



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1942/2010

Views adopted by the Committee at its 111th session (7–25 July 2014)

<i>Submitted by:</i>	T.L.N. (represented by counsel, Steinar Thomassen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Norway
<i>Date of communication:</i>	11 December 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 May 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	16 July 2014
<i>Subject matter:</i>	Lack of a duly reasoned judgement in appeal further to the author's criminal conviction by a jury trial
<i>Substantive issues:</i>	Right to have one's criminal conviction and sentence reviewed by a higher tribunal
<i>Procedural issues:</i>	None
<i>Articles of the Covenant:</i>	14 (para. 5)
<i>Articles of the Optional Protocol:</i>	-



Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (111th session)

concerning

Communication No. 1942/2010*

Submitted by: T.L.N. (represented by counsel Steinar Thomassen)

Alleged victim: The author

State party: Norway

Date of communication: 11 December 2009 (initial submission)

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

Meeting on 16 July 2014,

Having concluded its consideration of communication No. 1942/2010, submitted to the Human Rights Committee by T.L.N. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication is T.L.N., born in 1974 in Viet Nam. He claims that his rights under article 14, paragraph 5, were violated by Norway.¹ The author is represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Víctor Manuel Rodríguez Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

¹ Norway has made the following declaration with respect to article 14, paragraph 5, of the Covenant: "The Government of Norway declares that with the entry into force of an amendment to the Criminal Procedure Act, which introduces the right to have a conviction reviewed by a higher court in all cases, the reservation made by the Kingdom of Norway with respect to article 14, paragraph 5 of the Covenant shall continue to apply only in the following exceptional circumstances: [...] *Conviction by an appellate court*. In cases where the defendant has been acquitted in the first instance, but convicted by an appellate court, the conviction may not be appealed on grounds of error in the assessment of

The facts as presented by the author

2.1 On 9 May 2008, the Public Prosecutor in the counties of Vestfold and Telemark instituted criminal proceedings against the author before the Sandefjord District Court for contravention of sections 192, 195, 199, 201 and 219 of the Norwegian General Civil Penal Code. The most serious count concerned the violation of section 192 of the Penal Code for the rape of the author's stepson between 2004 and 2006, when the victim was between 11 and 13 years old.

2.2 The main proceedings in first instance took place in the Sandefjord District Court between 17 and 19 September 2008. A judgement was delivered on 19 September 2008 pursuant to which the author was convicted on all counts, and sentenced to three years' imprisonment. He was also ordered to pay compensation to the aggrieved party in the amount of Nkr 200,000.

2.3 On 26 September 2008, the author appealed the judgement of the Sandefjord District Court before the Agder Court of Appeal. The appeal was heard in Tønsberg between 12 and 15 January 2009. The Court of Appeal sat with a jury, which replied positively to all questions put to it, and approved the verdict. The Court of Appeal subsequently rendered its decision on 16 January 2009, in which it convicted the author on all counts, and sentenced him to five years' imprisonment. In addition, he was ordered to pay Nkr 225,000 to the aggrieved party as compensation.

2.4 On 19 January 2009, the author lodged an appeal before the Supreme Court of Norway, in which he claimed procedural errors and contested his sentence. Among other issues, the author contested the fact that the jury failed to provide grounds for its verdict, in breach of article 14, paragraph 5, of the Covenant. The case was referred by the Supreme Court to a plenary hearing composed of 17 judges. It was also consolidated for trial with another case, which raised similar issues.² The appeal was heard in Oslo in May 2009. On 12 June 2009, the Supreme Court rendered its decision in both cases. The Court unanimously found that the jury's failure to provide grounds for its decision did not constitute a violation of article 14, paragraph 5, of the Covenant, nor did it constitute a violation of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The complaint

3.1 The author claims that article 14, paragraph 5, of the Covenant was violated in his regard, as the jury's failure to provide grounds for its decision in the Agder Court of Appeal judgement deprived him of a duly reasoned written judgement.³

3.2 The author explains that pursuant to the Criminal Procedure Act, cases heard in the Court of Appeal shall be tried by a jury when an appeal is filed against the assessment of evidence in relation to the question of guilt, and when the appeal is concerned with the penalty for a felony punishable pursuant to statute by imprisonment for a term exceeding six years (section 352).

evidence in relation to the issue of guilt. If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever."

