

August 2008

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Recommended Citation

Dmitri, Goubarkov (2008) "Federal Courts: Finding a Remedy When None Seems Available, Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007)," *Florida Journal of International Law*: Vol. 20: Iss. 2, Article 4.
Available at: <https://scholarship.law.ufl.edu/fjil/vol20/iss2/4>

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CASE COMMENT

FEDERAL COURTS: FINDING A REMEDY WHEN NONE SEEMS AVAILABLE, *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007)

*Goubarkov Dmitri**

I. FACTS

The plaintiff, an Indian citizen, learned about the Vienna Convention on Consular Relations (VCCR)¹ while serving a prison sentence for aggravated battery with a firearm.² The plaintiff filed a civil complaint against law enforcement officials alleging a violation of Article 36³ of the treaty.⁴ The district court dismissed the action for lack of subject matter jurisdiction.⁵ The U.S. Court of Appeals for the Seventh Circuit reversed the district court's decision, finding jurisdiction over the VCCR claim under the Alien Tort Statute.⁶ After the Seventh Circuit issued its decision, the defendants filed a petition for rehearing.⁷ On rehearing, the Seventh Circuit substituted its previous opinion and HELD, that a claim for an Article 36 violation should be brought under 42 U.S.C. § 1983 (civil rights

* J.D., University of Florida, 2009; M.R., North Carolina State University, 2006; B.A., Ulyanovsk State Pedagogical University, 1998. This Case Comment was selected as the best comment in the Fall 2007 Writing Competition.

1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified Nov. 24, 1969) [hereinafter VCCR].

2. *Jogi v. Voges*, 425 F.3d 367, 370 (7th Cir. 2005) (*Jogi I*), *opinion withdrawn and superseded on reh'g by Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (*Jogi II*).

3. VCCR, *supra* note 1, art. 36.

4. *Jogi I*, 425 F.3d at 370.

5. *Id.* at 371.

6. *Id.* at 373. The Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2007). The Court also found jurisdiction under the federal question statute. *Jogi I*, 425 F.3d at 373. However in *Jogi II*, the parties did not dispute the federal question jurisdiction. *Jogi II*, 480 F.3d at 824.

7. *Jogi II*, 480 F.3d at 824.

statute)⁸ because it provides a cause of action for violations of federally protected individual rights.⁹

II. HISTORY

The U.S. Constitution declares treaties to be the supreme law of the land.¹⁰ However, they do not necessarily confer enforceable individual rights in U.S. courts.¹¹ Whether a treaty provides an independent remedy for individuals “depend[s] upon the particular treaty and claim involved.”¹²

The U.S. Supreme Court has been reluctant to recognize that the VCCR provides a private right of action.¹³ Article 36 of the VCCR refers to rights of individuals, but the preamble suggests that the purpose of the treaty is to regulate consular relations among member states.¹⁴ When confronted

8. The civil rights statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2007).

9. *Jogi II*, 480 F.3d at 835-36.

10. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

11. *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (holding that international treaties generally do not create a private right of action).

12. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000).

13. See *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (6-3 decision) (holding, without addressing the meaning of the VCCR, that a decision of the International Court of Justice on the application of the VCCR in the United States is not binding); see also *Medellin v. Dretke*, 544 U.S. 660 (2005) (refusing to consider a VCCR claim by dismissing its own writ of certiorari as improvidently granted). Both cases involve the same plaintiffs. The Supreme Court mentions *Medellin v. Dretke* when discussing the procedural history of *Medellin v. Texas*. *Medellin*, 128 S. Ct. at 1355-56.

14. VCCR, *supra* note 1, pmb1. “Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.” *Id.*

with the question of what individual guarantees the VCCR affords foreign citizens, the U.S. Supreme Court has avoided the issue.¹⁵

In *Breard v. Greene*, the Supreme Court recognized that the VCCR “arguably confers on an individual the right to consular assistance following arrest.”¹⁶ In that case, the state of Virginia sentenced Angel Breard, a Paraguayan citizen, to death for attempted rape and murder.¹⁷ The Virginia Supreme Court affirmed the conviction and Breard filed an application for a writ of habeas corpus in federal district court.¹⁸ In his application, Breard argued that the Virginia authorities had violated his rights by not informing him of the right to contact the Paraguayan Consulate.¹⁹ The federal district court rejected the claim.²⁰ After an unsuccessful appeal, Breard petitioned the U.S. Supreme Court for review.²¹

The U.S. Supreme Court acknowledged that as a treaty ratified by the United States, the VCCR is the supreme law of the land.²² But the U.S. Supreme Court emphasized that the rights granted by the VCCR should be recognized “in conformity with the laws and regulations of the receiving State.”²³ In the United States, errors in criminal proceedings should be challenged at trial or on direct appeal.²⁴ Failure to do so prevented the review of Breard’s Article 36 claim.²⁵ The U.S. Supreme Court added that even if Breard properly raised his VCCR claim, the violation would not affect the outcome.²⁶ Thus, by denying relief on procedural grounds, the U.S. Supreme Court did not have to explain what remedy, if any, the VCCR provides in the domestic legal system.²⁷

15. Compare *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (assuming, without deciding, that the VCCR creates enforceable rights), with *Breard v. Greene*, 523 U.S. 371 (1998) (holding that a VCCR claim was procedurally barred because of failure to raise it during trial).

