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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1185/2003

Submitted by:	Johannes Van Den Hemel (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 2 June 2003 (not issued in document form)
Date of decision:	25 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Independence of the judiciary

Procedural issues: None

Substantive issues: Right to fair trial

Articles of the Covenant: 14

Articles of the Optional Protocol: 2

[ANNEX]

ANNEX

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

Eighty-fourth session

concerning

Communication No. 1185/2003[*]

Submitted by:	Johannes Van Den Hemel (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)

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

Meeting on 25 July 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Johannes van den Hemel, a Dutch citizen. He claims to be a victim of a violation by the Netherlands of his rights under article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. B.W.M. Zegers.

1.2 On 15 August 2003, pursuant to the State party's submission on admissibility, the Special Rapporteur on New Communications, acting on behalf of the Committee, decided that the admissibility and merits of the communication should be considered together.

[*] 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. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The author is an orthodontist living in the Netherlands. On 12 October 1989, he was involved in a car accident in which road signs used by road construction companies were damaged. The author himself suffered "material and non-material" damage and a 20% loss of earning capacity.

2.2 The damage was covered by several insurance companies, including Royal Nederlands Verzekeing Maatschappij NV (Royal), which partially compensated the damage. The insurance company VVAA Schadeverzekeing-smattschappij (VVAA), with whom the author had third party insurance at the time of the accident, partially compensated the damage to Royal. The question of guilt regarding the cause of the car accident and the damaged road signs led to a dispute between the author and the insurance company Royal.

2.3 Royal filed a claim in the Utrecht Regional Court against the author and VVAA for compensation for the remaining damages. The author filed a counter claim. On 21 February 1996, the Utrecht Regional Court ordered the author to pay Royal 9.576,62 Dutch Guilders plus interest in the amount of 5.257,25 Dutch Guilders. The Utrecht Regional Court declared the author's counter claim inadmissible.

2.4 The author appealed the judgement to the Court of Appeal, which affirmed the judgement on 26 June 1997. Judges Van der Reep and Veger, who rendered judgement in the Court of Appeal case, also sit on the Utrecht Regional Court. The author refers to a report published in 1996 by the Scientific Research Judiciary Foundation, in which it is reported that a third judge, judge Cremers, who also rendered judgement in the author's Court of Appeal case, had decided in favour of the insurance company in all 26 appeal cases in which an insurance company was one of the parties.

2.5 On 26 September 1997, the author appealed the judgement to the Supreme Court. Two of the judges who considered this appeal, judges Herrman and Mijnssen, were at the time of the author's appeal, employed and remunerated by the Supervisory Board of the Insurance Sector (Raad van Toezicht Verzekeringen), which is financed by the League of Insurers (Verbond van **V**erzekeraars) of which Royal is a member. The Board is a disciplinary body that determines disputes between insurance companies and the insured.

2.6 On the basis that judges Herrman and Mijnssen of the Supreme Court would not be impartial, the author requested that they recuse themselves from the case. His application was heard by a different composition of the Supreme Court. Pursuant to a request from judges Herrman and Mijnssen, they were heard by the Supreme Court in the absence of the author. The author was heard in the presence of the two judges. According to the author, the judges stated that if their request were not granted by the court, they would "no longer cooperate with the hearing of the request with regard to the challenge". On 19 November 1999, the Supreme Court rejected the author's application and on 24 December 1999, rejected his appeal from the Court of Appeal.

2.7 The author states that judge Mijnssen had earlier been a colleague of judge Heemskerk at a University in Amsterdam. The latter, a judge on the Supreme Court, had considered and rejected the author's request to have Judge Mijnssen recuse himself from the case and had also heard and rejected the author's appeal.

2.8 According to the author, he has been unable to ascertain whether any of the judges of the Supreme Court or the Court of Appeal were shareholders of Royal, and accuses the Utrecht Regional Court of failing to comply with its obligations under article 44 of the Legal State Magistrates Act (Wet Rechtspositie Rechterlijke Ambtenaren), which requires Courts to hold a register in which the additional functions of magistrates are listed. He bases his argument on an October 2000 study undertaken by the Ministry of Justice, which concluded that a large number of judges refuse to publish their other functions or only partially publish them.

