



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Ninety-first session
15 October - 2 November 2007

VIEWS

Communication 1385/2005

<u>Submitted by:</u>	Benjamin Manuel (represented by counsel, Mr. Tony Ellis)
<u>Alleged victim:</u>	The author
<u>State party:</u>	New Zealand
<u>Date of communication:</u>	6 April 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 April 2005 (not issued in document form)
<u>Date of adoption of Views:</u>	18 October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Recall of prisoner to continue serving life sentence for murder following release on parole and engagement in violent conduct

Substantive issues: Arbitrary detention

Procedural issues: Exhaustion of domestic remedies - substantiation, for purposes of admissibility – victim status

Articles of the Covenant: Articles 7, 9, paragraphs 1, 2, 3 and 4; article 10, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3 (a) and (b), and 7; article 15; and article 26

Articles of the Optional Protocol: Articles 1, 2 and 5, paragraph 2(b)

On 18 October 2007, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1385/2005.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-first session

concerning

Communication 1385/2005*

<u>Submitted by:</u>	Benjamin Manuel (represented by counsel, Mr. Tony Ellis)
<u>Alleged victim:</u>	The author
<u>State party:</u>	New Zealand
<u>Date of communication:</u>	6 April 2005 (initial submission)

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

Meeting on 18 October 2007,

Having concluded its consideration of communication No. 1385/2005, submitted to the
Human Rights Committee on behalf of Benjamin Manuel under the Optional Protocol to the
International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the
communication, and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine
Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter
Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc,
Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael
Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Benjamin Manuel, a New Zealand national born in 1967. He claims to be victim of violations by New Zealand of his rights under article 7; article 9, paragraphs 1, 2, 3 and 4; article 10, paragraphs 1 and 3; article 14, paragraphs 1, 2, 3(a) and (b), and 7; article 15; and article 26 of the Covenant. He is represented by counsel, Mr. Tony Ellis.

Factual Background

2.1 In July 1984, the author was convicted of murder and sentenced to life imprisonment. On 18 January 1993, he was conditionally released on parole. While on parole he engaged in a variety of further offences for which he was convicted and sentenced as follows; in February 1993, he was convicted for driving with excess blood alcohol, fined \$500 and disqualified for six months; in March 1993, he was convicted of a breach of parole conditions for failure to report and sentenced to 150 hours community service; in May 1994, he was convicted for receipt of stolen property and fined \$200; in October 1995, he was convicted of disorderly behaviour, intentional damage and threatening language, and fined \$400; in November 1995, he was convicted of dangerous driving (reversing a car over his sister), driving with excess breath alcohol and disorderly behaviour, and sentenced to four months imprisonment. He was also charged with male assault on a female, but was acquitted following his recall.

2.2 On 29 January 1996, the author was released from custody after completing the term of imprisonment imposed in November 1995. The same day, the Chief Executive of the Department of Corrections applied to the Parole Board under s.107I of the Criminal Justice Act ("the Act") for the author's recall to prison.¹ The grounds advanced were that the author had been convicted of a number of offences for which he had been given two cumulative sentences of two months imprisonment; that he was on bail charged with a further offence of assault on a female; and that it was in the interest of public safety that he remain in custody given this offending and his deteriorating behaviour in general. The Chief Executive also requested an interim order for recall under s.107J of the Act² on the basis that he posed an immediate risk to the safety of the public.

¹ **Section 107 I** of the Act provided, at the material time, in relevant part:

"(1) ... [T]he Secretary may apply to the Parole Board for an order that any offender who is subject to an indeterminate sentence and has been released under this Part of this Act be recalled to a penal institution to continue serving his or her sentence.

...

(6) An application may be made under this section where the applicant believes on reasonable grounds that-

a) The offender has breached the conditions of his or her release; or
b) The offender has committed an offence; or
c) Because of the offender's conduct, or a change in his or her circumstances since release, further offending is likely;

...

(7) An application made under this section shall specify the grounds in subsection (6) of this section on which the applicant relies and the reasons for believing that the grounds apply."

² **Section 107 J** of the Act provided, at the material time, in relevant part:

2.3 On 31 January 1996, the Chairperson of the Parole Board, a justice of the High Court, ordered the author's interim recall under s.107J of the Act, pending a Board hearing scheduled for 29 February 1996. On 1 February 2006, the author voluntarily surrendered to police and was arrested under the interim warrant. On 13 February 1996, he consented in writing to adjournment of the Board hearing of the recall application until 19 March 1996, which took place on that day accordingly. The author was represented by counsel, whom he had consulted by telephone before the hearing date and whom he met in person twenty minutes prior to the hearing.