16. *Breard*, 523 U.S. at 376.

17. *Id.* at 372-73.

18. *Id.* at 373.

19. *Id.*

20. *Id.*

21. *Id.* at 373.

22. *Id.* at 376.

23. *Id.* at 375 (quoting VCCR, *supra* note 1, art. 36(2)).

24. *Id.*

25. *Id.* at 375-76.

26. *Id.* at 377.

27. See Howard Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT’L & COMP. L. 27, 59 (2000) (discussing *Breard* and concluding that current U.S. law might provide no remedy for foreign citizens asserting an Article 36 violation).

In *Sanchez-Llamas v. Oregon*, the U.S. Supreme Court “assume[d], without deciding,” that Article 36 created judicially enforceable individual rights.²⁸ The *Sanchez-Llamas* decision involved two consolidated cases from Oregon²⁹ and Virginia.³⁰ In both cases, state law enforcement officials arrested and charged foreign citizens without giving them an opportunity to contact their respective consulates.³¹

The U.S. Supreme Court considered three questions: (1) whether Article 36 confers rights that defendants may raise in a judicial proceeding; (2) whether a violation of Article 36 requires suppression of evidence (the issue from the Oregon case); and (3) whether failure to raise an Article 36 violation at trial precludes defendants from pursuing the claim in a habeas proceeding (the issue from the Virginia case).³² On the second question, the U.S. Supreme Court held that an Article 36 violation does not require suppression of evidence.³³ On the third question, the U.S. Supreme Court ruled that procedural rules of a forum state may bar defendants from raising an Article 36 claim.³⁴ The majority did not address the first question because it concluded that the disposition of the other two questions rendered it unnecessary.³⁵

Justices Breyer, Stevens, Souter, and Ginsburg dissented.³⁶ They argued that the U.S. Supreme Court should have addressed the first question.³⁷ The dissenting Justices would allow defendants to raise an Article 36 claim because the language of the article clearly referred to an

28. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006).

29. *Sanchez-Llamas v. Oregon*, 338 Or. 267 (2005).

30. *Bustillo v. Johnson*, No. 201879, 2004 WL 1318885 (Va. Cir. Ct. May 4, 2004).

31. In *Sanchez-Llamas v. Oregon*, a Mexican citizen made incriminating statements to the police. *Sanchez-Llamas*, 548 U.S. at 339-40. In a pretrial motion and on appeal, his counsel argued that the incriminating statements should be suppressed because the Mexican citizen was not advised of the right to contact his consulate. *Id.* at 340. The trial court denied the motion and the Oregon Court of Appeals and the Oregon Supreme Court affirmed the trial court's decision. *Id.* In *Bustillo v. Johnson*, a Honduran citizen was sentenced to 30 years in prison for first-degree murder. *Id.* at 341. The Court of Appeals of Virginia affirmed the conviction. *Bustillo v. Commonwealth*, No. 2321-98-4, 2000 WL 365930 (Va. Ct. App. Apr. 11, 2000). Only then, the Honduran citizen raised the consular notification issue in a petition for a writ of habeas corpus in state court. *Sanchez-Llamas*, 548 U.S. at 342. The state habeas court ruled that the claim was procedurally barred since the Honduran national did not argue the issue at trial or on appeal. *Id.* at 342. The Supreme Court of Virginia upheld the dismissal of the VCCR claim. *Id.* at 343.

32. *Sanchez-Llamas*, 548 U.S. at 342.

33. *Id.* at 350.

34. *Id.* at 360.

35. *Id.* at 343.

36. *Id.* at 364 (Breyer, J., dissenting). Justice Ginsburg joined the majority's decision on the second and third questions. *Id.* at 360 (Ginsburg, J., concurring).

