

## HUMAN RIGHTS COMMITTEE

### Francis v. Jamaica

Communication No. 606/1994

25 July 1995

CCPR/C/54/D/606/1994\*

### VIEWS

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

*Victim: The author*

*State party: Jamaica*

*Date of communication: 12 August 1994 (initial submission)*

*Date of decision on admissibility: 28 July 1992*

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

Meeting on 25 July 1995,

Having concluded its consideration of communication No. 606/1994 submitted to the Human Rights Committee by Mr. Clement 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 is Clement Francis, a Jamaican citizen currently detained at the General Penitentiary in Kingston, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and 14, paragraphs 3(c), (d) and 5, of

the International Covenant on Civil and Political Rights. He is represented by counsel.

2. An earlier communication submitted by the author to the Committee was declared inadmissible because of non-exhaustion of domestic remedies, since it appeared from the information before the Committee that the author had failed to petition the Judicial Committee of the Privy Council for special leave to appeal.<sup>1</sup> The decision provided for the possibility of review of admissibility, pursuant to rule 92, paragraph 2, of the Committee's rules of procedure. On 23 July 1992, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed. With this, it is submitted, all domestic remedies have been exhausted.

The facts as submitted:

3.1 The author was arrested and charged on 22 February 1980 for the murder of one A.A. On 26 January 1981, he was found guilty as charged and sentenced to death in the Home Circuit Court of Kingston, Jamaica.

3.2 The Jamaican Court of Appeal dismissed the author's appeal on 18 November 1981; on 17 October 1987, a note of the oral judgment was produced, but no written judgment was issued. It appears from the note delivered by a judge of the Court of Appeal that Mr. Francis' legal representatives stated before the Court that they could find no grounds to argue on his behalf, to which the Court of Appeal agreed.

3.3 A warrant for the author's execution on 23 February 1988 was signed by the Governor-General, but a stay of execution was granted. It is stated that the Governor-General ordered that Mr. Francis' petition for special leave to appeal to the Judicial Committee of the Privy Council should be lodged with the Registrar of the Privy Council not later than 30 April 1988. On 10 March 1988, the London law firm willing to represent the author for the purpose of a petition for special leave to appeal, wrote to the Jamaica Council for Human Rights requesting copies of the trial transcript and Court of Appeal judgment. On 26 April 1988, the London law firm informed the Governor-General of Jamaica, that despite numerous requests by the Jamaica Council for Human Rights to the Registrar of the Court of Appeal, they had not yet obtained the written judgment of the Court of Appeal. Finally, on 1 February 1989, the Registrar of the Court of Appeal forwarded to the Jamaica Council for Human Rights a note, dated 17 October 1987, of the oral judgment in the case. The Jamaica Council for Human Rights forwarded this note to the London law firm on 8 March 1989.

3.4 Although the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal, Lord Templeman observed the following in respect of the issue of delay:

"In this case the petitioner was found guilty of murder and sentenced to death on 26 January 1981. The Court of Appeal of Jamaica dismissed his appeal on 18 November 1981. It is now over ten years later and there comes before the Board a petition for special leave to appeal. During the whole of that time the petitioner has been under sentence of death. The delay is

horrendous and appears solely due to the fact that the machinery for the Court of Appeal's reasons being written down and supplied to the petitioner's representatives is either wholly lacking or wholly broken down.

The Board is well aware [...] that the legal authorities are struggling under great difficulties for lack of resources, [...], lack of machinery, lack of everything, [...]; and that in turn the Government, which must supply these facilities in the interest of justice, is labouring under great economic difficulties.

But nevertheless the Board consider - [...] - that there must be put in place machinery for disposing of appeals, particularly in murder cases, in the sense that the delay should not be brought about by purely mechanical failure to provide facilities for recording and distributing the reasons for the trial judge or the Court of Appeal."

3.5 In December 1992, the offence for which the author was convicted was classified as a non-capital offence under the Offences Against the Person (Amendment) Act 1992; the author was removed from death row to serve a further 10 years' imprisonment at the General Penitentiary before he becomes eligible for parole.

