

## HUMAN RIGHTS COMMITTEE

### Francis v. Jamaica

Communication No 320/1988

24 March 1993

CCPR/C/47/D/320/1988\*

### VIEWS

*Submitted by: Victor Francis (represented by counsel)*

*Alleged victim: The author*

*State party: Jamaica*

*Date of communication: 10 July 1988*

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

Meeting on 24 March 1993,

Having concluded its consideration of communication No. 320/1988, submitted to the Human Rights Committee by Victor Francis 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, his counsel and the State party,

Adopts its

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

1. The author of the communication (initial submission dated 10 July 1988 and subsequent submissions) is Victor Francis, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of articles 7, 10 and 14, paragraphs 3 (c) and 5, of the International Covenant on Civil and Political Rights by Jamaica. He is represented by counsel.

## Facts as submitted

2.1 The author was charged with the murder, on 6 February 1981, of a child, Kimberley Ann Longmore. The prosecution's contention was that the author, together with another unidentified man, killed the child by shooting at random into a "board house". At the trial, the child's mother testified that her child was shot while she and her other children were hiding from the gunfire that had erupted outside her house. She added that she could not see the men who were firing, since, at the time in question, the street lights were off and so were the lights of other houses in the neighbourhood.

2.2 Two prosecution witnesses identified the author as one of the men they saw at the time of the shooting. The first, one Janet Gayle, testified that she could observe the two men firing through a fence. The second, one Robert Bailey, asserted that both men were carrying "long guns" and that the lights in the area were on at the time of the shooting. The author claimed to be innocent and contended that, at the relevant time, he was at his mother's home, asleep with his wife. His wife reportedly confirmed his alibi.

2.3 On 20 January 1982, the author was found guilty as charged and sentenced to death. On 4 February 1983, the Court of Appeal of Jamaica dismissed his appeal. The Court gave an oral judgement, but, in spite of numerous requests, did not provide written reasons for its decision. Owing to the absence of the Court of Appeal's written judgement, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 20 February 1987.

## Complaint

3.1 The author alleges that he was denied a fair trial in that several irregularities occurred during its conduct. He claims that the evidence of the witnesses against him was contradictory and that there were discrepancies between their testimony during the trial and their original statements, especially as to whether street lights were on in the area during the night of the murder. He further submits that defence counsel requested an adjournment of the trial in order to obtain evidence about the lighting conditions at the time the murder took place. The judge allegedly denied his request. In this context, it is also pointed out that no evidence was produced by the prosecution to establish that the author owned a gun, nor was a ballistic report presented to establish a causal link between any gun he may have been carrying and the child's death.

3.2 The author claims that the Court of Appeal's failure to issue a written judgement violates his right under article 14, paragraph 3 (c), to be tried without undue delay and his right under article 14, paragraph 5, to have his conviction and sentence reviewed. He indicates that the absence of a written judgement of the Court of Appeal in his case resulted in the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council. More specifically, he explains that the dismissal of his petition was due, in particular, to his failure to meet the requirements of the Judicial Committee's rules of procedure, namely, to explain the grounds on which he was seeking special leave to appeal, and to provide the Judicial Committee with copies of the decisions of lower courts.

3.3 The author further submits that his representative invited the Judicial Committee of the Privy Council (a) to allow the petition on the ground that the failure of the Court of Appeal to provide a written judgement in a capital case was such a violation of the principles of natural justice that leave to appeal should be granted, and (b) to remit the case to Jamaica with a direction, under Section 10 of the Judicial Committee Act 1844, that the Court of Appeal be required to provide written reasons. According to the author, the failure of the Judicial Committee of the Privy Council to adopt one of the above courses of action left him with no available legal remedy.

3.4 The author finally alleges that he has been subjected to violations of articles 7 and 10 of the Covenant. He claims that on the night of 9 July 1988, twenty to twenty-five soldiers and over twenty warders searched a block of St. Catherine District Prison known as the New Hall. After concluding the search, they returned to Wards C and D of the block, where they allegedly brutalized and severely beat the convicts, including the author, after the latter had been pointed out by the warders. The author adds that one soldier entered his cell, beat him badly on the head and pushed him with a bayonet. Allegedly, three warders participated in this assault. The soldiers are further said to have emptied a urine bucket over the author's head, thrown his food and water on the floor and his mattress out of the cell. Many inmates reportedly suffered from similar maltreatment on the same night. The author further alleges that the events were witnessed by two Assistant Superintendents of the prison and one overseer, who apparently did not make any attempt to intervene.

3.5 With regard to the requirement of exhaustion of domestic remedies, the author submits that, following his maltreatment at St. Catherine District Prison, he wrote about the incident to the Senior Parliamentary Ombudsman. On 29 July and 25 November 1988, he received a reply from the latter's office, which informed him that the matter had been referred to the competent authorities for investigation, and that as soon as the result became known he would be so notified. Since then he has not received any notice. The author further wrote to the Minister of Justice about the same matter, but did not receive any reply.

#### State party's observations and author's comments

4. The State party contends that, with regard to the author's allegations that, on 9 July 1988, he was subjected to inhuman and degrading treatment at St. Catherine District Prison, the communication is inadmissible for non-exhaustion of domestic remedies, since the author has failed to pursue constitutional remedies available to him. The State party submits that Section 17 of the Jamaican Constitution guarantees protection from cruel, inhuman and degrading treatment, and that pursuant to Section 25, anyone who alleges that a right protected by the Constitution has been, is being or is likely to be contravened in relation to him may apply to the Supreme (Constitutional) Court for redress.