37. *Sanchez-Llamas*, 548 U.S. at 366 (Breyer, J., dissenting).

individual right³⁸ and the International Court's of Justice interpretation of the same provision supported the dissent's conclusion.³⁹

III. INSTANT CASE

In the instant case, the Seventh Circuit attempted to resolve the ambiguity by holding that Article 36 establishes a private right of action under the civil rights statute.⁴⁰ On rehearing, the Court acknowledged the U.S. Supreme Court's opinion in *Sanchez-Llamas* that the VCCR creates judicially enforceable rights.⁴¹ However, the Seventh Circuit concluded that as a claim under federal law, an Article 36 claim should fall within the scope of the civil rights statute.⁴²

The Seventh Circuit reasoned that the absence of the word "treaties" in the language of the civil rights statute does not mean that the statute excludes international agreements.⁴³ The Constitution puts treaties on the same footing as the laws of the United States.⁴⁴ The Court found that the VCCR is a self-executing treaty.⁴⁵ If the VCCR grants rights to individuals and satisfies the criteria for the civil rights statute, Article 36 is incorporated in the statute as "part of the law of the United States."⁴⁶ The

38. *Id.* at 374 (Breyer, J., dissenting).

39. *Id.* at 376 (Breyer, J. dissenting).

The key ICJ holdings are its determinations (1) that the Convention obligates a member nation to inform an arrested foreign national without delay that he may contact his consulate; (2) that the Convention requires the United States to provide some process for its courts to "review and reconside[r]" criminal convictions where there has been a prejudicial violation of this obligation; and (3) that this "review and reconsideration" cannot be foreclosed on the ground that the foreign national did not raise the violation at trial *where the authorities' failure to inform the foreign national of his rights prevented him from timely raising his claim.*

Id. at 370-71 (Breyer, J., dissenting). The dissent refers to *Case Concerning Avena and other Mexican Nationals* (Mex. v. United States), 2004 I.C.J. 12 (Mar. 31) and *LaGrand Case* (F.R.G. v. United States), 2001 I.C.J. 466 (June 27). *Id.* at 368-69.

40. *Jogi v. Voges*, 480 F.3d 822, 836 (7th Cir. 2007).

41. *Id.* at 831.

42. *Id.* at 824-25.

43. *Id.* at 827.

44. *Id.*

45. *Jogi II*, 480 F.3d at 830. "[T]he Convention is self-executing, meaning that legislative action was not necessary before it could be enforced." *Id.*

46. *Id.* at 827.

Court noted that the purpose of the civil rights statute is to protect against official misconduct.⁴⁷

To bring an Article 36 claim under the civil rights statute, a claimant must satisfy two requirements.⁴⁸ First, the claimant must establish that a treaty grants a personal right.⁴⁹ Second, the claimant must show that the statute provides a remedy to the claimant.⁵⁰

As to the first requirement, the Seventh Circuit reiterated, with moderate additions, its discussion from the previous opinion of a private right of action under Article 36.⁵¹ The Court rejected the broad language of the VCCR preamble as the explanation of the meaning of Article 36.⁵² The Court emphasized that the preamble needs to be consulted only if the text of a treaty provision is ambiguous.⁵³ The Court found that Article 36 is unequivocal and refers to an individual right.⁵⁴

The Court also deferred to the regulations issued by the Department of Homeland Security, the Department of Justice, and the Foreign Affairs Manual issued by the Department of State.⁵⁵ These sources indicated that Article 36 confers on a detained foreign citizen the right to consular notification.⁵⁶

As to the second requirement, the Court concluded that the civil rights statute provides a remedy to an Article 36 claimant.⁵⁷ Under the statute, a presumption exists that an individual right protected by federal statutes is enforceable.⁵⁸ Plaintiffs need only to show that such individual right has been violated.⁵⁹ The Seventh Circuit did not find that the VCCR rebutted this presumption.⁶⁰ Thus, the Court held that an Article 36 violation could

47. *Id.*

48. *Id.*

49. *Id.*

50. *Jogi II*, 480 F.3d at 827.

51. *Compare Jogi v. Voges*, 425 F.3d 367, 378-84 (7th Cir. 2005), *with Jogi II*, 480 F.3d at 831-35.

52. *Jogi II*, 480 F.3d at 834.

53. *Id.* "It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous." *Id.*

54. *Id.* at 833.

55. *Id.* at 835.

56. *Id.*

57. *Jogi II*, 480 F.3d at 835.

58. *Id.* (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002)).

59. *Id.* at 835.

60. *Id.* at 835-36.

be pursued under the civil rights statute.⁶¹ The Court found no need to address Article 36 claims as a direct treaty violation.⁶²

IV. ANALYSIS

At first glance, the ruling of the Seventh Circuit in the instant case seems to follow a familiar legal trend. Federal courts choose to decide cases in favor of domestic law when international obligations clash with matters traditionally within the purview of domestic law.⁶³ However, the Seventh Circuit set a precedent by finding a remedy for Article 36 violations under the domestic law and thus expanded the applications of the VCCR in the U.S. legal system.