3.6 Counsel affirms that the author has not applied to the Supreme (Constitutional) Court for redress. He submits that a constitutional motion in the Supreme Court would inevitably fail, in light of the precedent set by the Judicial Committee of the Privy Council's decisions in **DAP v. Nasralla**<sup>2</sup> and **Riley et al. v. Attorney General of Jamaica**<sup>3</sup>, where it was held that the Jamaica Constitution was intended to prevent the enactment of unjust laws and not merely the unjust treatment under the law. Since Mr. Francis alleges unfair treatment under the law, and not that post-constitutional laws are unconstitutional, the constitutional motion is not available to him. Counsel further submits that, if it is nonetheless considered that Mr. Francis has a constitutional remedy in theory, it is not available to him in practice because he has no means to retain counsel and no legal aid is made available for the purpose of a constitutional motion.

3.7 It is submitted that Mr. Francis' mental condition has deteriorated as a direct result of his stay on death row. Counsel refers to the letters Mr. Francis addressed to his London solicitors, and points out that these letters demonstrate not only a high level of cognitive impairment, but also general mental disturbance and paranoia. Furthermore, reference is made to a letter, dated 3 June 1992, from the prison chaplain, Father Massie, who states, **inter alia**, that: "[...] Having worked with the men on Jamaica's death row for over five years, I have a fairly good sense of how they operate, what keeps them sane, what 'breaks' some. [...] It is my opinion that Clement has over the eleven years lost more and more contact with the 'real world'. While we spoke there were moments of lucidity and calmness which would suddenly be interrupted with bursts of paranoia regarding those he could no longer trust. The conversation went back and forth this way. He remembers some things very clearly, and will be conversing naturally, when, unexplainably, his voice will rise, the eyes begin to look suspiciously around, and he will become agitated over those he feels are persecuting him. [...]. As there is no psychiatric care of any kind at the prison it is not possible to get a professional opinion. I have, however, thirty years of experience as a

pastoral counsellor [...] and it is my judgment that Clement Francis is in need of psychiatric help [...]."

3.8 Counsel affirms that there has not been a medical diagnosis of insanity, and that all attempts to have Mr. Francis examined by a qualified psychiatrist have failed. He claims that this is due to the difficulty in securing the services of a psychiatrist, because of the shortage of qualified psychiatrists in Jamaica and the lack of psychiatric care within the Jamaica prison system. In respect of the State party's submission to the Human Rights Committee relating to the author's earlier communication, that Mr. Francis was examined on 6 February 1990 and was found to be sane, counsel points out that no details were given as to the nature of that examination or the qualifications of the assessor. According to counsel, the information provided by the State party is insufficient to assess the sanity of the author, and should be weighed against the comments of Father Massie and the letters of the author. In support of his arguments, counsel refers to documentation on the psychological impact of death row incarceration.

3.9 Counsel concludes that the nature of the alleged violations is such to require Mr. Francis' release from prison as the only means to remedy the violations.

3.10 It is stated that the matter has not been submitted for examination under any other procedure of international investigation or settlement.

#### The complaint:

4.1 It is submitted that the author has been denied the right to have his conviction and sentence reviewed by a higher tribunal, in violation of article 14, paragraph 5, because of the Court of Appeal's failure to issue a written judgment. Counsel points out that the right of appeal to the Judicial Committee of the Privy Council against a decision of the Court of Appeal is guaranteed by Section 110 of the Jamaican Constitution. Mr. Francis, however, was prevented from effectively exercising this right, because, in the absence of the written judgment, he was unable to meet the requirements of the Judicial Committee's rules of procedure, i.e. to explain the grounds on which he was seeking special leave to appeal, and to include copies of the Appeal Court's judgment with his petition.<sup>4</sup> With reference to the jurisprudence of the Human Rights Committee<sup>5</sup>, and of English<sup>6</sup>, Australian<sup>7</sup> courts, counsel concludes that the Jamaican Court of Appeal is under a duty to provide written reasons for its decisions and that, by failing to do so in the author's case, his right to have conviction and sentence reviewed has been rendered illusory.

4.2 Counsel points out that it has been over thirteen years since the Court of Appeal orally dismissed Mr. Francis' appeal and that no written judgment has been issued to date. It is submitted that the failure of the Court of Appeal to issue a written judgment, despite repeated requests on Mr. Francis' behalf, violates his right, under article 14, paragraph 3(c), of the Covenant, to be tried without undue delay. Reference is made to the Human Rights Committee's General Comment 13<sup>8</sup>, to its jurisprudence<sup>9</sup>, and to Lord Templeman's observations when considering Mr. Francis' petition for special leave to appeal to the Judicial Committee of the Privy Council.