2.4 The Board, comprising a justice of the High Court and four other members, issued in writing a final recall order, finding that (i) the author's breach of conditions of parole, (ii) his commission of further offences while on parole, and (iii) his conduct indicating likely further offending if he remained on parole had been established to the necessary standard (balance of probabilities). More widely, the Board found that there were reasonable grounds to conclude that he posed a risk to the safety of the public. After reviewing the convictions, reports made by Community Corrections, the author's difficulties with anger management and alcohol, and the views of the supervising probation officer, the Board considered action necessary to forestall future offending and made final the interim recall order. The Board supported consideration by the Corrections Department of a temporary release from custody under the Penal Institutions Act to undertake a residential alcohol treatment programme. Accordingly, on 19 March 1996, a warrant was issued under s.107L of the Act for the author's return to prison, where he has remained since. He did not appeal to the High Court against the making of an order for recall, as he was entitled to do under s.107M of the Act.

“(2) Where an application [for recall] is made under ... section 107I(6) of this Act, the Chairperson of the appropriate Board shall, on behalf of the Board, make an interim order for the recall of the offender where-

- a) The offender is subject to a sentence for a serious violent offence ...; or
- aa) The offender is subject to a sentence of life imprisonment for murder or manslaughter ...; or
- b) The Chairperson believes on reasonable grounds that-
 - i) The offender poses an immediate risk to the safety of the public or of any person or any class of persons; or
 - ii) The offender is likely to abscond before the determination of the application for recall.

...

(4) Where an order is made under this section and a warrant is issued, the offender shall on, or as soon as practicable after, being taken into custody be given-

- a) A copy of the application [for recall] made under section 107I of this Act; and
- b) A notice-
 - i) Specifying the date on which the application is to be determined, being a date not early than 14 days, nor later than 1 month, after the date on which the offender is taken into custody pursuant to this section;
 - ii) Advising the offender that he or she is entitled to be heard and to state his or her case in person or by counsel; and
 - iii) Requiring the offender to notify the Board, not later than 7 days before the date on which the application is to be determined, whether he or she wishes to make written submissions or to appear in person or be represented by counsel.

2.5 From 9 December 1996 until the present, the Board reviewed the case every six to twelve months, declining to order outright release but making a variety of remedial recommendations at various stages (such as temporary release to attend a residential programme, three days leave to undertake an alcohol abuse programme, temporary leave to undertake a violence prevention programme, placement in an anti-violence unit, placement in Maori focus unit, placement in self-care unit and work parole, and temporary release). In custody and on remedial programmes, the author repeatedly engaged in inappropriate conduct.³ The author did not apply at any time for judicial review, nor did he utilise the statutory right introduced in July 2002 to request reconsideration by a differently constituted Parole Board of any of the post-recall Parole Board decisions.

2.6 On 30 March 2004, the author applied for summary release under the urgent procedure set out in the Habeas Corpus Act. He argued that the recall had been unlawful, as the provisions of the Criminal Justice Act had not been read together with the prohibition of disproportionately severe punishment, contained in s.9 of the New Zealand Bill of Rights Act. Second, he argued that the Parole Board had no jurisdiction to hold a hearing for final recall, as the interim recall order was unlawful. Specifically, there was no record of an order except a reference to an order in the warrant itself, and further the application for an interim order could not be made ex parte. He also argued that he had not validly consented to the short adjournment of the final hearing, which was accordingly unlawful. Finally, he argued that the interim and final recall orders were unlawful because the Parole Board, the Corrections Department and the Police all failed to ensure that he was advised of his rights to legal advice and to habeas corpus, and he was not brought speedily before a court.

2.7 On 2 April 2004, the High Court denied the application. On the argument that recall was disproportionate to his actual conduct, the High Court held that that statutory scheme did not limit recall to circumstances where the likely future offending involved serious violence or risk to life and limb. In any event, the Court held that having regard to the facts of the conduct (his reversing, in drunken state, a vehicle over his sister after a dispute, knocking her unconscious, and his assault on his mother), his problems with anger management and alcohol, and the apparently escalating risk of offending, it was open to the Parole Board to conclude that he posed a serious risk of harm to others.

³ In May 1996, the author twice offended against good order and discipline; in April-June 1997 he failed to complete the violence prevention programme and tested positive for drugs; in October 1997, he possessed an article without lawful authority; in June 1998, the temporary release facility declined to accept the author for failure to meet programme rules; in September and November 1998, he disobeyed a lawful order; in October 1998, he committed an offence against order and discipline; in January 1999, he twice disobeyed lawful orders; in April 1999, he consumed drugs and alcohol; in November 1999, he behaved in a threatening manner and consumed drugs and alcohol; between May and July 2000, he tested positive for drugs and escaped from a temporary release facility; in December 2000 and March and December 2001, he used drugs and alcohol; in February 2002, one-on-one counselling as terminated due to argumentative and unresponsive stance; in March 2003, he received counselling but declined to co-operate; in January and March 2004, he was returned from self-care due to security concerns and a positive drugs test respectively; in May 2004, he twice used drugs; in June 2005, he assaulted an officer and used drugs.

2.8 On the argument that unlawfulness of the interim order voided the final order pursuant to which the author remained detained, the Court noted that if the interim order was unlawful he could be entitled to damages for the short period from 1 February 1996 to 19 March 1996 that imprisonment occurred pursuant to it; under the statutory scheme, however, there was no link between the two orders other than one of timing – where an interim order is made, a final order must be made no less than two weeks before and no more than four thereafter, unless by consent of the parties. On the argument of bias arising from the Chairperson who made the interim order also being on the Board making the final order, the Court found the statutory scheme clear on this point and no legal difficulty involved.

