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SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE
UNDER THE OPTIONAL PROTOCOL

Volume 9

Corrigendum

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At the end of decision No. 1123/2002, insert the appendix appearing overleaf.

APPENDIX

Dissenting opinion by Committee members Ms. Elizabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty

We disagree with the majority's decision for the following reasons.

As the Committee's majority has noted, the right to defend oneself without a lawyer is not absolute. Even if the relationship of trust between the accused and lawyer is important, the interests of justice may require the assignment of a lawyer against the wishes of the accused. We observe that it is not for the Committee to decide on the State party's legislation in the abstract but to examine if there in the case before it is a violation of the author's right under the Covenant. We consider that national courts are better placed than an international committee to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice. We find that there is nothing in the material before the Committee that indicates that the relevant courts' decisions were arbitrary or that the author was unable to present his own view of the facts to the courts concerned. We therefore find that the State party has not infringed the author's right to defense and that consequently there has been no violation of the Covenant. Furthermore we note that the European Court of Human Rights has, in the decision *Correia de Matos* v. *Portugal*, 15 November 2001, declared inadmissible an application from the same author on the same facts. We are deeply concerned that two international instances—instead of trying to reconcile their jurisprudence with one another—come to different conclusions when applying exactly the same provisions to the same facts.

Dissenting opinion by Committee member Sir Nigel Rodley

While inclined to agree with the dissent of Mr. Ando and Ms. Palm on the merits, not least because of the cavalier way in which the Committee chooses to ignore the reasoned approach of the European Court of Human Rights, applying the same law to the same facts, I do not believe that the Committee needed even to reach a decision on the merits.

Important as it may be to ensuring justice in an individual case, a constitutional motion is not procedurally an integral part of a criminal trial. The Covenant does not guarantee a right to engage in any legal procedure without legal counsel. Accordingly, the author's failure to instruct legal counsel to pursue the motion (the Committee is not in a position to determine whether the author was improperly removed from the Bar Council's roll, nor does it) meant that a possible domestic remedy was not exhausted. Accordingly, the Committee should have declared the case inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

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At the end of decision No. 1314/2004, insert the appendix appearing below and overleaf.

APPENDIX

Dissenting opinion by Committee members Mr. Hipólito Solari-Yrigoyen, Mr. Edwin Johnson and Mr. Rafael Rivas Posada

I disagree with the majority view in the following particulars:

1. In regarding the Good Friday Agreement as a "political agreement" which it "cannot examine … outside its political context", the Committee gives undue weight to the State party's claim that it based its decision not to include the authors in the early release scheme on the exceptional impact and repercussions of the offence [of which they were convicted] on public opinion. The State party asserts that the offences in question "caused outrage", that the Government did not believe the Irish people would tolerate the early release of the authors, and that when the Prime Minister announced in Parliament that he would consider their early release, his statement provoked "strong public criticism".

2. It seems perverse that, according to the majority position during the discussion of the case in its political context, the authors' political opinions are to be described as real or "alleged" when the State party has explicitly acknowledged that high-ranking members of the Provisional IRA were involved, and when unchallenged evidence made available to the Committee shows that the offences of which the authors were found guilty were committed in the name of the Provisional Irish Republican Army, that the prison authorities and the Department of Justice acknowledged that the authors belonged to the Provisional IRA, and that as such the authors were confined in a special wing of the prison intended for IRA members. The Supreme Court also found that the authors were undeniably members of the Provisional IRA. There is nothing "alleged" about the authors' political opinions.

3. Whether the Good Friday Agreement was political or not, the crucial issue for the Committee should be to ascertain whether the exclusion of the authors from the early release scheme was consistent with article 26 of the Covenant, which calls for equality before the law and prohibits discrimination on the grounds which it specifies. Even if the early release scheme left it to the discretion of the authorities to include or exclude a particular individual, a decision to exclude someone ought to be based on fair and reasonable criteria—something which the State party has not so much as attempted to do.

4. The authors point out that the State party included under the scheme people guilty of crimes as serious as or more serious than those which they committed, such as killing policemen, a crime attracting the death penalty until 1990 and punishable thereafter by a mandatory minimum 40-year prison sentence. They also report that a Department of Justice document made available to them which discussed the prison terms that should be served by prisoners found guilty after 10 April 1998 of crimes committed before the Good Friday Agreement (the authors' case) expressly excluded them. The State party has confirmed that the authors were repeatedly excluded from the early release scheme and that "on successive occasions members of the … Government made public pronouncements to this effect" (para. 4.2). Hence the State party has deliberately treated the authors differently from other people convicted of crimes similar to or more serious than those the authors committed.

