Manuel Wackenheim v. France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

Communication No 854/1999 : France. 26/07/2002.
CCPR/C/75/D/854/1999. (Jurisprudence)

Convention Abbreviation: CCPR

Human Rights Committee

Seventy-fifth session

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(omissis)

1. The author of the communication is Mr. Manuel Wackenheim, a French citizen born on 12 February 1967 in Sarreguemines, France. He claims to be a victim of violations by France

The facts as submitted by the author

2.1 The author, who suffers from dwarfism, began in July 1991 to appear in "dwarf tossing" events organized by a company called Société Fun-Productions. Wearing suitable protective gear, he would allow himself to be thrown short distances onto an air bed by clients of the establishment staging the event (a discotheque).

2.2 On 27 November 1991, the French Ministry of the Interior issued a circular on the policing of public events, in particular dwarf tossing, which instructed prefects to use their policing powers to instruct mayors to keep a close eye on spectacles staged in their communes. The circular said that dwarf tossing should be banned on the basis of, among other things, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.3 On 30 October 1991 the author applied to the administrative court in Versailles to annul an order dated 25 October 1991 by the mayor of Morsang-sur-Orge banning a dwarf tossing event scheduled to take place in a local discotheque. The court annulled the mayor's order in a ruling on 25 February 1992, on the grounds that:

The evidence on file does not show that the banned event was of a nature to disturb the public order, peace or health in the town of Morsang-sur-Orge; the mere fact that certain notable individuals may have voiced public disapproval of such an event being held could not be taken to suggest that a disturbance of public order might ensue; even supposing, as the mayor maintains, that the event might have represented a degrading affront to human dignity, a ban could not be legally ordered in the absence of particular local circumstances; the order under challenge is thus vitiated by an overstepping of authority [...]

2.4 On 24 April 1992, the commune of Morsang-sur-Orge, represented by its then mayor, appealed against the ruling of 25 February 1992.

2.5 By an order dated 27 October 1995 the Council of State overturned the ruling on the grounds, first, that dwarf tossing was an attraction that affronted human dignity, respect for human dignity being part of public order and the authority vested in the municipal police being the means of ensuring it, and second, that respect for the principle of freedom of employment and trade was no impediment to the banning of an activity, licit or otherwise, in exercise of that authority if the activity was of a nature to disrupt public order. The Council of State went on to say that the attraction could be banned even in the absence of particular local circumstances.

2.6 On 20 March 1992 the author made another application for annulment of an order by the mayor of Aix-en-Provence banning a dwarf tossing event planned to take place in his commune. In a ruling on 8 October 1992 the administrative court of Marseille annulled the mayor's decision on the grounds that the activity in question was not of a nature to affront human dignity. Aix-en-Provence, represented by its mayor, appealed against this ruling in an application dated 16 December 1992. By order dated 27 October 1995 the Council of State overturned the ruling on the same grounds as given above. Since that order, Société Fun-Productions has decided no longer to engage in activities of this kind. In spite of his desire to continue, the author has since been without a job for want of anyone to organize dwarf tossing events.

The complaint

3. The author affirms that banning him from working has had an adverse effect on his life and represents an affront to his dignity. He claims to be the victim of a violation by France of his right to freedom, employment, respect for private life and an adequate standard of living, and of an act of discrimination. He further states that there is no work for dwarves in France and that his job does not constitute an affront to human dignity since dignity consists in having a job. He invokes article 2, paragraph 1; article 5, paragraph 2; (1) article 9, paragraph 1; article 16; (2) article 17, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights.

Observations by the State party

4.1 In observations dated 13 July 1999, the State party argues, first, that the alleged violations of article 9, paragraph 1, and article 16 should be set aside at once inasmuch as they are unrelated to the facts at issue. The complaint of a violation of article 9, paragraph 1, it continues, is in substance identical to a claimed violation of article 5 of the European Convention which the author has already brought before the European Commission, (3) and should be rejected for the same reasons as the Commission puts forward. In the view of the State party the author has not been subjected to any deprivation of liberty. As regards the claimed violation of article 16 of the Covenant, the State party points out that the author does not put forward any arguments to show that banning dwarf tossing events has in any way affected his legal personality. It affirms, moreover, that the bans do not affect his legal personality at all, and thus leave his position as the beneficiary of rights

unassailed. On the other hand the bans do, the State party considers, acknowledge the author's right to respect for his dignity as a human being, and ensure that that right is indeed respected.

