenant and inadmissible *ratione materiae* under article 2 of the Optional Protocol.

³ See, among others, communications No. 1616/2007, *Manzano et al. v. Colombia*, decision adopted on 19 March 2010, para. 6.4; No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3; and No. 2070/2011, *Cañada Mora v. Spain*, decision adopted on 28 October 2014, para. 4.3.

6.8 The Committee finds that the author's claims under article 14 (1) regarding excessive judicial delays, as well as under articles 17, 23 and 24, have been sufficiently substantiated.

6.9 In the light of the above, the Committee declares the communication admissible insofar as it appears to raise issues under articles 14 (1), 17, 23 and 24 of the Covenant, and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

7.2 The Committee takes note of the authors' argument that his son's removal amounted to arbitrary interference with the family and home and a failure to protect the family, in violation of articles 17 and 23 of the Covenant. The Committee recalls its jurisprudence that the term "family" must be understood broadly, and that it includes the relations in general between a parent and child.⁴ The Committee further recalls that the removal of a child from the care of his or her parent(s) constitutes interference in the family of the parent(s) and the child.⁵ The issue thus arises of whether or not such interference was arbitrary or unlawful under article 17.

7.3 The Committee recalls that, in cases of child custody and access, the relevant criteria for assessing whether the specific interference with family life was objectively justified must be considered, on the one hand, in the light of the effective right of a parent and a child to maintain personal relations and regular contact with each other and, on the other hand, in the light of the best interests of the child.⁶ In the present case, the Committee observes that the national authorities did not adopt any measure to allow contact between the author and his son after the son's removal from Poland, and that the author's application for access was rejected by the Family Court of Western Australia on 29 January 2014 due to concurrent custody proceedings initiated almost four years earlier, on 12 April 2010. In the absence of explanations from the State party which could justify maintaining this situation, the Committee considers that the State party did not adopt the measures necessary to guarantee the right to family life between the author and his son following the latter's removal from Poland, and that this lack of action amounted to arbitrary interference in their family life.

7.4 In the light of all of the above, the Committee concludes that the facts before it constitute arbitrary interference with the author's family, in violation of article 17 (1) of the Covenant, and a failure by the State to take the steps necessary to guarantee the family's right to protection under article 23 (1) of the Covenant.

7.5 For the reasons stated above, as well as the absence of any information by the State party that its failure to provide access between the author and his son was based on the best interests of the child, the Committee also finds that the State party failed to take such measures of protection as required by the author's son given his condition as a minor, in violation of article 24 (1) of the Covenant.

⁴ See communications No. 201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, para. 10.3; No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 10.2; and No. 1052/2002, *N.T. v. Canada*, Views of 20 March 2007, para. 8.2.

⁵ See *N.T. v. Canada*, para. 8.3.

⁶ See communication No. 946/2000, *L.P. v. Czech Republic*, Views adopted on 25 July 2002, para. 7.3; and *N.T. v. Canada*, para. 8.3.

7.6 As to the author's claim relating to undue delays by national authorities regarding his access complaint under the Hague Convention, the Committee takes note of the State party's argument that article 14 (3) refers to criminal procedures and that, therefore, Hague Convention procedures fall outside the scope of this provision. However, the Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in the sense that "an important aspect of the fairness [of a trial] is its expeditiousness" and that "while the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision".⁷ In the present case, the Committee observes that the author's access application of 6 December 2011 was filed by the Australian central authority with the Family Court of Western Australia only on 2 July 2013 — 19 months later — and that this court permanently stayed the application on 29 January 2014 in the light of ongoing custody procedures initiated in April 2010 — almost four years before. The Committee notes that the State party has not presented any justification for this delay in dealing with the author's custody application or his access application, or in ensuring some provisional access scheme for the author, especially considering the matter at stake.⁸ Consequently, the Committee considers that the access proceedings were plagued by undue delays, in violation of article 14 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that facts before it reveal a violation of articles 14 (1), 17, 23 and 24 of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to ensure regular contact between the author and his son and to provide adequate compensation to the author. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, and to have them widely distributed.

⁷ See general comment No. 32, para. 27.

⁸ In the same line, see communication No. 1407/2005, *Asensi Martínez v. Paraguay*, Views adopted on 27 March 2009, para. 7.3.