5. Given that one of the authors was convicted of manslaughter (in the *Garda McCabe* case) and the other of conspiracy to commit robbery although he had not even been at the scene of the crime, one must conclude that the State party has not shown that its decision to exclude the authors from the early release scheme was based on fair and reasonable grounds. The decision was based on political and other considerations unacceptable under the Covenant such as the potential impact of the authors' early release on public opinion. As the Committee has pointed out in general comment 18, article 26 of the Covenant does not merely duplicate the guarantee offered by article 2 but provides an autonomous right prohibiting discrimination in law or in fact in any field regulated and protected by public authorities.

6. I therefore consider that the authors' right under article 26 of the Covenant to equality before the law and equal protection of the law without discrimination of any kind has been violated.

Concurring opinion of Committee member Ms. Ruth Wedgwood

The Committee has properly concluded that the State party did not act in an arbitrary fashion when it declined to release the two authors from prison under the Good Friday Agreement. The authors were involved in a robbery which led to the shooting death of an Irish police officer in June 1996. This violent crime contributed to the breach of a two-year ceasefire declared in August 1994, and helped to bring more than another year of fighting in a bitter civil conflict. Any alleged misapprehension of the facts of the authors' case by the Supreme Court of Ireland was cured in a petition for consideration and Government affidavit submitted to the Court. See Views of the Committee, paragraph 2.16 supra. In full possession of these facts, the Supreme Court reaffirmed its prior holding.

There is one cautionary note that properly attends our consideration of this case. Article 26 of the Covenant provides that all persons are equal before the law, and are entitled to equal protection of the law. Article 26 also forbids discrimination on "any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." But article 26 does not allow the Committee to sit as an administrative court, reviewing every Government decision, in the same fashion as a national administrative tribunal. This is a point especially important in the management of our decisional capacity under the First Optional Protocol.

The authors' complaint alleges that the Justice Minister of Ireland failed to write them with reasons for their exclusion from "qualifying prisoners" for potential release. They also ask the Committee to disallow the Minister's underlying reasons as arbitrary and inadequate, because other prisoners who were released had allegedly committed crimes as equally grave as their own. But the Supreme Court of Ireland noted that the Good Friday Agreement had not been incorporated into Irish law and was not designed to confer specific rights on individuals. In a great many countries, pardon authority remains a discretionary exercise, for which the Executive is not required to give reasons. There is no allegation here that any of the specific characteristics named in article 26 affected the Government's decision, nor any other identity-related characteristic. Thus, there is no apparent basis for the authors' claim under article 26.

Individual opinion by Committee members Mr. Rajsoomer Lallah and Ms. Christine Chanet

1. I am unable to share the majority view that article 26 has not been violated. In my view, those provisions of the article prescribing the fundamental principles of equality before the law and the equal protection of the law have been violated.

2. While it is true to say that the actual exercise of power to release prisoners earlier than their term of imprisonment was contained in existing law which applied generally to all prisoners, nevertheless the 1998 Act which was designed to implement the GFA, in its specific application to prisoners, created a special scheme and the special mechanism of an advisory Commission to consider the early release of "qualifying prisoners" (*vide paragraphs 2.6 and 2.7 of the Committee Views for the background and meaning of this term*).

3. The 1998 Act thus created, for the purpose of the exercise of the early release provisions, a special category of prisoners a list of whom the relevant Minister was statutorily empowered to refer to the Commission for advice.

4. I open a parenthesis here to observe that the question whether the Minister would or would not be bound by that advice is not relevant, though it could reasonably be assumed that such Commissions are created for a genuine purpose, are not otiose statutory creations and are not unlike Commissions on the Prerogative of Mercy in a number of modern Constitutions by whose advice the Executive is bound. Clearly the purpose is precisely to shield decisions affecting the liberty of individuals from political expediency and to ensure, in this regard, the observance of the principles of equality and equal protection of the law.

5. Be that as it may and at a minimum, the 1998 Act created a special category of "qualifying prisoners", as distinct from the general category of prisoners, to be entitled to inclusion in the Ministerial list and to have their cases considered by the statutory Commission. While article 26 permits, in principle, different treatment between several claimants on reasonable and objective criteria, such criteria cease to be reasonable and objective when they are based on essentially political considerations expressly prohibited by article 26, whether in the enactment of laws or in their implementation or else in their judicial adjudication. The authors were thus deprived of their entitlement to inclusion in the list in violation of their article 26 right, as "qualifying prisoners", to equality of treatment and the equal protection of the law.