4.2 As regards the alleged violation of article 17, paragraph 1, of the Covenant, the State party says that the author has not exhausted the available domestic remedies. The author's communication being based on the same facts and proceedings as were brought to the attention of the European Commission, his failure to bring before the French courts a complaint of a violation of the right to respect for his private and family life effectively renders the communication inadmissible in the present case, too. On a related point to do with the author's right to respect for his private life, the State party explains that the contested ban entailed no violation of article 17, paragraph 1, of the Covenant. To begin with, the right invoked by the author to allow himself to be "tossed" in public for a living does not appear to belong within the orbit of private and family life. Nor is it clear whether it extends beyond the realm of private life. The State party argues that dwarf tossing is a public practice and, as far as the author is concerned, a genuine professional activity. In that case it can hardly be protected, the State party concludes, on the strength of arguments deriving from the respect due to private life. It is more a matter, as the reasoning followed by the Council of State makes clear, of freedom of employment or freedom of trade and industry. Next, the State party goes on, even assuming that under a particularly wide-ranging interpretation of the notion the possibility of being "tossed" for a living does stem from the author's right to respect for his private life, the limit that has been imposed on that right is not contrary to article 17, paragraph 1, of the Covenant. That limit, the State party considers, is justified by higher considerations deriving from the respect due to the dignity of the human person. Hence it is rooted in a fundamental principle and thus constitutes neither an illegal nor an arbitrary encroachment upon individuals' right to respect for their private and family lives.

4.3 Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party believes that the article is similar in content to article 14 of the European Convention; the European Commission found that that article, which the author cited in his application to the Commission, was not in fact applicable since the author did not elsewhere invoke any right which the Convention protected. The State party asserts that the same is true of the present communication, since the author again fails to show that his claimed right to be tossed professionally is recognized in the Covenant or could be derived from one of the rights the Covenant does cover. It adds that, if the author's intention is to avail himself of such rights, it must be remembered that freedom of employment and freedom of trade and industry are not among the rights protected by the International Covenant on Civil and Political Rights.

4.4 On the alleged violation of article 26 of the Covenant, the State party stresses that the Council of State regards the non-discrimination clause in that article as the counterpart to article 2, paragraph 1, and as with article 2, the scope of application of article 26 is limited to the rights protected by the Covenant. (4) From that interpretation it follows, the State party argues, that as already stated in reference to the alleged violation of article 2, paragraph 1, a dwarf's right to be tossed for a living derives from none of the rights protected by the Covenant and the question of non-discrimination therefore does not arise. If for the sake of argument, the State party goes on, the non-discrimination language in article 26 were to be held valid for all rights enshrined both in the Covenant and in the domestic legal order, the question would arise of whether the contested ban is discriminatory. Self-evidently, the State party argues, it is not. By definition it applies only to individuals suffering from dwarfism since they are the only ones who might be involved in the banned activity; the indignity of the activity stems very specifically from those individuals' particular physical characteristics. The State party says it cannot be upbraided for treating dwarves differently from those who are not since they are two separate categories of individuals and for one of them "tossing", for obvious physical reasons, cannot be of any concern. It also says that any discussion of whether an activity involving

the tossing of people of normal size, i.e. unaffected by a specific handicap, was undignified would take a very different form. (5) It concludes that the difference in treatment is based on an objective difference in status between those suffering from dwarfism and those that are not and hence, given the underlying aim of upholding human dignity, is legitimate and, in any event, consistent with article 26 of the Covenant.

4.5 Concerning the alleged violation of article 5, paragraph 2, of the Covenant, the State party declares that the author presents no arguments showing why banning dwarf tossing should be contrary to that provision. It is difficult to see, in the State party's view, in what way the State authorities might have unduly restricted rights recognized under French law on the basis of the Covenant. The author may perhaps consider that the authorities have evinced an over-extended notion of human dignity which has prevented him from asserting his rights to employment and to pursue the occupation of his choosing, but the State party argues that an individual's right to respect as a human being is not one of those covered by the Covenant even if some of the wording in the Covenant - such as the ban on inhuman and degrading treatment - is in fact inspired by that notion. For that reason it concludes that article 5, paragraph 2, is not applicable in the present case. It adds that, even supposing for the sake of argument that the article were held to apply, it would not have been infringed: the action taken by the authorities was not prompted by a desire to restrict freedom of employment, trade and industry unduly on the grounds of due respect for the individual; it is a classic instance in administrative police practice of reconciling the exercise of economic freedoms with the desire to uphold public order, one element of which is public morals. Such a construction is not excessive since on the one hand, as Government Commissioner (6) Frydman said in his findings, public order has long incorporated notions of public morals and, on the other hand, it would be shocking were the basic principle of due respect for the individual to be abandoned for the sake of material considerations specific to the author (and otherwise scarcely commonplace), to the detriment of the overall community to which the author belongs.

4.6 For the above reasons, the State party concludes that the communication should be rejected as there is no basis for any of the complaints it contains.

Counsel's comments on the State party's observations

5.1 In comments dated 19 June 2000, counsel for the author argues that the State party is taking refuge in the first instance behind two identical orders handed down on 27 October 1995 by the Council of State, granting mayors the right to ban dwarf tossing events in their communes on the grounds that "human dignity is a part of public order" even in the absence of particular local circumstances and despite the consent of the individual concerned. Counsel rehearses the facts on which the communication is based, including the annulment by the administrative courts of the mayors' orders banning dwarf tossing events and the circular from the Ministry of the Interior.