2.9 On the point that at the time he was arrested pursuant to the interim recall, he was not advised at the point of detention of the reason therefor and also of his right to counsel, in breach of sections 23(1)(a) and (b) of the New Zealand Bill of Rights Act,⁴ the Court found that there was no evidence that the author had been given a copy of the s.107J(4) notice, and further that that notice did not address the right to legal advice in respect of the interim detention but only with respect to the Board hearing. While the breach of the rights in section 23 could give rise to an application for damages or exclusion of evidence, in the habeas corpus proceedings before the Court it did not make the detention unlawful. In any event, nothing turned on the delay in advice of his right and no attempt was made to extract evidence. On the issue of the ex parte nature of the interim order, the Court found this was clearly contemplated by the statutory scheme and did not give rise to difficulty. Finally, on the technical point that the interim warrant was not accompanied by an interim order in a separate document, the Court found the warrant, in the prescribed form, to be sufficient evidence of an order.

2.10 On 15 June 2005, the Court of Appeal refused the author's appeal. The Court held that in the urgent, summary procedure set out in the Habeas Corpus Act, in general presentation of a regular warrant such as that in issue would be a decisive answer; attacks, such as those advanced in this case, on administrative law grounds to decisions lying upstream of apparently regular warrants should be challenged in the more appropriate forum of judicial review proceedings. That said, the Court addressed the merits of the arguments presented and upheld the High Court's dismissal of the arguments put by the author.

2.11 On 3 August 2005, the Supreme Court refused leave to further appeal. A second application for writ of habeas corpus on 4 August 2005 was withdrawn two days later. On 27 November 2006, the Parole Board concluded that the author had maintained excellent progress

⁴ Section 23 of the New Zealand Bill of Rights Act provides:

Rights of Persons Arrested or Detained.

- (1) Everyone who is arrested or who is detained under any enactment -
 - (a) Shall be informed at the time of the arrest or detention of the reason for it; and
 - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
 - (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
- (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
- (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

towards release and granted release on standard conditions, and special conditions lasting two years.

The complaint

3.1 The author raises complaints under four broad sets of issues: the interim recall order of 1 February 1996, the final recall order of 19 March 1996, the author's continued detention and the capacity of challenging his detention.

3.2 As to the interim order, the author argues that the facts disclose violations of article 9, paragraphs 1, 2, 3 and 4; article 10, paragraph 1; article 14, paragraphs 1, 2 and 3(a); article 15 and article 26. Specifically, he argues that the interim recall order was made without notice to him (arts. 9(1); 10(1); 14(1); 15 and 26); that upon his detention under the order he was neither notified of his rights to counsel or to writ of habeas corpus (art. 9(4)), nor of reasons for his detention (arts.9(2) and 14(3)(a)); that the recall warrant was arbitrary and/or unlawful as issued without a separately documented interim recall order (art. 9(1)); that, once detained under the order, the Parole Board hearing set for 29 February 1996 was adjourned to 19 March 1996 and he was therefore not promptly brought before a judicial officer; nor was he entitled to take proceedings before any court, judicial or quasi-judicial body (art.9(3)and/or(4)); and that he was not permitted to challenge his detention (art.9(4)).

3.3 As to the final recall order, the author argues that the facts disclose violations of article 7; article 9, paragraph 1; article 10, paragraphs 1 and 3; article 14, paragraph 7; and article 15. Specifically, he argues that the recall decision was in breach of domestic law and his detention pursuant to it was therefore arbitrary (art.9(1)). He also argues that detention pursuant to the decision to recall him to continue serving his sentence was arbitrary because the decision was based on breach of parole conditions, commission of further violent offences while on parole and likelihood of commission of further offences. The likelihood of further offending, however, does not amount to "compelling reasons" for continued detention as described in Rameka v New Zealand;⁵ is an insufficient ground for recall according to Stafford v United Kingdom;⁶ is impermissibly vague and covers offences insufficiently serious to warrant recall from parole. The author also argues that the detention was arbitrary as the Parole Board was neither independent nor impartial as i) the interim decision to recall was made by a member of the Parole Board, the Chairperson, who was on the Board that then made the final decision; ii) the Chairperson was also a sitting judge; iii) the Parole Board's procedures were inconsistent with those of a Court; and iv) the Parole Board's offices are in the same building as the legal section of the Department of Corrections, a department also providing administrative support to the Parole Board. For the same reasons, the Parole Board breached his fair trial rights under article 14, paragraph 1.

3.4 The author goes on to argue, with respect to the final recall order, that the decision amounted to disproportionately severe treatment, in violation of articles 7 and 10, paragraph 1. It was also inconsistent with the right to be brought before a court following arrest or detention on a criminal charge under article 9, paragraph 3, on account of the infirmities described in the

⁵ Communication No. 1090/2002, Views adopted on 6 November 2003.

