

SOUTH AFRICA

McCallum v South Africa

(2010) AHRLR 21 (HRC 2010)

Communication 1818/2008, *Bradley McCallum (represented by counsel, Egon Aristidie Oswald) v South Africa*

Decided at 100th session, 23 October 2010, CCPR/C/100/D/1818/2008

Failure to investigate alleged assault of prisoner and provide adequate medical attention

Cruel, inhuman or degrading treatment (failure to investigate alleged ill-treatment in detention, 6.4, 6.7; *incommunicado* detention, 6.5; failure to provide HIV test requested by sexually assaulted inmate, 6.6; delay in providing medical examination, 6.8)

1. The author of the communication, dated 7 July 2008, is Mr Bradley McCallum, born on 18 April 1979. He is currently held at the St Albans Correctional Facility of the Eastern Cape. He claims to be a victim of violations by South Africa¹ of articles 7 and 10, alone and read in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by counsel, Mr Egon Aristidie Oswald.

The facts as presented by the author

2.1 The author is a detainee at the St Albans Maximum Correctional Facility in Port Elizabeth, Province of Eastern Cape. On 15 July 2005, a cleaner of Section C of the correctional facility informed the author and the other inmates of cell No C2 that a fellow inmate had stabbed Warder N in the section's dining hall and that the warder passed away. On the same day, warders of Section B assaulted inmates in that section.

2.2 On 17 July 2005, the author, together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M, intervened and forcibly removed the author's

¹ The Covenant and the Optional Protocol entered into force for South Africa on 10 December 1998 and on 28 August 2002, respectively.

shirt. In the corridor, Warder M kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognised five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them.

2.3 Around 60 to 70 inmates were lying naked on the floor of the wet corridor building a chain of human bodies. Inmates who looked up were beaten with batons and kicked. Around 20 female warders were present and walked over the inmates, kicking them into their genitals and making mocking remarks about their private parts. Thereafter, the inmates were sprayed with water, beaten by the warders with batons, shock boards, broomsticks, pool cues and pickaxe handles. They were also ordered to remove their knives from their anus.² As a result of the shock and fear, inmates urinated and defecated on themselves and on those linked to them in the human chain.

2.4 At some point, Warder P approached the author and while insulting him, he inserted a baton into the author's anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate's belongings. Thereafter, the inmates were ordered to return to their cells. This however created chaos, as the floor was wet with water, urine, feces and blood and some inmates fell over each other.

2.5 Injured inmates were not allowed to see a doctor until September 2005. Prisoners resorted to treating their wounds themselves with ashes as disinfectant and sand to stop the bleeding. The author was able to obtain medical attention only in late September 2005.³ The prison doctor, however, did not administer any treatment on him, as he considered the author's complaints to be of 'internal' nature and therefore not covered by his duties.⁴ The author requested HIV testing for fear of having contracted the virus from other inmates' bodily fluids on 17 July 2005. However, he was unable to obtain it. HIV is widespread in South African prisons.⁵ In October

² According to the author, it is not unusual for inmates to hide a knife in their anus.

³ According to the medical history on file, on 31 August 2005, the author went to the hospital in the morning, however, there is no mention of the nature of the consultation.

⁴ According to information provided by the author, unofficial protocol dictates that medical treatment is not administered to inmates in respect of 'internal' matters.

⁵ See concluding observations by the Committee against Torture, CAT/C/ZAF/CO/1, para 22.

2005, the author received treatment for his dislocated jaw and loose teeth.⁶ Between March and November 2006, the author's teeth were extracted one by one, adversely affecting his diet and health. On 3 April 2008, the author requested that the prison authorities provide him with a teeth prosthesis, without however receiving any answer to his request.

2.6 After the assault, the correctional facility was locked down and, as a result, the author was denied contact with his family and counsel for about a month. His telephone and exercise privileges were also taken away. Thereafter, he was allowed visits of five to ten minutes at a time.

2.7 On 20 November 2006, the author's counsel requested HIV testing for the author and the other victims. He wrote to the Head of the Correctional Facility, the Minister of Correctional Services, the National and Provincial Commissioner in the Department of Correctional Services and the State Attorney. On 13 December 2006, the Office of the State Attorney replied that the Department of Correctional Services, denied all allegations of torture and ill-treatment raised by the author and the other alleged victims and that it had no objection to HIV testing provided that the inmates gave their written consent and advice on the payment of the test. The author wrote back to the State Attorney invoking sections 27 and 35 of the Constitution⁷ on the right to have access to health care and

⁶ Complaint about teeth and jaw injuries reported on 11 October 2005 according to the medical history on file.