5.2 Counsel says that the important decisions on points of principle taken in Mr. Wackenheim's case are disappointing. To the tripartite structure of public order in France as normally portrayed - order (tranquillity), safety (security) and public health - a fourth component - public morals, embracing respect for human dignity - has been added. Case law of this kind at the dawn of the twenty-first century revives the notion of moral order, counsel argues, directed against an activity that is both marginal and inoffensive when compared with the many forms of truly violent, aggressive behaviour that are tolerated in modem French society. The effect, counsel goes on, is to enshrine a new policing authority that threatens to open the door to all kinds of abuse: are mayors to become censors of public morality and defenders of human dignity? Are the courts to rule on citizens' happiness? Hitherto, counsel says, the courts have been able to take the protection of public morals

into account insofar as it has repercussions on public tranquillity. In the case of dwarf tossing events, however, counsel affirms that that requirement has not been met.

5.3 Counsel stands by the substance of the complaint and emphasizes that employment is an element of human dignity: depriving an individual of his employment is tantamount to diminishing his dignity.

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 Although France has entered a reservation to article 5, paragraph 2 (a), the Committee notes that it has not invoked that reservation which does not, therefore, impede consideration of the communication by the Committee.

6.3 In the case of the claimed violations of article 9, paragraph 1, and article 16 of the Covenant, the Committee takes note of the State party's arguments about the inconsistency of the complaints with the Covenant ratione materiae. It finds that the information furnished by the author does not provide grounds for claiming that these articles have been violated or for holding the complaints to be admissible under article 2 of the Optional Protocol.

6.4 Regarding the author's claims of a violation of article 17, paragraph 1, of the Covenant, the Committee points out that the author has at no point complained to the French courts of a violation of the right to respect for private and family life. In this respect, therefore, the author has not exhausted all the remedies that were at his disposal. The Committee thus declares this element of the communication to be inadmissible in the light of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As regards the alleged violation of article 5, paragraph 2, of the Covenant, the Committee notes that article 5 of the Covenant relates to general undertakings by States parties and cannot be invoked by individuals as a self-standing ground for a communication under the Optional Protocol. This complaint is thus not admissible under article 3 of the Optional Protocol. However, this conclusion does not prevent the Committee from taking article 5 into account when interpreting and applying other provisions of the Covenant.

6.6 As regards the author's complaint of discrimination under article 26 of the Covenant, the Committee takes note of the State party's observation that the Council of State holds the scope of application of article 26 to be limited to the rights protected by the Covenant. The Committee nevertheless wishes to draw attention to its jurisprudence establishing that article 26 does not simply duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. The application of the principle of non-discrimination contained in article 26 is therefore not limited to those rights which are provided for in the Covenant. As the State party has not put forward any other arguments against finding the communication admissible, the Committee finds the communication admissible inasmuch as it appears to raise questions pertaining to article 26 of the Covenant, and thus proceeds to examine the complaint on its merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

The Committee's deliberations on the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must decide whether the authorities' ban on dwarf tossing constitutes discrimination within the meaning of article 26 of the Covenant, as the author asserts.

7.3 The Committee recalls its jurisprudence whereby not every differentiation of treatment of persons will necessarily constitute discrimination, which is prohibited under article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds. The question, in the present case, is whether the differentiation between the persons covered by the ban ordered by the State party and persons to whom this ban does not apply may be validly justified.

7.4 The ban on throwing ordered by the State party in the present case applies only to dwarves (as described in paragraph 2.1). However, if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown. Thus, the differentiation between the persons covered by the ban, namely dwarves, and those to whom it does not apply, namely persons not suffering from dwarfism, is based on an objective reason and is not discriminatory in its purpose. The Committee considers that the State party has demonstrated, in the present case, that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant. The Committee accordingly concludes that the differentiation between the author and the persons to whom the ban ordered by the State party does not apply was based on objective and reasonable grounds.

7.5 The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant.

7.6 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal any violation of the Covenant.

[Done in English, French and Spanish, the French text being the original version. Subsequently to be translated also into Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer,

Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Notes

1. The author does not elaborate on the alleged violation of this article.

2. The author does not elaborate on the alleged violation of this article.

3. The material on file shows that on 4 February 1994 the European Commission on Human Rights took up a complaint by Mr. Wackenheim against France. On 16 October 1996 it declared that complaint inadmissible on the grounds that, first, the author had not exhausted the domestic remedies available against the alleged violations of articles 8 and 14 (alleged discrimination in the exercise of the right to employment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, second, the author's complaints regarding article 5, paragraph 1, and article 14 of the Convention were inconsistent ratione materiae.

4. Council of State, Vve Doukoure, Section opinion handed down on 15 April 1996, No. 176399.

5. Findings of Government Commissioner Patrick Frydman, RTDH 1996, p. 664.

6. The Government Commissioner is not a representative of the administration. He is a member of the Council of State whose presence is required when the Council sits as a judicial body and whose role is to offer a completely independent opinion "on the factual circumstances and the applicable rules of law, and his view of the solutions which, his conscience tells him, the dispute under consideration calls for". This definition, given in one of its judgements by the Council of State itself (CE Sect. 10 July 1957, Gervaise, Leb. P.467), has been incorporated into article L7 of the Code of Administrative Justice (Source: "Justice et institutions judiciaires", La Documentation Française, 2001).