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DECISIONS

Communication No. 593/1994

Submitted by: Patrick Holland
Victim: The author
State party: Ireland
Date of communication: 8 June 1994 (initial submission)
Date of present decision: 25 October 1996

[ANNEX]

*/ Made public by decision of the Human Rights Committee.

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ANNEX

Decision of the Human Rights Committee under the Optional Protocol
to the International Covenant on Civil and Political Rights
- Fifty-eighth session -

concerning

Communication No. 593/1994

Submitted by: Patrick Holland
Victim: The author
State party: Ireland
Date of communication: 8 June 1994 (initial submission)

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

Meeting on 25 October 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is Patrick Holland, an Irish citizen, born on 12 March 1939, at the time of submission of the communication serving a prison term in Ireland. He claims to be a victim of a violation by Ireland of articles 14 and 26 of the Covenant. Both the Covenant and the Optional Protocol entered into force for Ireland on 8 March 1990.

The facts as submitted by the author

2.1 The author was arrested on 6 April 1989 under section 30 of the Offences against the State Act 1939 and charged with possession of explosives for unlawful purposes. He was tried on 27 June 1989 by a Special Criminal Court, together with four co-defendants, found guilty and sentenced to ten years' imprisonment. On appeal against sentence, the Court of Appeal, on 21 May 1990, reduced the sentence to seven years' imprisonment, considering that the judgment of the Special Court might give the impression that he was convicted of a more serious charge, namely of possession of explosives for enabling others to endanger life. The author was released from prison on 27 September 1994.

2.2 At the trial before the Special Criminal Court, the author pleaded guilty of the charge, allegedly because his lawyer had told him that "in this court, they are going to believe the police" and that his sentence would be heavier if he would plead not guilty. In this context, the author states that one of his co-accused who pleaded not-guilty was indeed sentenced to a longer term of imprisonment.

2.3 The author submits that there was no evidence against him, but that the police claimed that he had admitted to them that he knew about the explosives in his house. No tape recording of the author's alleged confession was provided; he did not sign any confession.

2.4 The author explains that in April 1989, an acquaintance of his, A.M., stayed with him in his house, having come from England to inquire into the possibilities of renting a restaurant or pub. On 3 April 1989, they were joined by P.W., a friend of A.M., who had come to Dublin to attend a court hearing. The author states that he did not know P.W. before, but that he allowed him to stay at his house. The author, who had his own printing business, worked most of the time, only coming home to sleep or eat. At lunchtime on 6 April 1989, the police raided his house, and arrested him, A.M. and P.W. and a fourth acquaintance, a former colleague, who was visiting the author. Explosives were found in a black bag, but the author denies having had knowledge of their presence.

The complaint

3.1 The author claims that the trial against him was unfair, because the Special Criminal Court does not constitute an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. In this connection, the author explains that the Irish constitution permits the establishment of "special courts" for the trial of offences in cases where it is determined that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The author points out that it is the Government who decides which cases are to be brought before a special court. The author quotes from section 39 of the Offences against the State Act, which provides that members of special courts are appointed and removed at will by the Government. The remuneration, if any, is determined by the Ministry for Finance. Members of special courts need not be members of the judiciary; barristers and solicitors of at least seven years standing and high ranking officers of the Defence Forces may also be appointed.

3.2 The author contends that the special courts represent a threat to the equality of treatment of those accused of crimes, because the independence of the members of such courts is not protected. In this context, the author refers to the judgment in his case, which appeared to sentence him for a more serious offence than for which he had been charged.

3.3 The author further alleges that he was discriminated against in the prison system because he "fought for his rights" through the courts in order to have his proper entitlement to parole established. He states that two of his co-accused, who received the same sentence, were moved to an open prison in 1992 and early 1993, whereas the author was only moved to an open prison in the beginning of 1994. The author points out that regular weekend home visits are allowed from an open prison, whereas he was unable to obtain permission to visit his sister in hospital before she died on 22 December 1993; he was granted parole from 22 to 27 December 1993, after she had already died.