⁶ European Court of Human Rights (2002) 35 EHRR 1121.

Parole Board's independence. It further failed to assist his reintegration into society, contrary to article 10, paragraph 3. The author did not have sufficient opportunity to instruct counsel, and did not enjoy a presumption of innocence protected by article 14, paragraph 2. The recall decision also breaches the right against double jeopardy, contrary to article 14, paragraph 7, and/or retrospective application of the law, protected by article 15. Finally, the recall decision breached article 26, because it applied a test of whether the author posed a sufficient risk to public safety to warrant recall and/or because certain issues raised by him could not be determined by summary application under the Habeas Corpus Act.

3.5 In terms of his ongoing detention after the recall decision, the author goes on to argue that the detention breaches article 9, paragraph 1; and article 10, paragraphs 3 and 4. The Parole Board decisions after recall breach article 9, paragraph 1, as they were not on a basis of "compelling reasons" or other understandable basis. The results and conclusions of the 1998 Psychological Service Report produced to the Board were flawed, and the consequential detention was therefore arbitrary and unlawful. The author further argues that he has been denied the opportunity to be placed in self-care and has had no proper remedial plan, in breach of article 10, paragraph 3. Lastly, he alleges that he was moved from minimum to high-medium security upon issuance of his application for habeas corpus.

3.6 The author contends that the extent of means to challenge his detention violates article 9, paragraph 4; and article 26. The availability of judicial review does not satisfy the review required by article 9, paragraph 4, as i) the remedy granted by the court on judicial review is discretionary, rather than mandatory as in the habeas corpus context, ii) judicial review does not go to the merits of detention, within the meaning of the European Court's decision in Weeks v United Kingdom,⁷ iii) an application for judicial review requires a \$40 court fee, whereas a habeas corpus application is free; iv) judicial review is said to be slower than habeas corpus. The availability of judicial review, and not of habeas corpus, for certain grounds raised by the author is discriminatory against prison inmates, in additional breach of article 26. Lastly, the habeas corpus procedure is urgent and summary, and does not provide for pre-trial discovery of evidential material held by opposing parties, said to be required by article 9, paragraph 4.

State party's submissions on admissibility and merits

4.1 By submissions of 7 November 2005, the State party disputes the admissibility and merits of the entire communication. The State party argues, as a general matter, that the author is detained under a sentence of imprisonment following his recall from conditional release. His initial recall to prison was made on the basis that he was eligible for recall and posed an immediate risk to the safety of others. The final recall decision was made following an oral hearing of the Parole Board, at which the author appeared and was legally represented. His continuing detention has been reviewed by the Parole Board every six to twelve months (up to his release on conditions in November 2006) on the basis of constantly updated information on his conduct and psychological state, as well as submissions by his legal representatives. Both the Board and the Corrections Department have made substantial efforts to provide the author with rehabilitative programmes. The State party observes that apart from an application for summary release under the Habeas Corpus Act, the author has not challenged any decision under which he

⁷ European Court of Human Rights; Application No. 9787/82; Judgment of 2 March 1987.

was detained, in particular, reconsideration or judicial review of the successive decisions of the Parole Board under which the detention continues.

Issues around the interim recall

4.2 On the bundle of claims around the interim order, the State party argues with respect to the claim under article 10, paragraph 1, that this provision is not engaged simply by fact of detention but imposition of unacceptable hardship.⁸ The claim that he is discriminatorily denied fair trial rights available to persons charged with criminal offences is nowhere detailed and is in any event justified by the distinction between determinations of a criminal charge and determination of eligibility for parole. These claims are therefore inadmissible for insufficient substantiation.

4.3 On the merits of the claims on the interim issue, the State party stresses that the interim and final decisions, as confirmed by the courts, are factually and legally distinct, on the basis of different criteria, and therefore any infirmity in the former does not affect the validity of the latter, which was the basis for detention from 19 March 1996 onwards. On the issue of the *ex parte* nature of the interim order, the State party notes that there are good reasons for dealing within interim recall applications on this basis, as a parolee whose conduct has given rise to sufficient concern to warrant a recall application is likely to go into hiding if served with an application for recall. A recall order does not impose a new sentence, but revokes conditional release and requires a person to continue to serve an existing sentence, on the basis that the person is considered to pose a sufficiently serious risk to others. The recalled individual's interests are protected by the provision of counsel and the holding of a hearing at short order. On the issue of the absence of a separately documented recall order alongside the warrant, the statute does not so require, and the domestic courts so confirmed.

4.4 On the issue as to whether he was advised of the reason for detention upon arrest under the interim warrant, the State party notes that the author voluntarily surrendered to police the day after the warrant was issued and was thus clearly aware of the reasons for his arrest; it refers to the Committee's Views in *Stephens v Jamaica*⁹ to the effect that where an individual surrendered to police, fully aware of the reasons for detention, no breach of article 9, paragraph 2, was shown. Nor does article 14, paragraph 3, apply to the interim (or final) recall order, as there is not a determination of a criminal charge, but a recall of a parolee to prison to continue serving sentence.