² Case No. 2009/397, *Arfan Qadeer Bhatti v. Public Prosecutor*, Supreme Court, 12 June 2009.

³ The author refers, inter alia, to communications No. 230/1987, *Henry v. Jamaica*, Views adopted on 15 March 1990, para. 10.5; and No. 355/1989, *Reid v. Jamaica*, Views adopted on 8 July 1994, para. 14.4.

3.3 The jury is composed of 10 members (elected). After the submission of evidence relating to the question of guilt is completed, the President of the Court formulates the questions to be put to the jury and submits them to the parties. The object of the questions is the matter to which the indictment relates. A question must relate only to one person indicted, as far as possible only to one criminal matter, and to only one single penal provision. The questions are so framed as to allow the jury to answer “yes” or “no”.

3.4 Once the parties have finished presenting their closing arguments relating to the question of guilt, the President of the Court presents his/her instructions to the jury, which include an overview of the substantive and procedural law applicable. It is up to the President to decide whether to say anything about the evidence. After receiving the President’s instructions, the jury retires to consider its verdict. At least seven votes are required to convict a person indicted. If the jury’s verdict is that the person is guilty, the sanction shall be based on the verdict (section 376 (b) of the Criminal Procedure Act). Negotiations then begin in order to establish the appropriate sentence, which is determined by the Court of Appeal’s three legally qualified judges, and the jury foreman, together with three members of the jury chosen by lot. If the Court of Appeal finds that insufficient evidence was submitted to prove the indicted person’s guilt, it will set aside the jury’s verdict (section 376 (c)).

3.5 The author claims that the guarantees set forth in article 14, paragraph 5, of the Covenant contain a requirement for providing grounds to ensure a full review was conducted. Accordingly, the fact that the jury failed to provide any grounds for its decision reveals a failure to provide him with a proper review, as a simple “yes” to the questions posed deprived him of the opportunity to ascertain that he had been heard, i.e. that his submissions had been considered, and that what was raised in the closing arguments had been considered in a defensible manner. Nor did the answers to the questions put to the jury allow for an assurance of the general public’s control over the exercise of justice.

3.6 The author further claims that neither the questions posed, nor the answers by the jury, allowed him to appeal against the application of the law, since the instruction provided to the jury was not recorded. It was therefore impossible for him to ascertain that the proper application of the law was made in his case. Consequently, he was deprived of the right to effective access to the Supreme Court, which, under article 306 of the Criminal Procedure Act, only reviews appeals against procedural errors, application of the law, and sentencing, unless the ground of appeal is that the recorded explanation by the President of the Court of the legal principles applicable was wrong.

3.7 The author also submits that inherent in the right to have one’s conviction reviewed is a right to have the assessment of evidence, procedural matters and the application of the law reviewed. He claims that when a scheme has been established under national law, whereby the right to appeal is limited to procedural matters and the application of the law, such limitation cannot lead to the result of the convicted person being denied his/her right to an effective review of these two grounds on appeal.

3.8 The author submits that he has exhausted all available domestic remedies, as a decision of the Supreme Court was rendered in his case.

State party’s observations on admissibility and merits

4.1 The State party submitted observations on admissibility and merits on 15 November 2010.

4.2 The State party states that it sees no reason to challenge the communication's admissibility. On the merits, it contends that there was no violation of the author's rights, as no obligation for the jury to provide reasons can be derived from article 14, paragraph 5, of the Covenant.⁴ Nor do the facts reveal a violation of article 14, paragraph 5.

4.3 The State party recalls that trial by jury is a longstanding and important arrangement in the criminal procedure law of many jurisdictions, in most of which the jury is responsible for establishing the facts of the case, while the judge is to determine the applicable law and to set the penalty. Typically, the jury does not give grounds for its verdict beyond a mere "yes" or "no" in answer to the questions put to it.