In interpreting treaties, courts must first look at the language of a treaty.⁶⁴ In the instant case, the Seventh Circuit did not give in to the ambiguity and contradiction presented by the preamble to the VCCR.⁶⁵ The Court admitted that its analysis did not completely resolve the extent of the VCCR applicability.⁶⁶ However, the Court went to great lengths to reconcile the principles the VCCR intended to proclaim and the wording of Article 36.⁶⁷

Moreover, the Seventh Circuit did not dodge the question of whether a foreign national can find a redress for an Article 36 violation.⁶⁸ The Seventh Circuit recognized that an enforceable right could not exist without an appropriate remedy.⁶⁹ Having established that Article 36 affords individual rights, the Court bypassed the complexity of finding an

61. *Id.* at 836.

62. *Jogi II*, 480 F.3d at 836.

63. *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (holding that a violation of the VCCR does not warrant dismissal of the indictment); *see also United States v. Duarte-Acero*, 296 F.3d 1277, 1282 (11th Cir. 2002) (same holding); *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002) (refusing to exclude the defendant's self-incriminating statements despite an Article 36 violation).

64. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).

65. *Jogi II*, 480 F.3d at 834.

66. *Id.* at 833-34.

67. *Id.* at 834-35.

68. *Id.* at 831-32.

69. *Id.* at 827; *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *see generally* Thomas Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003) (arguing that courts should provide a remedy for a violation of a legal right).

available remedy by fitting the VCCR into the meaning of the civil rights statute.⁷⁰

The fact that the Seventh Circuit found a cause of action under the civil rights statute, however, leaves open the question of whether the VCCR itself is a direct source of an enforceable remedy. The Seventh Circuit refused to consider the international law violation directly.⁷¹ Such predisposition is hardly different from the U.S. Supreme Court's decisions in *Breard* and *Sanchez-Llamas*.⁷²

The Seventh Circuit's hesitance in labeling Article 36 violations as an independent tort should not be surprising. Both *Breard* and *Sanchez-Llamas* circumvent the discussion about enforceability of individual rights under Article 36 by focusing on other issues.⁷³ In essence, the U.S. Supreme Court in *Sanchez-Llamas* conceded that Article 36 speaks of individual rights, but the opinion did not say how these rights should be enforced by the courts.⁷⁴ As such, the *Sanchez-Llamas* decision was similar to the ruling in *Breard*, which the Seventh Circuit included in its first opinion.⁷⁵

Nevertheless, the Seventh Circuit's decision should make adjudication of Article 36 claims easier for other courts. The legal rules applicable to claims under the civil rights statute are well established. On remand, the Seventh Circuit instructed the district court to consider the statute of limitations, the applicable tolling rules, and the qualified immunity doctrine.⁷⁶ Thus, Article 36 claims could find a concrete application in jurisprudence of federal courts.

V. CONCLUSION

The U.S. Supreme Court has recognized that Article 36 of the VCCR creates rights for detained foreign citizens.⁷⁷ However, no remedy has been acknowledged when these rights have been violated.⁷⁸ Courts have been

70. *Jogi II*, 480 F.3d at 835-36.

71. *Id.* at 825. "We can safely leave for another day the question whether the Vienna Convention would directly support a private remedy." *Id.*

72. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 341 (2006); *Breard v. Greene*, 523 U.S. 371, 375-76 (1998).

73. *Sanchez-Llamas*, 548 U.S. at 341; *Breard*, 523 U.S. at 375-76.

74. *Sanchez-Llamas*, 548 U.S. at 341.

75. *Jogi v. Voges*, 425 F.3d 367, 379 (7th Cir. 2005).

76. *Jogi II*, 480 F.3d at 836.

77. *Sanchez-Llamas*, 548 U.S. at 341; *Breard*, 523 U.S. 371 at 376.

78. *Sanchez-Llamas*, 548 U.S. at 341; *Breard*, 523 U.S. 371 at 376.

justifiably reluctant to assign a greater legal significance to the VCCR as the U.S. Supreme Court itself could not define what redress foreign citizens get for an Article 36 violation.⁷⁹

Against this background, the Seventh Circuit decision is notable. The Seventh Circuit is the first court to address an Article 36 violation in the civil context.⁸⁰ As the Court demonstrated, domestic law can provide a civil remedy for the right guaranteed by Article 36.⁸¹

79. *Sanches-Llamas*, 126 S. Ct. at 2677-78; *Breard*, 523 U.S. 371 at 376.

80. *Jogi II*, 480 F.3d at 832.

81. *Id.* at 835-36.