State party's submission and the author's comments

4.1 By submission of 5 December 1994, the State party argues that the communication is inadmissible ratione temporis, since the substance of the author's complaint relates to his trial in the Special Criminal Court on 27 June 1989, that is before the entry into force of the Covenant and its Optional Protocol for Ireland.

4.2 The State party further argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party notes that the essence of the author's claim is that he did not receive a fair trial before an independent and impartial tribunal and that he claims that he was innocent of the offences with which he was charged. However, the author withdrew his plea of not guilty, leaving the trial court with no option but to accept his acknowledgement and sentence him accordingly. The State party submits that he might have been acquitted, had he pleaded not guilty. It contests the author's suggestion that persons tried in the Special Criminal Courts are invariably convicted.

4.3 The State party further submits that the author failed to request the judges of the Special Court to disqualify themselves on the grounds that they were not independent and impartial. In this connection, the State party notes that the author, in fact, has not alleged any bias against the judges of the court which tried him. His argument seems to be that by virtue of the method of appointment and dismissal of the members of the Court a lack of independence and impartiality could arise, not that it did.

4.4 The State party explains that the Special Court is subject to control through judicial review by the High Court. A person who alleges a breach of the constitution or of natural justice can seek an order from the High Court quashing a decision by the Special Criminal Court or prohibiting it from acting contrary to the Constitution or to the rules of natural justice. If the author would have had reason to argue that he had not received a fair trial in the Special Court, he could therefore have sought an order of judicial review from the High Court, which he failed to do.

4.5 In this context, the State party refers to the Supreme Court's decision in the *Eccles case*¹, where it was held that the Government could not lawfully terminate the appointment of individual members of the Special Court for disagreeing with their decisions. The Court found that whereas the express constitutional guarantees of judicial independence did not apply to the Special Court, it enjoyed a derived guarantee of independence in carrying out its function.

4.6 The State party also argues that it would have been open to the author to argue at the hearing of his appeal that his conviction was defective by reason of lack of independence of the judges. The State party notes that the author, however, failed to appeal against his conviction and made no allegation that the Special Court was biased or lacked independence.

¹ Eccles v. Ireland [1985] I.R. 545.

4.7 Further, the State party argues that the author has not shown that he is personally a victim of the violation alleged. The State party refers to the author's argument that under the applicable legislation the independence of the court cannot be guaranteed. The State party submits that this is an argument of an actio popularis, since the author does not argue that the judges who tried him did in fact lack independence or that they were biased against him, nor does he specify any shortcoming in the proceedings. In this context, the State party refers to the decision by the European Commission on Human Rights in the Eccles case², which found that the Special Court was independent within the meaning of article 6 of the European Convention.

4.8 The State party explains that article 38 of the Constitution provides that special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The Offences against the State Act, 1939, provides for the establishment of such special courts, if the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and publishes a proclamation accordingly. Any such Government proclamation may be annulled by resolution of the Lower House of Parliament. A Special Criminal Court was first established in 1939 and remained in existence until 1962. In 1972, due to the situation arising from the troubles in Northern Ireland, the Special Criminal Court was re-established.

4.9 Section 39 of the Offences against the State Act regulates the appointment of members to the Court. The State party underlines that with few exceptions the members of the Special Criminal Court since 1972 have been judges of ordinary courts at the times of their appointment, and that since 1986 the Court has been comprised only of serving judges. No members of the Defence Forces have been appointed to the Court since its establishment in 1972.

4.10 Section 40 of the Act provides that the determination of the Special Criminal Court is to be according to the opinion of the majority and that individual opinions are not to be disclosed. Pursuant to section 44 of the Act convictions or sentences of a Special Criminal Court are subject to appeal to the Court of Criminal Appeal in the same way as convictions and sentences of the Central Criminal Court. There are no rules of evidence applying to the Special Criminal Court which do not apply to the ordinary courts, apart for provisions permitting the taking of evidence on commission in Northern Ireland.