4.3 As to a violation of the author's right under article 14, paragraph 3(d), it is submitted that the legal aid attorneys assigned to Mr. Francis for the purpose of his appeal, did not consult with him, nor informed him that they intended to argue before the Court of Appeal that the appeal had no merit. Counsel explains that, had Mr. Francis known that his attorneys were not going to put forward any ground of appeal, it is likely that he would have requested a change of legal representation. With reference to the Committee's Views in communication No. 356/1989, it is submitted that the attorneys assigned for Mr. Francis' appeal did not provide effective representation in the interest of justice.<sup>10</sup>

4.4 In respect of violations of articles 7 and 10, paragraph 1, counsel points out that Mr. Francis has been held on death row from his conviction and sentence on 26 January 1981 until the commutation of his death sentence to life imprisonment in December 1992. It is submitted that the mere fact that the author will no longer be executed does not nullify the mental anguish of the twelve years spent on death row, facing the prospect of being hanged. In this context, it is stated that, after a warrant had been issued for the author's execution on 23 February 1988, he was placed, on 18 February 1988, in the death cell adjacent to the gallows where condemned men are held prior to execution. He was subjected to round the clock surveillance and was weighed in order to calculate the length of "drop" required. The author claims that he was taunted by the executioner about the impending execution and about how long it would take for him to die. Furthermore, he could hear the gallows being tested. He adds that the strain of the five days in the death cell was such that he was unable to eat and it left him in a shaken, disturbed state for a long period of time. It is submitted that an increasing number of jurisdictions now recognize that prolonged periods of detention on death row can constitute inhuman and degrading treatment.<sup>11</sup>

4.5 In addition to the psychological stress, it is submitted that the physical conditions of Mr. Francis' detention on death row exacerbate the violations of his rights under articles 7 and 10, paragraph 1, of the Covenant. In this context, the author states that, during the 12 years on death row, he was held in a cell measuring 10 x 10 feet, which was dirty and infested with rats and cockroaches. He was only allowed out of his cell for a few minutes each day and sometimes remained locked up for 24 hours. He claims that he was regularly beaten by warders and that he still suffers from headaches as a result of a severe wound to his head sustained by the beatings, for which he was denied medical treatment. He further complains about the excessive noise on death row, caused by the cell doors which would ring loudly when slammed shut, or when rattled by inmates trying to attract the attention of the warders.

4.6 Finally, it is submitted that the issuing of a warrant of execution of a mentally disturbed person, such as the author, (see paragraphs 3.7 - 3.8 **supra**) is in violation of customary international law; the fact that Mr. Francis was kept on death row facing execution until December 1992, while being mentally disturbed, is said to amount to violations of articles 6, 7 and 10, paragraph 1, of the Covenant, **juncto** ECOSOC Resolutions 1984/50 and 1989/64. The lack of psychiatric care in St. Catherine District Prison is said to be in violation of articles 22, paragraph 1, 24 and 25 of the Standard Minimum Rules for the Treatment of Prisoners.<sup>12</sup>

State party's observations and counsel's comments:

5.1 By submission of 16 February 1995, the State party does not raise any objections to the admissibility of the communication and offers comments on the merits, in order to expedite the examination of the communication.

5.2 The State party concedes that the author was not provided with a written judgement from the Court of Appeal, but emphasizes that, following instructions by the then President of the Court of Appeal, reasons are now being issued in all cases within three months of the hearing.

5.3 The State party argues that the author did not suffer any miscarriage of justice because of the absence of a written judgment and consequently that there has been no violation of article 14, paragraph 5, of the Covenant. Reference is made to the judgment of the Privy Council in **Pratt & Morgan v. Attorney General for Jamaica**<sup>13</sup>, where the Privy Council states that the availability of reasons is not a condition precedent for lodging an application for special leave to appeal. In this connection the State party recalls that the author's case was in fact heard by the Privy Council.

5.4 As regards the author's claim under article 14, paragraph 3(d), with regard to his appeal, the State party emphasizes that it is its duty to provide competent counsel to assist the author, but that it cannot be held responsible for the manner in which counsel conducts his case, as long as it does not obstruct counsel in the preparation and conduct of the case. To hold otherwise would mean that the State has a greater burden with respect to legal aid counsel than it does for privately retained lawyers.