The complaint

3.1 The author claims that his hearing before the Court of Appeal was contrary to article 14 as two of the judges who rendered judgement in this appeal, also sit on the Utrecht Regional Court.

3.2 He claims that the relationship of the two judges of the Supreme Court with Royal, through their presence on the Supervisory Board, gives rise to "the appearance of a possible bias" in violation of the author's right to a fair hearing under article 14 of the Covenant.[1] He argues that a finding by these judges of the Supreme Court for the author in Royal's claim against him could have resulted in the termination of their membership on the Board and thus a loss of fees. The author states that the two judges indicated their interest in the dispute between the author and Royal through their refusal to withdraw from the case and their behavior during the author's challenge to their hearing of the case. In addition, he argues that the failure to grant him a fair hearing was compounded by the "link" between Judge Mijnssen and Judge Heemskerk, as they had earlier been colleagues in a university in Amsterdam.

3.3 Lastly, he claims that relationships between Royal and the judges of the Utrecht Regional Court, the Court of the Appeal and the Supreme Court, violate his right to a fair trial under article 14 of the Covenant because these judges "could" be shareholders of Royal. He claims that as it "appeared" to him that the Utrecht Regional Court had failed to comply with article 44 of the Legal State Magistrates Act, his right to a fair trial had been violated, as he was unable to ascertain whether any of the judges were such shareholders.

[1] In the communication, the author cites as applicable a decision of the House of Lords of 17 December 1998, ILM Vol. 38 (1999), which discusses the principle that a man may not be a judge in his own case as applied in a case where a judge is in fact a party to the litigation and where the behaviour of the judge gives rise to a suspicion that he is not impartial. The author additionally cites the High Court of Australia in Webb and Hay v. the Queen to demonstrate that the doctrine of disqualification applies where, as in the current case, a direct or indirect relationship gives rise to prejudice on the part of a judge.

The State party's submission on admissibility and merits and the author's comments thereon

4.1 On 4 August 2003, the State party contested the admissibility of part of the complaint. It submitted that the claim concerning the judges of the Court of Appeal is inadmissible for failure to exhaust domestic remedies. It argues that under articles 36 and 37, paragraph 1, of the Code of Civil Procedure, the author could have challenged the judges assigned to examine his case on "the grounds of facts and or circumstances which might prejudice judicial impartiality" and should be done "as soon as the person concerned has become familiar with these facts or circumstances". Had the author challenged the impartiality of one or more of the judges, the proceedings would have been suspended immediately. The challenge would have been heard by the full bench, excluding the challenged judges, at the earliest opportunity. Had the full-bench upheld the author's challenge, the case would subsequently have been heard by a court in which the challenged judge or judges took no part. It refers to the Committee's decision in *Perera v. Australia* and in *Triboulet v. France*[2] in this regard.

4.2 On 2 December 2003, the State party provided its submission on the merits, arguing that the part of the case which is not considered inadmissible for failure to exhaust domestic remedies is "manifestly ill-founded". As a preliminary remark, it noted that, on 14 November 2000, the European Court of Human Rights had found this case inadmissible, because it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". According to the State party, a finding by the Committee that there has been a violation in this case would be extremely difficult to reconcile with this conclusion.

4.3 As to the facts, the State party sets out the legislation governing challenges to judges on grounds of bias and the recusal of judges, including article 34 of the Code of Civil Procedure and 8:19 of the General Administrative Law Act (Algemene Wet Bestuursrecht), which states that a judge must recuse himself if there are facts or circumstances in a case that could be prejudicial to the court's impartiality. It submits that, under (old)[3] article 32 of the Code of Procedure, the court may determine, at the request of either the challenging party or the challenged judge, that either one or both parties will not be heard in each others' presence. The two judges of the Supreme Court availed themselves of this option and author's counsel stated expressly during the oral questioning at the public hearing of 4 October 1999 that he did not object.[4] After the president had granted the request, the author left the court. His counsel stated that he "thought it

[2] Communication No. 536/1993, Decision adopted on 28 March 1995, para. 6.5, and Communication No. 661/1995, Decision adopted on 29 July 1997, paragraph 6.2.

