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HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October – 3 November 2006

DECISION

Communication No. 1367/2005

Submitted by:	Tim Anderson (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	26 July 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 February 2005
Date of decision:	31 October 2006

Subject matter: right to compensation following reversal of conviction

Procedural issue: admissibility *ratione temporis*, admissibility *ratione materiae*, reservation

Substantive issue: reversal of conviction after "final decision"

Article of the Covenant: 2, paragraph 3; and 14, paragraph 6

Article of the Optional Protocol: 1, 2 and 3

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-eighth session

concerning

Communication No. 1367/2005[*]

Submitted by:	Tim Anderson (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	26 July 2004 (initial submission)

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

Meeting on 31 October 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication dated 26 July 2004 is Tim Anderson, an Australian citizen, born on 30 April 1953. He claims to be a victim of violations by Australia of articles 2, paragraph 3; and 14, paragraph 6 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Australia on 25 December 1991. He is not represented by counsel.

Factual background

2.1 In 1978, the author was a member of an organization known as Ananda Marga, a religious movement based in India, which was under investigation in connection with a bombing at the Sydney Hilton Hotel in which three people died. The same year, he was arrested and charged

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.
Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

with conspiracy to murder a politician by means of explosives, but not in relation to the Hotel bombing. On 8 August 1979, he was convicted by the Supreme Court of New South Wales of conspiracy to murder and sentenced to sixteen years imprisonment. His subsequent appeals were dismissed. In 1985, fresh evidence emerged and pursuant to a judicial inquiry, the author was pardoned by the State government of New South Wales on 15 May 1985. He was released, having spent seven years in jail. An inquiry into his conviction uncovered evidence of police criminality, but no disciplinary action was taken against the police officers concerned. In March 1987, the author applied for and was paid $100,000 by the State government by way of 'rehabilitation compensation' pursuant to an *ex gratia* system run by the executive government of the State of New South Wales, whereby the State considers claims for compensation on a case by case basis.

2.2 In 1989, the author was arrested and charged with the murder of the three people who died in the bombing of the hotel in 1978. On 25 October 1990, he was convicted by the Supreme Court of New South Wales on three charges of murder and sentenced to an unspecified term of imprisonment. He appealed to the Court of Criminal Appeal which, on 6 June 1991, quashed his conviction and directed that a verdict of acquittal be entered on the three charges. The author was then released from jail. An investigation was instigated into the conduct of the prosecutor, including his apparently deliberate failure to examine a key witness on important issues. On 17 September 1991, the author made another application to the State government for compensation. The State government refused to consider it pending the results of the inquiry into the prosecutor's conduct. This inquiry lasted from 1991 until 2003, when the last of the charges of misconduct against the prosecutor were finally dismissed by the Administrative Decisions Tribunal on 30 April 2003. In 10 May 2004, the author was advised by the Attorney General of New South Wales that, given the decision of the Administrative Decisions Tribunal, his claim for compensation was rejected.

The complaint

3. The author claims a violation of articles 2, paragraph 3; and 14, paragraph 6 of the Covenant. He argues that despite being acquitted in 1991 and released from prison, he did not have access to compensation 'according to law', as required by article 14, paragraph 6. He states that he has had no effective remedy to this violation of his rights, in contravention of article 2, paragraph 3. He recalls that the compensation paid to him in 1987 was an arbitrary *ex gratia* amount, subject to no legal process. He argues that, although his acquittal in 1991 stemmed from unfairness in trial procedure, rather than from fresh evidence, this second case was linked to the first. He argues that the absence of a proper legal compensation procedure at the time of his first prosecution led to a lack of accountability, and contributed to his second prosecution.