4.5 As to the claims of access to review of detention under interim recall, the State party argues that it is only where an individual is arrested "on a criminal charge" that it has an obligation under article 9, paragraph 3, to bring her before a court. As the author was not arrested or detained on a criminal charge, the applicable provision is article 9, paragraph 4, concerning the right to contest before a court the lawfulness of detention. In this respect, on 19 March 1996 the author appeared before the Parole Board, legally aided by counsel to whom he had access prior to hearing. He had access to judicial review in court at all times, even though he only

⁸ See *Jensen v Australia* Communication 762/1997, Decision adopted on 22 March 2001.

⁹ Communication No. 373/1989, Views adopted on 18 October 1995.

sought to exercise that right in March 2004. The Committee has confirmed that this right is engaged, not ex officio by the State, but by the instigation of the author or his representatives.¹⁰

4.6 On the right to apply for habeas corpus, the State party disputes that the right under article 9, paragraph 4, also contains a concomitant right to be informed of that right. The author has had, and continues to have, access to the right to seek habeas corpus at all stages. The State party also argues that there is no entitlement under this article of the Covenant for a person to be advised of the right to instruct a lawyer; in this respect, section 23(1)(b) of the New Zealand Bill of Rights Act goes further than article 9 of the Covenant. In any event, the State party does not accept that the author was not notified of his right to instruct a lawyer when arrested on the interim warrant, but argues that it has not had the opportunity to test this in court because of the way in which the author mounted his legal challenge.

4.7 On the right to a fair trial, the State party argues that an application that, if granted, requires the recall of a paroled prison inmate to continue serving a sentence of imprisonment does not amount to a charge for a criminal offence, implicating article 14. The jurisprudence of the European Court of Human Rights has repeatedly held that such applications involve a resumption of sentence, rather than a new charge.¹¹ In any case, while the author did not have a hearing at the interim stage (as this process is determined without a hearing), he did have a right to a fair hearing before the full Parole Board, an independent, impartial tribunal, at the final recall stage, where he attended and was represented.

Issues around the final recall

4.8 As a matter of admissibility, the State party notes that the author did not exercise his right of appeal to the High Court against the final order under s.107M of the Act, under which the Court determines whether the order ought to have been made and, if not, whether it is overturned and the prisoner released. Nor has he sought judicial review (offering also interim relief) in the High Court of the Board's final recall decision. Nor has he exercised his right to apply to the Parole Board for reconsideration of his continued detention (under s.97(3) of the Act) or for review of decision (under the subsequent Parole Act, which also provides for application to the High Court in the event the Board postpones release, as has also occurred in this case.)

4.9 The State party argues that all of the issues raised by the author, bar the single issue of alleged discrimination under article 26, were amenable to review under one or more of these remedies and are accordingly inadmissible for failure to exhaust domestic remedies. Specifically, there are claims of breach of the Criminal Justice Act, reliance on assessments of reoffending, insufficient severity of offending while on parole, apparent or actual partiality of the Board and disproportionality of recall could have been raised on appeal under s.107M of the Act. The claims of breach of the Criminal Justice Act, reliance on assessments of reoffending, disproportionality of recall, apparent or actual Parole Board bias, failure to consider rehabilitation, breach of presumption of innocence and double jeopardy could be raised in judicial review. The claims of incorrect assessment of risk, insufficient severity of offending and

¹⁰ Ibid.

¹¹ Ganusauskas v Lithuania Application. No. 47922/99, Judgment of 7 September 1999; Brown v United Kingdom Application No. 968/04, Judgment of 26 October 2004.

the disproportionality of recall could have been put to the Board on application for reconsideration. Presumption of innocence, double jeopardy and retrospectivity could also, in a sufficiently straightforward case, be dealt with under the habeas corpus procedure.

4.10 The State party also argues that three claims are inadmissible, for want of sufficient substantiation: (i) that the author's detention goes beyond the fact of detention to unacceptable hardship, raising issues under articles 7 and 10, paragraph 1; (ii) that a proper remedial plan is absent, raising an issue under article 10, paragraph 3; this cannot be reconciled with the fact that the Department of Corrections and the Parole Board have provided him with repeated rehabilitative courses, the full benefit of which the author has denied himself through using drugs in prison and failing to cooperate with courses, including abscondment from course facilities; and (iii) that discrimination is raised in the risk assessment on an application for recall not being proved to beyond reasonable doubt and in the limits of the habeas corpus procedure.

4.11 As to the merits, the State party argues that detention pursuant to final recall was not arbitrary as the author had breached parole conditions, committed further violent offences while on parole and his conduct indicated sufficient risk that he would reoffend; the Parole Board concluded he posed a risk to the safety of the public and his recall was accordingly justified.