[3] The Judiciary Act and the Code of Civil Procedure was amended on 1 January 2002. Thus, the numbering of the articles has changed.

[4] It refers to the relevant paragraph of the official report which reads as follows, "At the request of Mr. Mijnssen and Mr. Herrmann to be heard in Mr. Van den Hemel's absence, Mr. Groen replied that his client had no objection to this", and "The President [of the special chamber hearing the challenge on grounds of bias – the Government stated that the request of Mr. Mijnssen and Mr. Hermann to be heard in Mr. Van den Hemel's absence was granted, since the latter did not object".

better that he should also leave the court". The State party adds that the judges concerned had said that they had no objection to the author's counsel being present while they were being heard. As to the claim that the judges stated that if their request were not granted by the court, they would "no longer [……] cooperate with the hearing of the request with regard to the challenge", the State party submits that this observation is completely groundless and is not supported by the documents in the case.

4.4 As to the claim that two of the judges considering his case before the Supreme Court were members of the Insurance Companies Supervisory Board, which is financed by the Dutch Association of Insurers, of which the other party in this case belonged, the State party refers to the Committee's definition of impartiality in Communication No. 387/1989, *Karttunen v. Finland*[5], in which it was found that, "impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." In the State party's view, the author has not demonstrated that the judges in question harboured such preconceptions.

4.5 According to the State party, the author's observations fail to take into account the fact that the Supervisory Board's members are independent experts, and that the Supervisory Board is an independent disciplinary tribunal set up under private law. This Board provides, together with an Insurance Ombudsman, an alternative to legal proceedings. It sets out, in consultation with the insurer or agent involved, to find a solution to, or to pronounce an opinion on, an insurance dispute, but does not act in the place of the competent court. The Insurance Companies' Complaints Council is financed by a foundation of the same name, which was set up jointly by insurance companies and agents and the Dutch Consumers' Association, none of which, it is added, exercise any influence on, or have any power to decide, the way in which a case is dealt with.

4.6 The State party refers to the reasoning of the Supreme Court, stating that the mere fact that the Supervisory Board is financed in part, by way of the Insurance Companies' Complaints Council, and the Dutch Association of Insurers, the large membership of which includes the other party to the author's proceedings, and that the Supervisory Board's members receive a fee for their work, provides no justification, for the author's fear that the judges concerned lack impartiality.[6]

4.7 The State party argues that the Supervisory Board's members are appointed by the board of directors of the Dutch Association of Insurers, on the basis of nominations by the Association's management. Royal, as one of the many members of the Dutch Association of Insurers, was not

[5] Views adopted on 23 October 19992, para. 7.2.

[6] "The mere fact that the Foundation is financed in the manner described in 2.7 and that the members of the Supervisory Board receive a fee, the amount of which is determined by the Foundation's Board, is insufficient having regard, *inter alia,* to the mandate [of the Supervisory Board] as defined in 2.5, to justify the conclusion that the petitioner's fear as described in 2.6 [that judges who are also members of the Supervisory Board lack impartiality in cases between insurers and non-insurers] is objectively justified."

in a position to exercise such considerable influence on the appointments, or reappointments, of Supervisory Board members, as suggested by the author. The State party explains that the Dutch Association of Insurers is only one of a large number of organisations, including the Consumers' Association, which is affiliated to the Insurance Companies' Complaints Council. Its members' independence is guaranteed explicitly in the Regulations. Furthermore, Royal, as a member of the Dutch Association of Insurers, is expressly subject to independent disciplinary jurisdiction. As to the allegation that the judges failure to ensure a positive outcome for Royal may have resulted in a failure to prolong their appointment thereby losing their fees, the State party highlights the fact that the author did not make this submission in the domestic proceedings.