4.11 Finally, the State party informs the Committee that the Court before which the author was tried consisted of a judge of the High Court, a judge of the Circuit Court and a District Justice. The State party adds that it is not aware of any challenge to the members' personal impartiality and independence.

² Eccles e.a. v. Ireland, application No. 12839/87, decision of 9 December 1988.

5.1 On 8 February 1995, the author provides his comments on the State party's submission. He reiterates that members of the Special Court can be dismissed at will by the Government and that there is therefore no guarantee for their independence and impartiality.

5.2 As to the State party's argument that his communication is inadmissible for non-exhaustion of domestic remedies because he withdrew his plea of not guilty, the author explains that after he had pleaded not guilty, his barrister asked the Court for a short recess. He then came to see him and advised him to plead guilty, since he was before the Special Criminal Court and a not guilty plea would result in a 12 years' sentence. Consequently, he pleaded guilty.

5.3 As regards the State party's argument that he failed to ask the judges of the trial court to disqualify themselves, that he failed to have the trial proceedings quashed by judicial review and that he failed to appeal against his conviction or to raise the alleged lack of independence of the court as a ground of appeal, the author states that he could not have done any of these things because his own defence counsel had already told him to plead guilty and he himself had not yet learned about United Nations human rights treaties. The author recalls that as a layman he was depending on his legal advisers, who let him down and never raised these issues. In this connection, the author states that he knows of a lot of people who stood up and did not recognise the court and then were sentenced for that alone.

Further submission from the State party

6.1 Upon request of the Committee, the State party, in a further submission of 2 July 1996, comments on the admissibility of the author's claim that he had been discriminated against in the prison system, and explains the legislation and practice surrounding the decision to bring the author's case before the Special Criminal Court.

6.2 As regards the author's claim that he is a victim of discrimination, the State party confirms that the two co-accused who were sentenced to six years' imprisonment were moved to an open prison prior to the completion of their sentences and that the author and one other co-accused remained in a closed institution until their release. The State party explains further that the co-accused moved to an open prison received the standard 25% remission of their sentences and were released about six months early. The third co-accused spent the duration of his sentence in a high security facility and was released 36 days prior to his release date.

6.3 The State party explains that the author was considered for a transfer to an open prison, but that, since the author had friends and relatives in Dublin, and all the open facilities were outside the Dublin area, it was decided that it would be better if he stayed in a closed institution in Dublin. The author was offered early release from 27 June 1994, that is three months prior to his release date. However, he declined to leave prison as he had nowhere to live. He was subsequently released on 22 September 1994, four days early.

6.4 The State party submits that transfers from a closed to an open prison are benefits accorded certain prisoners on the basis of their records, home addresses and other relevant considerations, but that it is not a right to which all prisoners are equally entitled. Reference is made to the Judgment of the European Court of Human Rights in the Ashingdane case (14/1983/70/106).

6.5 It is further submitted that the author was not treated differently from others, but that the decision to keep the author in a closed institution in Dublin was taken, as were the decisions to transfer two of his co-accused to an open institution outside Dublin, by reference to their personal and family circumstances and were intended to facilitate communication between the detainees and persons close to them. Moreover, it is submitted that, might the Committee nevertheless find that the author was treated differently, this treatment was based on reasonable and objective criteria and did not amount to discrimination.

6.6 The State party argues that the communication is inadmissible under article 3 of the Optional Protocol, for being incompatible with the provisions of the Covenant. Further, it is argued that the author's claim is inadmissible for non-exhaustion of domestic remedies, since it was open to the author to seek judicial review of the order made by the minister of Justice to transfer him to Whatefield Detention Centre in Dublin and not to an open prison. It was also open to the author to institute proceedings for alleged breach of constitutional rights, since the Constitution in article 10.1 protects the right of all citizens to be held equal before the law. It is submitted that the author never availed himself of any of the remedies open to him.