4.12 The State party rejects that its action was inconsistent with the Committee's Views in Rameka, where the Committee found that preventive detention had to be justified by compelling reasons, regularly reviewed by an independent body. The State party notes that, in contrast to Rameka, that the author is serving a punitive sentence of life imprisonment, from which he was paroled and recalled. The assessment of risk was made at the point of recall, rather than only at sentencing, and has been continually reviewed since recall. The independence of the Parole Board to carry out such reviews was accepted by the Committee in Rameka. The author did not appeal or seek review of the Parole Board's decisions, but the High Court, on hearing the habeas corpus application, specifically found as a matter of fact that it was open to the Parole Board to conclude that the author posed a serious risk of harm to others. This finding was not challenged in the Court of Appeal.

4.13 The State party also disputes that the author's recall was inconsistent with the judgment of the European Court in Stafford, where the applicant's recall from parole to continue a sentence of life imprisonment was found to be arbitrary on the basis of no causal link between the original sentence for murder and the possible commission of other non-violent offences. The State party notes that unlike Stafford, the author was recalled on the basis of violent offences and a risk of further violence. Instead, to the extent the European Court's approach is appropriate for the Committee, the case more resembles Spence v United Kingdom,¹² where relatively minor instances of violence and factors indicating a risk to public safety precluded a finding of arbitrariness.

4.14 On the contention that the risk assessment was overly vague or reflected too low a level of risk, the State party refers to the unchallenged assessments of risk by the Parole Board and High Court, and notes that the basis of detention, including the level of penalties and conditions of release, is an area where States parties have wide latitude. It is within their competence to regard

¹² European Court of Human Rights, Application No. 1190/04, Judgment of 30 November 2004.

criminal offending by parolees within the term of their sentences as a factor, among others, that may warrant recall.

4.15 On the contentions that the Parole Board's final decision was not impartial as the Chairperson made the interim order and sat on the Board making the final order, the State party notes that the two decisions were legally wholly distinct: the first found an immediate risk to the safety of others, while the second was a much wider enquiry, including the submissions of the author and his counsel. On the argument that the participation of a sitting judge called the impartiality of other Board members into question, the State party refers to varying State practice ensuring actual independence. Apart from the author's failure to raise this issue in the domestic courts, which have never addressed the issue, the State party argues that within its constitutional system the appointment of a High Court judge to the Parole Board compromises the independence of neither. On the claim that the Department of Corrections' provision of administrative support to the Parole Board compromises its impartiality, the State party submits that the support provided is entirely practical in nature and, under no reasonable assessment, could it provide a tenable basis for concern. On the final argument that the Board does not follow the procedures of a criminal court, the State party notes that it is a specialist tribunal with more flexibility, often advantageous to inmates, whose fairness is subject to judicial review.

4.16 On the claim under article 9, paragraph 3, the State party argues that this provision is not engaged by the parole decision of the Parole Board, as it concerned conditional release from sentence rather than a new charge of offence.

4.17 On the claim that the author's written consent to adjournment of the Parole Board hearing was vitiated by lack of access to legal advice, which made the adjourned hearing a legal nullity and detention further to it in breach of article 9, paragraph 1, the State party notes that both the High Court and Court of Appeal found no suggestion his consent was not freely given or properly informed. The Court of Appeal also noted the issue could be further pursued in judicial review proceedings, more apt than the summary habeas corpus procedure to test disputed allegations of fact, but the author did not do so. Accordingly, the written consent and adjournment should be accepted at face value.

4.18 On the argument going to presumption of innocence, the State party refers to the jurisprudence of the European Court that recall to continue a term of imprisonment is the resumption of an existing sentence rather than imposition of a new sentence. On the presumption issue deriving from the fact that the Parole Board's final recall decision was based, in part, on the fact that at that point he was awaiting trial on a charge of male assault on a female (on which he was later acquitted), the State party argues that the Board was not considering his guilt or otherwise on this charge. Instead, it found that his conduct had met the statutory criteria (s.107I(6)(a), (b) and (c) of the Act), including a sufficient risk of further offending. The Board noted that there was an outstanding charge for trial but did not express any view on his criminal responsibility.

4.19 As to the double jeopardy and retrospectivity issues posed by the final recall, the State party notes the European Court views that a new sentence is not implicated. There was no increase in penalty, as the author's detention was within the term of sentence. Neither did his release mean that he had finished the sentence, or, within the Rameka sense, the punitive

component thereof. On access to counsel, the State party, while accepting that the author did not see counsel until the day of the hearing, understands that there was earlier telephone contact. It was also open to him to seek an adjournment if he felt disadvantaged, which he did not do.

Issues around continuing detention

4.20 As to admissibility, the State party notes that each of the Parole Board's decisions was open to reconsideration or judicial review, which has never been pursued. The communication also alleges factual aspects not placed before the courts. With one exception (a specific complaint of methodological error in a 1998 psychological assessment, which has not been raised in court), there is no substantiation at all on why these decisions were incorrect and arbitrary, and these claims are therefore inadmissible. The claim under article 10, paragraph 3, is again similarly inadmissible.