5.5 The State party denies that the author's detention on death row for over twelve years constitutes a violation of articles 7 and 10. The State party rejects the view that the case of **Pratt & Morgan v. the Attorney General** is an authority for the proposition that once a person has spent five years on death row there has been automatically a violation of his right not to be subjected to cruel and inhuman treatment. The State party argues that each case must be examined on its own merits. It refers to the Committee's jurisprudence that "in principle, prolonged judicial proceedings do not **per se** constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners."<sup>14</sup>

5.6 As regards the claim that the author is mentally ill and that his continued detention on death row constituted a violation of articles 7 and 10, the State party submits that the author was examined by a psychiatrist on 6 February 1990 and that the psychiatric report states that the author displayed no psychiatric features and no evidence of cognitive impairment. On this basis, the State party rejects the assertions about the author's mental health and notes that an allegation of this kind must be supported by medical evidence.

6.1 In his comments on the State party's submission counsel for the author agrees to the immediate examination by the Committee of the merits of the communication.

6.2 Counsel reiterates that the failure of the Court of Appeal to deliver written reasons for dismissing the appeal constitutes a violation of article 14, paragraph 5, of the Covenant. In

support of his view, counsel refers to the Privy Council judgment in **Pratt & Morgan v. Jamaica**, where it was held that "in practice it is necessary to have the reasons of the Court of Appeal available at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains". Counsel concludes that without a written judgement the author could not **effectively** exercise his right to have his conviction and sentence reviewed by a higher tribunal according to law.

6.3 As regards the claim under article 14, paragraph 3(d), that the author was not provided with effective representation before the Court of Appeal, counsel refers to the Committee's Views in communication No. 356/1989<sup>15</sup>, where it was held that effective representation included consulting with, and informing, the accused if counsel intends to withdraw the appeal or intends to argue that the appeal has no merit. Counsel argues that, although a State party cannot be held responsible for the shortcomings of privately retained counsel, it has the responsibility to guarantee effective representation in legal aid cases.

6.4 Counsel refers **inter alia** to the judgment of the Privy Council in **Pratt & Morgan v. Jamaica** and maintains that, as the author was kept on death row for over 12 years, he has been subjected to inhuman and degrading treatment or punishment in violation of articles 7 and 10, paragraph 1, of the Covenant. In this connection counsel emphasizes the length of the delay in the author's case and the conditions on death row in St. Catherine District Prison.

6.5 As regards the author's mental state, counsel notes that the State party has given no details as to the nature of the psychiatric examination or about the qualifications of the assessor. Counsel argues therefore that the report to which the State party refers has no more evidentiary value than the comments of the prison chaplain and the letters of the author himself. Counsel reiterates that the prison chaplain is convinced that the author is suffering from a mental illness and that the letters of the author demonstrate cognitive impairment, paranoia and general mental confusion. Counsel concludes that one psychiatric evaluation over a 12 year period on death row is insufficient to determine the author's sanity.

6.6 In this connection counsel also recalls the five days spent by the author in the death cell in February 1988, and submits that the State party has not provided medical evidence that the author was sane at the time the warrant for execution was issued. It is argued that articles 7 and 10, paragraph 1, of the Covenant prohibit a State party from executing the insane and that Jamaica's statutory procedure for determining insanity fails to provide adequate protection of this right. In this context, counsel states that an estimated 100 prisoners at St. Catherine District Prison are mentally ill. Counsel concludes that the issuing of a warrant for execution without a prior attempt to establish the author's mental condition constitutes in itself a violation of articles 7 and 10 of the Covenant.

#### Decision on admissibility and examination on the merits:

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee observes that the author had submitted an earlier communication in 1989, which the Committee declared inadmissible in 1992 on account of non-exhaustion of domestic remedies. In its decision the Committee indicated that pursuant to rule 92, paragraph 2, of the rules of procedure the communication could be considered after the author had exhausted domestic remedies.

7.4 Having determined that the author has exhausted domestic remedies for purposes of the Optional Protocol, the Committee finds that it is appropriate in this case to proceed to an examination of the merits. In this context, the Committee notes that the State party does not raise any objections to the admissibility of the communication and has forwarded its comments on the merits in order to expedite the procedure. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written explanations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee finds that this period may be shortened, in the interests of justice, if the State party so wishes. The Committee further notes that counsel for the author agrees to the examination of the communication at this stage, without the submission of additional comments.