⁷ 27. Health care, food, water and social security

(1) Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

35. Arrested, detained and accused persons

[...]

(2) Everyone who is detained, including every sentenced prisoner, has the right

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's

(i) spouse or partner;

(ii) next of kin;

emergency medical treatment for persons deprived of their liberty. Despite several exchanges of correspondence, the State Attorney has not provided any response on the author's allegations of torture, nor has he responded to the author's request for free HIV testing. He simply indicated that he awaited instructions from the Department of Correctional Services. During the examination of the state party's initial report before the Committee against Torture on 15 November 2006, a member of the state party's delegation acknowledged that 'on the date of the murder in St Albans Maximum Correctional Facility, the officials were overcome with the situation and assaults took place'. On 18 February 2008, the author requested the Office of the Inspecting Judge to disclose its findings with respect to the assault. Despite several reminders, he has received no information.

2.8 Shortly after the incident, the author lodged a complaint to the prison authorities, which was however not accepted. During August/September 2005, the Office of the Inspecting Judge visited the prison and noted the author's and other inmates' grievances. In September 2005, an inspector of the South African Police Service recorded the author's statement, in which he complained of the treatment he had received. The inspector promised to open an investigation; however, the author has no knowledge of any such investigation into the matter.

2.9 In May 2006, the author was made aware of a legal representative, who was prepared to assist victims of torture. Up until then, the author had been unable to secure legal representation. On 12 May 2006, the author lodged a civil suit to demand compensation for the damages suffered. The author made a plea of exception to the state party's plea (Minister of Correctional Services) on the basis that their plea amounted to bare denial of liability. The Magistrate Court, however, upheld the state's plea, which denies the author's allegations of torture, inhuman and degrading treatment or punishment occurred on 17 July 2005. Furthermore, the state invoked section 3 of Act 40 of 2002 on the Institution of Legal Proceedings against certain Organs of State, according to which the plaintiff (the author) was obliged to serve the defendant, as an organ of the state, with written notice within six months of the alleged cause of action and the facts on which state's liability arose. The author withdrew his action and re-instituted proceedings in the High Court. However, he argues that his civil action may fail in the High Court, as he did not comply with the six months rule above-mentioned.

(iii) chosen religious counsellor; and
(iv) chosen medical practitioner.

The complaint

3.1 The author submits that his exposure to severe beatings and other ill-treatment during his detention at the St Albans Maximum Correctional Facility, his exposure to inhuman and degrading conditions of detention, the failure to properly investigate his allegations of ill-treatment and holding him *incommunicado* for a month after the assault amounts to a violation of article 7.

3.2 In particular, he claims that he was subjected to severe beatings with batons and shock shields while lying naked on the wet floor of the corridor and to rape with a baton forced into his anus. The physical abuse was such that it resulted in dislocation of his jaw and irreversible damage to his teeth, to the point that they had to be removed. Furthermore, he was raped with a baton, forced to strip naked, endure remarks about his private parts and required to insert his nose into the anal cavity of a fellow prisoner. Being forced to lie in urine, feces and blood was done deliberately to make him fear of an infection with the HIV virus. The subsequent denial by the authorities for HIV testing exacerbated the author's trauma. The author argues that these facts amount to torture and constitute a violation of article 7, of the Covenant.⁸

3.3 Furthermore, the author submits that he was kept *incommunicado* after the event and his privileges to telephone communication, exercise and his rights to access medical care, legal representation and family visits were denied for one month. He submits that this also breached article 7.

3.4 The author cites the Committee's jurisprudence, according to which for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.⁹ The author submits that the conditions of detention went far beyond those inherent in the deprivation of liberty and therefore amounted to a breach of article 7.

3.5 With regard to his conditions of detention, the author recalls the Committee's numerous statements according to which the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated in article 10. He claims that the overcrowding in St Albans Maximum Correctional Facility amounts to a violation of article 10, insofar as, instead of one prisoner per cell pursuant to rule 9 of the Standard Minimum Rules for the Treatment of Prisoners, the author was incarcerated in a cell of 60 to 70 inmates. Some of his cellmates had to share beds, and the author was exposed

⁸ The author submits that he requests the Committee to make a specific finding that his treatment amounted to torture under article 7, as opposed to making a general finding of a violation of article 7 which would not specify which limb of that article was violated.

⁹ See communication 265/1987, *Vuolanne v Finland*, views adopted on 7 April 1989.

to a lack of privacy and he did not have access to adequate sanitary facilities. He further submits that the overpopulation in the prison amounted to 300 percent, which is confirmed in a report by the Portfolio Committee of the Department of Correctional Services. Moreover, contrary to rules 10 to 21, of the Standard Minimum Rules for the Treatment of Prisoners, adequate bedding, clothing, food and hygiene facilities were not supplied and, contrary to rules 22 to 26, adequate medical care was not provided.