4.21 On the merits, the State party notes that since the 1996 final recall order, at least annual reviews – and sometimes more frequently – have taken place by the Parole Board. On each case, release has been declined following, as the record makes clear, careful consideration; at the same time, the Board has made recommendations aimed at assisting the author to address the factors putting him at risk of further offending. These have generally been pursued, but the author has frequently frustrated rehabilitative programmes by disobeying programme rules and other misconduct, including an attempted escape.

4.22 The State party notes that the most recent review (at the time of its submissions) took place on 13 September 2005. The author's counsel sought an adjournment in order that he could run a properly defended hearing in respect of the author's application. The Board noted that there had been a number of adjournments for counsel to obtain expert advice on risk assessment, and was concerned that the matter be dealt with as soon as possible. It granted adjournment on the basis that there would be a hearing as soon as counsel was ready, noting that his release would require a careful release plan and careful and sustained management, which should be the focus of the hearing. The Board's decision would again be subject to reconsideration by a differently constituted Board or review in the High Court. As to the alleged methodological error in the 1998 psychological assessment which would have allegedly resulted in a lower assessment of risk of re-offending (resisted by the State party), the State party notes that this complex factual and methodological matter was not put to the domestic courts.

4.23 On the argument that he was moved from minimum to medium-high security placement on commencement of the summary habeas corpus proceedings, the State party observes that he was, with his knowledge, placed in a higher security area of the prison over a weekend in order to permit better supervision at a time of increased volatility; his privileges and programmes were not, as far as practically possible, reduced as a result. The State party notes that there is no allegation that placement was undertaken to sanction him or for other improper purpose.

Right to challenge continued detention

4.24 The State party rejects the author's contention that the Court of Appeal's decision in the habeas corpus proceedings violated his rights under articles 9, paragraph 4, and 26 of the Covenant. The State party clarifies that habeas corpus proceedings are available to all detained persons, including inmates. On the argument that judicial review remedies are insufficient in terms of article 9, paragraph 4, as they are discretionary, the State party notes the Court of Appeal's statement that it was inconceivable that a judge would refuse relief on discretionary grounds to a person illegally detained. On the argument that the NZ\$400 filing fee presents a barrier to the availability of judicial review as a remedy, the State party notes that there is provision in the High Court regulations for waiver and postponement of payment pending decision on waiver; there is no suggestion in this case of any deterrent effect or that a waiver would not have been granted. The State party also rejects the contention that judicial review proceedings are slower than habeas corpus applications, noting domestic jurisprudence that a hearing for interim relief (on judicial review) can be arranged as speedily as a habeas corpus application.

4.25 As to the requirements of article 9, paragraph 4, the State party notes that in Rameka the Committee explicitly accepted that the Parole Board's regular review of continued detention fulfilled that obligation. In terms of the argument that judicial review is "not wide enough", in the sense of the judgment of the European Court in Weeks, to satisfy the European equivalent of article 9, paragraph 4, the State party notes that Weeks arose from a parole system under which the Parole Board (unlike the present case) did not have mandatory powers, and (unlike the present case) afforded limited participation rights for the detained person. Judicial review today in New Zealand is also substantially more advanced than the largely procedural English remedy in 1987 when Weeks was decided; the modern remedy can consider consistency with human rights, and order release where detention is found to be arbitrary.

4.26 On the argument that the summary habeas corpus procedure falls short of article 9, paragraph 4, as it does not afford pre-trial disclosure of relevant documentation, the State party notes that as an urgent procedure, the omission of pre-trial discovery is intended to avoid any unnecessary delay. To the extent disclosure is required, this is available in judicial review proceedings which can be dealt with urgently; it is anyway disclosed as part of the Parole Board process; and it can be obtained under the Official Information Act within four weeks or more urgently if necessary.

Author's comments on the State party's submissions

5. By letter of 23 December 2005, the author responded disputing all aspects of the State party's response. On the interim order, the author argues that there was no reason for urgency, and an ex parte hearing was not necessary as he had spent the preceding two months in prison, being recalled the day after he left prison. He also argues that the absence of a documented interim order is unfair and arbitrary. The author also argues that rehabilitative programs were not sufficiently tailored to him, and that the remedies available to him were not effective. The author also renews his attacks on the independence and effectiveness of the Parole Board, arguing that the Parole Board is in an all-powerful position vis-à-vis the prisoner and that a prisoner who does not co-operate with the Board process is at a singular potential disadvantage. As to the issue of

notification of reasons for arrest, as required by article 9, paragraph 2, the author seeks to distinguish the Committee's Views in Stephens on the basis that, in that death penalty case, the author was cautioned as soon as possible.¹³

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As to the issue of exhaustion of domestic remedies, the Committee notes that certain of the claims before the Committee were advanced to the domestic courts, which addressed them on their merits at first instance and on appeal. These claims, which were limited to the interim and final orders for recall, were: (i) that the author's recall was disproportionate to his actual conduct, (ii) that unlawfulness of the interim order voided the final order pursuant to which the author remained detained, (iii) there was bias arising from the Chairperson who made the interim order also being on the Board making the final order, (iv) that at the time he was arrested pursuant to the interim recall, he was not advised at the point of detention of the reason therefor and of his right to counsel, (v) the interim recall order was of ex parte nature; (vi) that the interim warrant was not accompanied by an interim order in a separate document, and (vii) that he had not consented to a short adjournment of the final hearing.