8. Accordingly, the Committee decides that the communication is admissible and proceeds, without further delay, to the examination of the substance of the author's claims, 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.

9.1 The Committee must determine whether the author's treatment in prison, particularly during the nearly 12 years that he spent on death row following his conviction on 26 January 1981 until the commutation of his death sentence on 29 December 1992 entailed violations of articles 7 and 10 of the Covenant. With regard to the "death row phenomenon", the Committee reaffirms its well established jurisprudence that prolonged delays in the execution of a sentence of death do not *per se* constitute cruel, inhuman or degrading treatment. On the other hand, each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.

9.2 In the instant case, the Committee finds that the failure of the Jamaican Court of Appeal to issue a written judgment over a period of more than 13 years, despite repeated requests on Mr. Francis' behalf, must be attributed to the State party. Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author's confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author's description of the prison conditions, including his allegations about regular beatings inflicted

upon him by warders, as well as the ridicule and strain to which he was subjected during the five days hespent in the death cell awaiting execution in February 1988, which the State party has not effectively contested, the Committee concludes that these circumstances reveal a violation of Jamaica's obligations under articles 7 and 10, paragraph 1, of the Covenant.

9.3 With regard to the author's allegations of violations of article 14 of the Covenant, the Committee finds that the inordinate delay in issuing a note of oral judgment in his case entailed of violation of article 14, paragraphs 3(c) and 5, of the Covenant, although it appears that the delay did not ultimately prejudice the author's appeal to the Judicial Committee of the Privy Council. In the light of these considerations the Committee does not deem it necessary to make findings in respect of other provisions of article 14 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, 14, paragraph 3(c), and 5, of the Covenant.

11. Pursuant to article 2, paragraph 3(a), of the Covenant, the author is entitled to an effective remedy, including appropriate medical treatment, compensation and consideration for an early release.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

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

#### Footnotes

\*/ Made public by decision of the Human Rights Committee.

1/ Communication No. 382/1989, declared inadmissible on 28 July 1992, during the Committee's 45th session.

2/ 1967, 2 ALL ER 161.

3/ 1982, 2 ALL ER 469.

4/ Rules 3 and 4 of the Judicial Committee (General Appellate Jurisdiction) Rules Order (1982 Statutory Instrument No. 1676) provide that: "3(1) A petition for special leave to appeal shall a) state succinctly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted; b) deal with the merits of the case only so far as is necessary to explain the grounds upon which special leave to appeal is sought;.... "4) A petitioner for special leave to appeal shall lodge a) six copies of the petition and of the judgment from which special leave to appeal is sought".

5/ Communication No. 230/1987 ( Raphael Henry v. Jamaica ), Views adopted on 1 November 1991, paragraph 8.4.

6/ See e.g. Norton Tools Co. Ltd. v. Tewson [1973] 1 WLR 45, p. 49 d.

7/ See e.g. Petit v. Dunkley [1971] 1 NSWLR 376.] and US [ See e.g. Griffin v. Illinois (100 L Ed 891 [1985]), p. 899.

8/ CCPR/C/21/Rev.1, p. 14, para. 10, where the Committee held that: "[...] all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."

9/ e.g. communication No. 282/1988 ( Leaford Smith v. Jamaica ), Views adopted on 31 March 1993, during the Committee's 47th session; para. 10.5.

10/ Communication No. 356/1989 ( Trevor Collins v. Jamaica ), Views adopted on 25 March 1993, during the Committee's 47th session. In paragraph 8.2 the Committee held that: "While article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit".

11/ Reference is made, inter alia , to the findings of the European Court of Human Rights in the Soering case (judgment of 7 July 1989, Series A, Volume 161); of the Indian Supreme Court in Rajendra Prasad v. State of Uttar Pradesh (1979 3 SCR 329); of the Zimbabwe Supreme Court in Catholic Commissioners for Peace and Justice in Zimbabwe v. Attorney-General (14 HRLJ 1993); and of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica (1993, 4 ALL ER 769).

12/ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

13/ Judgement of 2 November 1993.

14/ See Committee's Views in communications Nos. 219/1986 & 225/1987 ( Pratt and Morgan v. Jamaica ), Views adopted on 6 April 1989.

15/ Trevor Collins v. Jamaica , Views adopted on 25 March 1993, paragraph 8.2.