7.1 As regards the procedures of deciding whether a case will be tried before a Special Criminal Court, the State party explains that the Director of Public Prosecutions decides in accordance with law whether a case will be tried by the ordinary Criminal Courts or by the Special Criminal Court under part V of the Offences against the State Act. The Director is independent of the Government and the police in the discharge of his functions. The Offences against the State Act provides for certain offences to be scheduled under that Act. Where a person is charged with a scheduled offence, the Director of Public Prosecutions, under section 47(1) of the Act, may have that person brought before the Special Criminal Court to be tried on such offence. The author was charged with possession of explosive substances for an unlawful object, a scheduled indictable offence in accordance with section 47(1) of the Act.

7.2 A panel of nine judges, appointed by the Government and all being judges of the High Court, Circuit Court or District Court, is available to hear cases in the Special Criminal Court. The designation of members to hear a case is exclusively a matter for the judges of the panel to decide. The State party strongly refutes any suggestion that the judges of the Special Criminal Court lack independence or would have been biased against the author.

7.3 The State party explains that the decision to charge the author with the offence in question, as well as the decision to refer the author's case to the Special Criminal Court, was based on an assessment of the available evidence that was made known to the Director of Public Prosecutions by the Irish police.

7.4 The State party explains that the institution of the Special Criminal Court can be challenged since it is subject to constitutional scrutiny. It is also possible to challenge the constitutionality of various aspects of the legislation relating to the Special Criminal Court. Several such challenges have been undertaken. The author however did not attempt to initiate any proceedings in this respect.

7.5 The State party explains that it is also possible to challenge the referral of a case to the Special Criminal Court through judicial review of the Director of Public Prosecutions' decision. However, the relevant case law all relates to situations where the accused had been charged with a non-scheduled offence and the Director decided that he or she be tried before the Special Criminal Court. In availing himself of this remedy, the author would have had to show that the Director of Public Prosecutions had acted with mala fides.

7.6 The State party reiterates that the communication should be declared inadmissible.

Author's comments on the State party's submission

8.1 In his comments on the State party's submission, the author emphasizes that his main complaint is that the Special Criminal Court was illegal, because it was set up without making an application under article 4, paragraph 3, of the Covenant. He contends that there is no escaping a conviction before the Special Court and reiterates that when he pleaded not guilty, his solicitor told him that his sentence would be lower with a guilty plea, upon which he changed his plea.

8.2 The author reiterates that he was not allowed to leave prison in time to visit his dying sister in December 1993, but that he was only given leave after she died, to attend her funeral.

Issues and proceedings before the Committee

9.1 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.

9.2 The Committee has taken note of the State party's argument that the communication is inadmissible ratione temporis. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Covenant for the State party concerned, unless the alleged violations continue or have continuing effects which in themselves constitute a violation. The Committee notes that, although the author was convicted and sentenced at first instance in June 1989, that is before the entry into force of the Covenant for Ireland, his appeal was dismissed on 21 May 1990, that is after the entry into force of the Covenant for Ireland, and his imprisonment lasted until August 1994. In the circumstances, the Committee is not precluded ratione temporis from considering the author's communication.

9.3 As regards the author's claim that he did not receive a fair trial because he was tried before a Special Criminal Court, which was established in violation of article 14 of the Covenant, the Committee notes that the author pleaded guilty to the charge against him, that he failed to appeal his conviction, and that he never raised any objections with regard to the impartiality and independence of the Special Court. In this context, the Committee notes that the author was represented by legal counsel throughout and that it appears from the file that he made use of his right to petition the High Court with regard to other issues but did not raise the aforesaid issue. In the circumstances, the Committee finds that the author has failed to fulfil the requirement of article 5, paragraph 2(b), of the Optional Protocol, to exhaust available domestic remedies.

9.4 As regards the author's claim that he was discriminated against because he was not transferred to an open prison at the same time as his co-accused, the Committee notes that the State party has argued, and the author has not denied, that it would have been open to the author to seek judicial review of this decision. In the circumstances, the Committee considers that this claim is also inadmissible under article 5, paragraph 2(b), of the Optional Protocol, for non-exhaustion of domestic remedies.

10. The Human Rights Committee therefore decides:

- (a) that the communication is inadmissible;
- (b) that this decision shall be communicated to the State party and to the author.

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