5. In his reply to the State party's submission, the author states that a constitutional motion is not, in the circumstances, an effective remedy available to him, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He adds that the State party does not provide legal aid with respect to filing a constitutional motion before the Supreme (Constitutional) Court of Jamaica, and that, as a result, he is effectively barred from

exercising his constitutional rights, since he cannot afford to retain counsel.

#### Committee's decision on admissibility

6.1 At its forty-second session, the Committee considered the admissibility of the communication. It noted that part of the author's allegations related to the conduct of the trial by the trial judge and the evaluation of corroborative evidence. Since it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and the evidence placed before the domestic courts, the Committee declared this part of the communication inadmissible under article 3 of the Optional Protocol.

6.2 The Committee concluded, in the absence of any information provided by the State party, that the author's other allegations regarding a violation of article 14 were admissible.

6.3 As to the author's allegations under articles 7 and 10 of the Covenant, the Committee noted the State party's contention that this part of the communication was inadmissible because of the author's failure to pursue the constitutional remedies available to him. It also noted the author's contention that the remedy indicated by the State party was not a remedy available to him because of his lack of financial means and the unavailability of legal aid for purposes of filing a constitutional motion to the Supreme (Constitutional) Court of Jamaica. The Committee further considered that the author had demonstrated that he had made reasonable efforts through administrative demarches to seek redress in respect of the ill-treatment allegedly suffered while in detention. The Committee therefore found that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.4 On 4 July 1991, the Committee therefore declared the communication admissible in so far as it might raise issues under articles 7, 10 and 14 of the Covenant.

#### Review of admissibility

7. In its submission dated 16 January 1992, the State party challenges the Committee's admissibility decision. It argues that the communication is inadmissible, since the author failed to exhaust constitutional remedies available to him. It submits that, in the light of cases recently decided by the Supreme Court, it is clear that the Supreme Court has jurisdiction to allow applications for redress with regard to cases in which criminal appeals have been dismissed.

8. In his comments on the State party's submission, author's counsel argues that, while it is in theory possible for the author to file a constitutional motion, in practice this right is illusory in the light of the absence of legal aid.

9.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases

had been dismissed.

9.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case, a/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 4 July 1991.

#### Examination of the merits

10. The State party argues that it is not clear to which articles and paragraphs of the Covenant the allegations of the author refer. It therefore refrains from submitting comments on the substance of the allegations.

11. In his comments on the State party's submission, author's counsel submits that it is clear from earlier submissions and the Committee's admissibility decision which matters give rise to the author's complaint under article 14. He further states that the allegations of ill-treatment relate to article 10, paragraph 1, juncto article 7 of the Covenant.

12.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee notes with concern that the State party has not addressed the author's specific claims under articles 7, 10 and 14 of the Covenant. Article 4, paragraph 2, of the Optional Protocol enjoins the State party to investigate in good faith all the allegations made against it, and to make available to the Committee all the information at its disposal. In the circumstances due weight must be given to the author's allegations, to the extent that they have been substantiated.

12.2 The author claims that the failure of the Court of Appeal to issue a written judgement violates his right under article 14, paragraph 3 (c), to be tried without undue delay, and his right under article 14, paragraph 5, to have his conviction and sentence reviewed. The Committee recalls that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without delay. b/ In this connection, the Committee refers to its views concerning communications Nos. 230/1987 and 283/1988, c/ where it held that under article 14, paragraph 5, a convicted person is entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law. The Committee is of the opinion that the failure of the Court of Appeal to issue a written

judgement, more than nine years after the dismissal of the appeal, constitutes a violation of article 14, paragraphs 3 (c) and 5.

12.3 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". d/ In the present case, the final sentence of death was passed without there having been any possibility of appeal. Accordingly, there has also been a violation of article 6.

12.4 With regard to the author's allegation of ill-treatment in detention, the Committee notes that where the State party has not replied to the Committee's request for clarifications, due weight must be given to the author's allegations. In this context, the Committee observes that the author has made specific allegations, which have not been contested by the State party, that, on 9 July 1988, he was assaulted by soldiers and warders, who beat him, pushed him with a bayonet, emptied a urine bucket over his head, threw his food and water on the floor and his mattress out of the cell. In the Committee's view, this amounts to degrading treatment within the meaning of article 7 and also entails a violation of article 10, paragraph 1.

13. 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 violations of articles 7 and 10, paragraph 1, article 14, paragraphs 3 (c) and 5, and consequently article 6, of the International Covenant on Civil and Political Rights.

14. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to provide a right of appeal in accordance with article 14, paragraph 5, means that Mr. Francis did not receive a fair trial within the meaning of the Covenant. He is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the view that in the circumstances of the case, this entails his release. As regards the violation of articles 7 and 10, of which Mr. Francis also is a victim, he is entitled to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

15. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's views.

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\* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

a/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

b/ See the Committee's views concerning communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, paras. 13.3 to 13.5.

c/ Raphael Henry v. Jamaica and Aston Little v. Jamaica, views adopted on 1 November 1991.

d/ See CCPR/C.21/Rev.1, General Comment 6 [16], para. 7.

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