State party's admissibility and merits observations

4.1 By note verbale of 17 October 2005, the State party challenged the admissibility of the communication. It recalls that alleged violations which occurred prior to the entry into force of the Optional Protocol are inadmissible *ratione temporis*.[1] It acknowledges that there are

[1] See Communication No.520/1992, *E. and A.K. v. Hungary*, Inadmissibility decision adopted on 7 April 1994, para.6.4; Communication No.579/1994, *Werenbeck v. Australia*, Inadmissibility

exceptions to this rule where the effects of the event in question have extended into the period after the entry into force of the Optional Protocol or where the alleged violation continues to have effects which in themselves constitute a violation of the Covenant after the entry into force of the Covenant. In such cases, the continuing violation must be an affirmation, after the entry into force of the Optional Protocol, by clear act or by clear implication, of the previous violation amounting to a fresh and separate violation independent of the original.[2] The State party also recalls that the Committee has previously held that a failure to compensate an author after the entry into force of the Optional Protocol does not thereby constitute an affirmation of a prior violation by the State party.[3] Moreover, the Committee has held that a failure to take other remedial measures does not, in itself, constitute a fresh or separate violation.[4] The State party also invokes the jurisprudence of the European Court of Human Rights on article 3 of Protocol No.7, which is the equivalent to article 14, paragraph 6, according to which neither a conviction, nor the quashing of a conviction, which occurs prior to the entry into force of an obligation can be regarded as a continuing violation. The State party recalls that, in the present case, all events, with the exception of the rejection of the author's compensation claim, occurred prior to the entry into force of the Optional Protocol for Australia. Consequently, it submits that the communication is inadmissible *ratione temporis* so far as it relates to the circumstances surrounding the two convictions and the respective claims for compensation. On the issue of whether the failure to provide compensation constitutes a continuing violation, it argues that the failure to compensate or take other remedial measures in this case does not constitute a continuing violation.

4.2 For the State party, the claim under article 14, paragraph 6, is inadmissible *ratione materiae* for three alternative reasons. Firstly, while the author's complaint is that the *ex gratia* payment procedure is administrative and not legal in nature, the State party recalls that it has formulated a reservation to article 14, paragraph 6, expressly stipulating "that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision". It recalls that the Committee has previously noted the validity of this particular reservation.[5] The State party notes that the scope of application of the reservation is clear and confined so as not to defeat the object and purpose of the Covenant. Therefore, its obligation to provide mechanisms for compensation permits procedures that are administrative in nature.

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decision adopted on 27 March 1997, paras.9.2 and 9.3; Communication No.771/1997, *Baulin v. Russian Federation*, Inadmissibility decision adopted on 31 October 2002, para.6.2; and Communication No.1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para.10.3.

[2] See Communication No.1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para.10.3; Communication No.646/1995, *Lindon v. Australia*, Inadmissibility decision adopted on 20 October 1998, para.6.6; Communication No.851/1999, *Zhurin v. Russian Federation*, Inadmissibility decision adopted on 2 November 2004, paras.6.4 and 6.5; and Communication No.516/1991, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para.4.5.

[3] See Communication No.520/1992, *E. and A.K. v. Hungary*, Inadmissibility decision adopted on 7 April 1994, para.6.6.

[4] See Communication No.983/2001, *Love et alii. v. Australia*, Views adopted on 25 March 2003, para.7.3.

[5] See Communication No.880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para.1.2.

4.3 Secondly, the State party argues that in the second set of proceedings started in 1989, there was no "final decision" convicting the author of a criminal offence. It recalls that the Committee has interpreted "final decision" to mean one which, for one reason or another, is not subject to further appeal.[6] Consequently, the Committee has held that a conviction at first instance which is overturned on appeal is not a final decision.[7] The State party recalls that the *travaux préparatoires* to the Covenant confirm that article 14, paragraph 6, was not intended to apply to individuals convicted of a criminal offence which could still be appealed. The proposal to remove the word "final" was rejected. It also argues that this interpretation is consistent with paragraphs 5 and 7 of article 14. In the present case, the State party argues that the decision of the Court of Criminal Appeal on 6 June 1991 was the final decision and that that decision was to acquit, rather than convict.