3.6 The author further submits that the state party has failed to properly investigate his claims of ill-treatment and to provide him with a remedy. He recalls the Committee's General Comment 20,¹⁰ according to which complaints invoking article 7 must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The state party's failure therefore amounts to a violation of the author's rights under articles 7 and 10 read in conjunction with article 2, paragraph 3.

3.7 With regard to the exhaustion of domestic remedies, the author claims that the South African Police failed to properly investigate his case, that the Prosecuting Authority failed to prosecute the matter and that no disciplinary action has been taken against the perpetrators by the Department of Correctional Services. The author further submits that the state party has enacted legislation requesting that applicants in civil suits against the state institute proceedings within six months, when the normal deadline is three years. Therefore, his civil suit is likely to fail, due to his difficulties in corroborating physical, psychological and medical evidence, to his indigence, which negatively impacts on the quality of his legal representation, and to the six month time limitation for the notification of civil suits against the state.

State party's failure to cooperate

4. On 16 October 2008, 7 July 2009, 15 December 2009, 6 May 2010 and 18 August 2010, the state party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the state party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that states parties examine in good faith all allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the state party, due weight must be given to the author's allegations, to the extent that they are substantiated.

¹⁰ See General Comment 20, article 7, A/47/40(SUPP), paragraph 14.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As required under article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 In light of the author's complaints to the prison administration, the police the Office of the Inspecting Judge, the Magistrate Court and the High Court, which, it would appear, not to have been investigated and the absence of any observations from the state party, the Committee considers that the provisions of article 5, paragraph 2(b), of the Optional Protocol do not preclude the admissibility of the communication.

5.4 Having found no impediment to the admissibility of the author's claims under articles 7 and 10 alone and read in conjunction with article 2, paragraph 3, of the Covenant, the Committee proceeds to their examination on the merits.

Consideration of merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the state party has not addressed the author's allegations. In the circumstances, due weight must be given to such allegations to the extent that they have been sufficiently substantiated.

6.2 The Committee notes the author's claim that, on 17 July 2005, warders of the St Alban Correctional Facility beat him with batons and shock shields while he was lying naked on the wet floor of the prison corridor, and that, as a consequence, he suffered from several physical injuries, such as a dislocated jaw, irreversible damage to his teeth and wounds on his left arm and left side of his head. The Committee further notes the author's allegation that he experiences flashbacks of the rape with a baton, that he has endured ugly remarks about his private parts, that he was required to insert his nose into the anal cavity of a fellow prisoner, and forced to lie in urine, feces and blood coupled with the fear of contracting HIV. It also notes the author's allegation that following the incident, he was held *incommunicado* for one month and was deprived of access to a physician, lawyer or his family. The Committee also notes the

author's allegation that his conditions of detention went beyond those inherent in the deprivation of liberty, including that he was held in a cell of 60 to 70 inmates, that he lacked privacy, did not have access to adequate sanitary facilities, bedding, clothing, food, as well as medical care, and that the prison's overpopulation amounted to 300 percent. To support his claim, the author provides a copy of his medical history, press clippings about the incident of 17 July 2005 and an outline of his cell.

6.3 The Committee further notes the author's allegation that his claims have not been investigated and that he has therefore been deprived of an effective remedy. In support of his allegation, the author has provided copies of letters, confirmations of fax messages and various reminders submitted to the authorities requesting the investigation of the incident of 17 July 2005, as well as free HIV testing. The Committee further notes that the author commenced a civil suit against the Department of Correctional Services in the Magistrate Court, which he decided to withdraw and to re-institute in the High Court. It also notes the author's argument that his civil action is unlikely to be successful due to his difficulties in obtaining evidence, his inability to afford proper representation and the fact that the six month time limitation for the notification of a complaint against a state organ has already elapsed.

6.4 The Committee notes the author's detailed description of the incident of 17 July 2005, during which he was allegedly subjected to ill-treatment, as well as his identification by name of five warders who allegedly participated in the incident. It also notes the author's medical history and press clippings on the incident of 17 July 2005. The Committee observes that in the present case the arguments provided by the author necessitated at the very minimum an independent investigation of the potential involvement of the state party's warders in the author's ill-treatment. The Committee considers, therefore, that the author's allegations not having been addressed by the state party warrant the finding that there has been a violation of article 7 of the Covenant.¹¹

6.5 Regarding the author's claim that the St Alban's Correctional Facility was locked down after the incident of 17 July 2005 and that he was held *incommunicado* for a month without access to a physician, a lawyer or his family, the Committee recalls its General Comment 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that states parties should make provisions against *incommunicado* detention¹² and notes that the total isolation of a detained or imprisoned person

¹¹ See communication 962/2001, *Mulezi v Democratic Republic of the Congo*, views adopted on 8 July 2004, para 5.4.