6.3 On the remaining issues advanced to the Committee, the author has not shown to the Committee's satisfaction why these matters could not have been satisfactorily addressed by the domestic courts either (i) under the habeas corpus proceedings the author in fact brought, or (ii) under judicial review or (iii) under statutory appeal and, in part, reconsideration proceedings provided for under the State party's law. The Committee is not satisfied that variations of procedure or timing under the latter procedures are such as to disqualify these avenues as appropriate, available remedies in terms of the issues raised to the Committee. It follows accordingly that the remaining issues not set out in paragraph 6.2, supra, above are inadmissible for failure to exhaust domestic remedies, in terms of article 5, paragraph 2(b), of the Optional Protocol.

6.4 On the issues in respect of which domestic remedies were exhausted, the Committee notes that the arguments that that the interim warrant was not accompanied by an interim order in a separate document and was accordingly unlawful, and that due to unlawfulness of the interim order, the final order pursuant to which the author remained detained, was arbitrary were rejected by the domestic courts and found to be lawful. As to the issue of bias arising from the Chairperson who made the interim order also being on the Board making the final order, the Committee notes that it is common, and in principle unobjectionable, for judicial officers to take interim decisions in respect of proceedings the merits of which will later be before them. The author has not shown any elements to displace this presumption in the present case. Similarly, ex parte proceedings can, in principle, be necessary in order to act sufficiently promptly and avoid risk of serious harm, of which the author's conduct gave rise to reasonable belief, provided that

¹³ Op.cit., at paragraph 9.5

the affected party has opportunity to state his or her case at an early opportunity. Such an opportunity was afforded in this case by the final recall hearing. On the issue of consent to adjournment, the Committee notes that the domestic courts found, as a matter of fact, that the author had consented, a finding which, absent manifest arbitrariness or a denial of justice, the Committee will not disturb. In light of these elements, the Committee considers that the author has not sufficiently substantiated a claim in respect of these issues under articles 9, 14 or 26 of the Covenant. These claims are accordingly inadmissible, for lack of sufficient substantiation, under article 2 of the Optional Protocol. On the claim that, at the point of arrest, he was not notified of his right to counsel, the Committee considers likewise that the author has failed to substantiate, for purposes of admissibility, such a claim under article 9, paragraph 2, of the Covenant, which is accordingly also inadmissible under article 2 of the Optional Protocol.

6.5 As to the additional claim under article 9, paragraph 2, that he was not informed at the point of his arrest under the initial warrant of the reasons for his arrest, the Committee notes that the High Court recognized for the purposes of the proceedings before it that the author had not been so informed, and that an action for appropriate damages was open. In the circumstances, the Committee considers that the State party, through its courts, has appropriately addressed the claim with the consequence that the author can no longer be considered a victim for purposes of the Optional Protocol in respect of this issue.¹⁴ The claim is accordingly inadmissible under article 1 of the Optional Protocol.

6.6 As to the claims that the author's recall was disproportionate and amounted to arbitrary detention, the Committee considers that this issue has been sufficiently substantiated, for purposes of admissibility, under article 9, paragraphs 1, of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim that the author's recall was not justified by his underlying conduct, and was therefore arbitrary in breach of article 9, paragraph 1, the Committee must first assess the extent to which article 9 of the Covenant applies in the context of early release on parole and recall. Assuming *arguendo* that his arrest on the initial warrant while on parole deprived him of liberty, within the meaning of article 9, paragraph 1, such deprivation must be both lawful and not arbitrary. In contrast to the purely preventive detention at issue in Rameka, the author's recall meant that he resumed a pre-existing sentence. The State party concedes that the recall decision was taken for protective/preventive purposes given the risk he posed to the public in the future. In order to avoid a characterization of arbitrariness, the State party must demonstrate that recall to detention was not unjustified by the underlying conduct, and that the ensuing detention is regularly reviewed by an independent body.

7.3 The Committee notes that to recall an individual convicted of a violent offence from parole to continue sentence after commission of non-violent acts while on parole may *arguendo* in

¹⁴ See, for example, Dahanayake v Sri Lanka Communication No. 1331/2004, Decision adopted on 25 July 2006, at paragraph 6.5.

certain circumstances be arbitrary under the Covenant. The Committee need not decide that issue, as in the present case, the author, who had been convicted of murder, engaged in violent or dangerous conduct after his release on parole. This conduct was of sufficient nexus to the underlying conviction that his recall to continue serving that term was justified in the interests of public safety, and the author has not shown otherwise. The Committee also notes that the author's ongoing detention was reviewed at least once a year by the Parole Board, a body subject to judicial review which it found to satisfy the necessary requirements of independence in Rameka. The Committee thus concludes that the author's recall was not arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

8. 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 disclose a violation of the Covenant.

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