4.4 Thirdly, the State party argues that the conviction was not "reversed" because of a "new or newly discovered fact". It recalls that the Committee has previously held that the reversal of a conviction through the ordinary process of appellate review is not a reversal on the basis of a "new of newly discovered fact".[8] In the present case, the author's conviction was overturned during the ordinary process of appellate review. The two grounds for appeal were that there was unfairness in the way the trial was conducted and that the judge misdirected the jury. There was thus no ground of appeal dealing with the emergence of any facts which were unknown to the trial court at first instance.

4.5 With regard to the claim under article 2, paragraph 3, the State party argues that it is inadmissible because it cannot be invoked in isolation.[9] Since the claims relating to paragraph 14, paragraph 6, are inadmissible, the author cannot invoke article 2 of the Covenant.

4.6 If the Committee were to find that the communication is admissible, the State party argues that the communication discloses no violation of article 14, paragraph 6, on three alternatives bases. Firstly, it argues that its reservation explicitly permits the provision of compensation via administrative procedures. Secondly, the author's conviction was not a final decision. Thirdly, the conviction was not "reversed" because of a "new or newly discovered fact". With regard to the claim under article 2, paragraph 3, the State party argues that it is not proven, since the claims under article 14, paragraph 6, are not proven.

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[6] See Communication No.89/1981, *Muhonen v. Finland*, Views adopted on 8 April 1985, para.11.2; and Communication No.880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para.8.4.

[7] See Communication No.408/1990, *W.J.H. v. The Netherlands*, Inadmissibility decision adopted on 22 July 1992, para.6.3; and Communication No.963/2001, *Uebergang v. Australia*, Inadmissibility decision adopted on 22 March 2001, para.4.3.

[8] See Communication No.868/1999, *Wilson v. The Philippines*, Views adopted on 30 October 2003, para.6.6; and Communication No.880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para.8.4.

[9] See Communication No.268/1987, *H.G.B. and S.P. v. Trinidad and Tobago*, Inadmissibility decision adopted on 3 November 1989, para.6.2; Communication No.398/1990, *A.M. v. Finland*, Inadmissibility decision adopted on 23 July 1992, para.4.2; and Communication No.972/2001, *Kazantzis v. Cyprus*, Inadmissibility decision adopted on 7 August 2003, para.6.6.

Author's comments

5.1 By letter dated 10 December 2005, the author argues that the events complained of cover a very long period, from 1978 to 2004. He submits that the lack of an effective remedy for the violation of his rights during that period leaves him vulnerable to further attack, especially when the State party is formulating and now has in place new forms of arbitrary arrest and detention under an "anti-terrorist" rationale. He submits that the State party continues to violate his rights under articles 2, paragraph 3; and article 14, paragraph 6.

5.2 With regard to the State party's reservation to article 14, paragraph 6, the author recalls that the reason given by the State party in its third periodic report to the Committee was not valid: statutory procedures are objected to simply because they do not currently exist. He argues that the reservation defeats the object and purpose of the treaty.

5.3 With regard to the State party's argument that there was no "final decision" convicting the author of a criminal offence, the author submits that there was a final decision in the first case, but not in the second case. However, both cases involve a single attempt to implicate him in the same crime and he has thus treated them as a single prosecution, in two stages.

5.4 With regard to the State party's argument that the conviction was not reversed because of a "new or newly discovered fact", the author recalls that the first conviction was reversed because of a "new or newly discovered fact", whereas the second conviction was reversed on legal grounds. However, he argues again that he has treated both cases as a single prosecution, in two stages.

5.5 With regard to article 2, paragraph 3, the author recalls that the State party has failed to provide effective remedies for miscarriages of justice generally, including those that fall within the terms of article 14, paragraph 6. He argues that the provision of compensation generally, including under the terms of article 14, paragraph 6, constitutes an effective remedy. He submits that the State party has not responded to his complaint that it has failed to hold accountable police and prosecutors for their wrong doings.