¹² *Official Records of the General Assembly, Forty-seventh Session, Supplement No 40 (A/47/40)*, annex VI, sect A para 11.

may amount to an act prohibited by article 7. In view of this observation, the Committee finds an additional violation of article 7 of the Covenant.

6.6 With regard to the author's complaint that despite several requests to various authorities he was not tested for HIV, which he feared to have contracted as a result of the incident of 17 July 2005, the Committee finds that the prevalence of HIV in South African prisons, as attested by the Committee against Torture in its concluding observations of the state party's initial report,¹³ which had been brought to the Committee's attention by the author, as well as the particular circumstances of the incident of 17 July 2005 warrants the finding of a violation of article 7, of the Covenant.

6.7 The Committee notes the content of the complaints submitted by the author to different authorities, such as the prison administration, the police, the Office of the Inspecting Judge, the Magistrate Court and the High Court, none of which, it would appear, have been investigated. The Committee recalls its General Comment 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment¹⁴ and General Comment 31 (2004) on the subject of the General Legal Obligation on States Parties to the Covenant,¹⁵ as well as its constant jurisprudence,¹⁶ according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by competent authorities and appropriate action must be taken against those found guilty. In the present circumstances and in the absence of any explanation from the state party, due weight must be given to the author's allegations. Accordingly, the Committee concludes that the facts before it constitute a violation of article 7 read in conjunction with article 2, paragraph 3, of the Covenant.

6.8 With regard to the author's complaint alleging a denial to access to medical care after the author's ill-treatment on 17 July 2005, the Committee notes the information in the author's medical history, according to which he was taken to the prison hospital on 31 August 2005. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must

¹³ CAT/C/ZAF/CO/1, para 22.

¹⁴ *Official Records of the General Assembly, Forty-seventh Session, Supplement No 40 (A/47/40)*, annex VI, sect A para 14.

¹⁵ General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev. 1/Add. 13 (2004), para 18.

¹⁶ See for example communication 1436/2005, *Sathasivam/Saraswathi v Sri Lanka*, views adopted on 8 July 2008, para 6.4; communication 1589/2007, *Gapirjanov v Uzbekistan*, views adopted on 18 March 2010, para 8.3; communication 1096/2002, *Kurbanov v Tajikistan*, views adopted on 6 November 2003, para 7.4; communication 322/1988, *Rodriguez v Uruguay*, views adopted on 19 July 1994, para 12.3.

be treated in accordance with, *inter alia*, the United Nations Standard Minimum Rules for the Treatment of Prisoners.¹⁷ The Committee reiterates that it is the state party's obligation to provide for the security and well-being of persons deprived of their liberty.¹⁸ It observes that despite the author's request to see a doctor immediately after the incident of 17 July 2005, according to the medical record before the Committee, he received his first medical attention only on 31 August 2005. The Committee considers that the delay between the author's request for medical examination and the prison authorities response is such that it amounts to a violation of the author's rights under article 10, paragraph 1, of the Covenant.

7. 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 disclose a violation of the rights of Mr McCallum under article 7 alone and read in conjunction with article 2, paragraph 3, and article 10, paragraph 1, of the Covenant.

8. In accordance with article 2, paragraph 3(a), of the Covenant, the state party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation of the author's claims falling under article 7, prosecution of those responsible and full reparation, including adequate compensation. As long as the author is in prison, he should be treated with humanity and with respect for the inherent dignity of the human person and should benefit from appropriate health care. The state party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the state party, within 180 days, information about the

¹⁷ General Comment 21, on article 10, A/47/40(SUPP), paras. 3 and 5; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see also for example communication 1134/2002, *Fongum Gorji-Dinka v Cameroon*, views adopted on 17 March 2005, para 5.2, communication 1173/2003, *Benhadj v. Algeria*, views adopted on 20 July 2007, para 8.5.

¹⁸ See communication 907/2000, *Siragev v Uzbekistan*, views adopted on 1 November 2005, para 6.2; and communication 889/1999, *Zheikov v Russian Federation*, views adopted on 17 March 2006, para 7.2; communication 1284/2004, *Turaeva v Uzbekistan*, views adopted on 20 October 2009, para 9.2.

measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.