4.8 The State party contests the fact that two of the judges in question, who had been professors in the law faculty of the Free University in 1990 and 1986, respectively, prior to their appointments to the Supreme Court, could be of any significance in the present communication. As to the allegation that some judges may be shareholders in Royal, the State party submits that under section 44 of the Judicial Officers (Legal Status) Act, judges are required to report any outside activities that they either already have or are contemplating. The Board administering the courts keeps a register of outside activities, which is open to inspection at the court. The outside activities of judges and deputy judges are also published on the internet. The State party argues that this claim is solely based on assumptions and that the author did not raise this point during the domestic proceedings. Thus, the domestic courts had no opportunity to make any finding thereon.

4.9 The State party submits that, should the Committee find the claim relating to allegations of bias by the judges of the Court of Appeal to be admissible, it should be noted that the author has not provided any evidence that the mere fact that judges working at the Court of Appeal also serve as deputy judges at the Utrecht Regional Court provides objective justification for fears of bias or constitutes sufficient grounds on which to conclude that there is an appearance of bias. It also states that the two judges in the Court of Appeal who are also deputy judges at the Utrecht Regional Court did not pronounce on the author's case at first instance.

5. On 2 February 2004, the author commented on the State party's response. He argues that since he did not know, at the time his appeal was pending, that two judges of the Court of Appeal were also sitting on the Utrecht Regional Court, the conclusion by the State party that domestic remedies have not been exhausted is invalid. He reiterates his view that as a large number of judges refuse to publish information on their additional functions, a litigant does not have reliable information on such functions for the purpose of challenging him and exhausting domestic remedies. In supplementary information provided on 28 May 2004, the author makes various allegations about the relationship between the judiciary and insurance companies generally

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 complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that this matter was already considered by the European Court of Human Rights on 14 November 2000. However, it recalls its jurisprudence[7] that it is only where the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Thus, article 5, paragraph 2(a), does not bar the Committee from considering the present communication.

6.3 The Committee has noted the author's claim that the hearing of his case violated article 14 of the Covenant because (a) two of the judges who rendered judgement in the Court of Appeal also sit as substitute judges on the Utrecht Regional Court; (b) the Supreme Court judges who considered his case were biased because of their possible links to Royal (the insurance company that filed a claim against the author), because of their positions on the Supervisory Board of the Dutch Association of Insurers; and (c) the judges who pronounced on his case "could" have been shareholders of Royal.

6.4 As to the first claim, the Committee notes that the author has adduced no evidence to the effect that the two judges of the Court of Appeal had in fact also sat on his case in the Regional Court of Utrecht, or participated in any way in the adjudication of his case at first instance. In this respect, the author has failed to substantiate his claim of bias, for purposes of admissibility, and the Committee therefore declares it inadmissible under article 2 of the Optional Protocol.

6.5 In as much as the second claim is concerned (bias because of the Supreme Court judges' position on the National Insurers Association Supervisory Board), the Committee observes that the author challenged the two Supreme Court judges in question and requested that they recuse themselves. While expressing some doubts about the propriety of a system that allows judges to sit on a supervisory board established by a business association, the Committee notes that the Supreme Court heard the author's recusal challenge in a different composition, proceeded to a full hearing of the positions and the evidence advanced by the author and the judges in question, and in the end dismissed the challenge and subsequently, on 24 December 1999, also the substance of the appeal. The Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice[8]. Nothing in the material before the Committee suggests that the proceedings before the Supreme Court that resulted in the dismissal of the author's challenge on 19 November 1999 and of the substance of his appeal a

[7] See Communication, No. 824/1998, *N.M. Nicolov v. Bulgaria*, decision adopted on 24 March 2000.

[8] See Errol Simms v. Jamaica, communication No.541/1993, declared inadmissible 3 April 1995.

month later suffered from such defects. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol. The same applies with even more force to the author's claim, under article 14, that one of the Supreme Court judges who considered the author's challenge of the two Supreme Court judges had been a former colleague of one of these judges in the University of Amsterdam.

6.6 Finally, in as much as the author's final claim is concerned, the Committee notes that the contention that some of the judges who heard the author's appeal "might" have been shareholders of the insurance company which litigated against him (Royal), was not raised in the course of the domestic judicial proceedings. In this respect, accordingly, the Committee concludes that the author has failed to exhaust domestic remedies, as required by article 5, paragraph 2(b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

a) That the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol;

b) That this decision shall be communicated to the State party and to 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.]