Additional comments by the State party

6. By note verbale of 8 March 2006, the State party submits that a failure to discipline certain police and prosecutors after entry into force for alleged misconduct that occurred prior to entry into force would be insufficient to constitute an affirmation by act or clear implication such that it could be said to amount to a fresh, separate, independent violation. It recalls that article 14, paragraph 6, does not require a State to follow a certain procedure to provide compensation to an individual in certain cases of miscarriage of justice. In the absence of any stated requirement, a State may implement its obligation as it deems appropriate in the context of its domestic systems. In response to the author's submission that the implementation of administrative processes defeat the object and purpose of the Covenant, the State party recalls that its reservation to article 14, paragraph 6 has not been objected to, which is an inherent acknowledgement that it does not defeat the object and purpose of the Covenant.

Issues and proceedings before the Committee

7.1 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 it is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee takes note of the State party's objection that the communication is inadmissible *ratione temporis*, insofar as it relates to events which occurred prior to the entry into force of the Optional Protocol for Australia on 25 December 1991. It recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[10] It notes that the first conviction on 8 August 1979, the decision to pardon the author on 15 May 1985 and the decision to compensate him in May 1987 all predate the entry into force of the Optional Protocol for the State party. The Committee does not consider that this alleged violation continued to have effects after May 1987, which would in themselves have constituted violations of the author's Covenant rights. This part of the communication is therefore inadmissible *ratione temporis* under article 1 of the Optional Protocol, insofar as it relates to the first conviction, pardon and payment of compensation.

7.4 Insofar as the communication relates to the second conviction on 25 October 1990, the acquittal of the author on 6 June 1991, the request for compensation made on 17 September 1991 and the decision to deny compensation made on 10 May 2004, the Committee recalls that article 14, paragraph 6 provides for compensation according to the law to a person who has been convicted of a criminal offence by a final decision and has suffered punishment as a consequence of such conviction if his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.[11]

7.5 The Committee observes that the author’s conviction by the Supreme Court of New South Wales of 25 October 1990 was quashed by the Court of Criminal Appeal on 6 June 1991. The decision of the Supreme Court of New South Wales was subject to appeal and did not therefore constitute a “final decision” within the meaning of article 14, paragraph 6. The final decision was the decision of the Court of Criminal Appeal which acquitted the author. Accordingly, the

[10] See Communication No.24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para.7.3; and Communication No.1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para.10.3.

[11] See Communication no.408/1990, *W.J.H. v Netherlands*, Inadmissibility decision adopted on 22 July 1992, para.6.3; Communication No.880/1999; *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para.8.3; and Communication No.963/2001, *Uebergang v. Australia*, Inadmissibility decision adopted on 22 March 2001, para.4.2.

Committee considers that article 14, paragraph 6, does not apply in the present case, and this claim is inadmissible *ratione materiae* under article 3 of the Optional Covenant.[12]

7.6 The Committee recalls that article 2 of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant, and notes that article 2, paragraph 3(a), stipulates that each State party undertakes "to ensure that any person whose rights or freedoms […] are violated shall have an effective remedy". Article 2, paragraph 3(b), provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. A State party cannot be reasonably required, on the basis of article 2, paragraph 3(b), to make such procedures available no matter how unmeritorious such claims may be.[13] Considering that the author's claims in the present case have been declared inadmissible *ratione temporis* and *ratione materiae*, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

8. Accordingly, the Committee decides:

(a) that the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;

(b) that this decision be transmitted to the State party and the author.

[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.]

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[12] See Communication No.408/1990, *W.J.H. v. The Netherlands*, Inadmissibility decision adopted on 22 July 1992, para.6.3; Communication No.880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para.8.3; and Communication No.963/2001, *Uebergang v. Australia*, Decision on admissibility adopted on 22 March 2001, para.4.3.

[13] See Communication No.972/2001, *Kazantzis v. Cyprus*, Inadmissibility decision adopted on 7 August 2003, para.6.6; Communication No.1036/2001, *Faure v. Australia*, Views adopted on 31 October 2005, para.7.2; and Communication No.1229/2003, *Dumont de Chassart v. Italy*, Inadmissibility decision adopted on 25 July 2006, para.8.9.