4.4 The State party adds that in view of the fact that trial by jury is an essential element of the criminal procedure of several States parties to the Covenant, the absence of any reference to trial by jury within article 14, paragraph 5, by itself constitutes a persuasive argument against the merits of the author's assertion that article 14, paragraph 5, was violated in his case. The State party also refers to the absence, in the Committee's jurisprudence, of any precedent finding that legal proceedings in a jury trial contravened article 14, paragraph 5.

4.5 The State party further submits that the Norwegian criminal procedure law fully complies with article 14, paragraph 5, of the Covenant and that, in particular, several mechanisms exist to ensure that the assessment conducted by the jury can be verified. In the *Bhatti* case,⁵ the Supreme Court explained in detail how the Criminal Procedure Act ensures that the defendant, as well as the general public, can verify the assessment that was undertaken. The Supreme Court has recalled that section 40 (1) of the Criminal Procedure Act provides that a judgement of the Court of Appeal which is based on a jury verdict shall, "as regards the question of guilt, simply consist of a reference to the said verdict". The questions that are put to the jury shall provide information about the facts. A primary question shall begin with the words: "Is the person indicted guilty?" The jury is not asked whether the individual conditions for criminal liability are satisfied. A guilty verdict means that the jury has found that all the conditions to convict the defendant have been satisfied. Some questions that may remain unanswered (e.g. regarding the scope of the criminal act and the degree of guilt) are dealt with upon consideration of the sentence.

4.6 The sentence is determined by three professional judges and four jurors — consisting of the jury foreman and three other jurors (section 376 (e) of the Criminal Procedure Act). A reason shall be provided with the sentence, and it is established practice that the judges and the jurors jointly describe the act for which the defendant is convicted as a basis for passing the sentence. The description of the criminal act must, among others things, state what is found to be proven with respect to subjective guilt and, if the questions put to the jury were formulated using alternatives using the words "and/or", the description of the criminal act must state which alternative is found to be proven. Consequently, the grounds that are given for the sentence contain detailed information about what the four jurors and the three judges have found to be proven. Normally, such grounds must also be deemed to represent the jury's view.

⁴ The State party refers to article 31, paragraph 1, of the Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

⁵ See note 2 above.

4.7 Referring to the Committee's jurisprudence,⁶ the State party submits that there was a substantial review of the author's conviction and sentence. His conviction and sentence by the Sandefjord District Court were considered by the Agder Court of Appeal, pursuant to section 352 of the Criminal Procedure Act (para. 3.2). The Court of Appeal clearly is a "higher tribunal" within the meaning of article 14, paragraph 5 of the Covenant. The procedure to be followed by the Court of Appeal is set forth in the Criminal Procedure Act, therefore also meeting the requirement that the review be conducted "according to the law" under article 14, paragraph 5.

4.8 The State party refers to section 331 of the Criminal Procedure Act, which states that the Court of Appeal holds a completely new trial if the appeal hearing is to include an assessment of evidence in relation to the issue of guilt. Based on this provision, the Agder Court of Appeal dismissed the author's appeal only after it conducted a whole new trial, in which all aspects of the case regarding the criminal proceedings were considered anew both by the jury and the Court of Appeal. The State party also refers to section 362 *in fine* of the Criminal Procedure Act, which provides that judgements of the Court of Appeal shall be based exclusively on facts that come to light in the main hearing of this instance; and, until the jury has pronounced its verdict, only the conclusion of the judgement of first instance is read aloud.

4.9 The State party distinguishes the present case from that of *Aboushanif*, in which the contested decision did not provide any substantive reason whatsoever,⁷ contrary to the author's case, which involved a factual retrial. The State party recalls that according to section 306 of the Criminal Procedure Act, judgements of the Court of Appeal may be subject to further appeal to the Supreme Court. According to section 306 (2), error in the assessment of evidence in relation to the question of guilt cannot be a ground for appeal. The author's appeal to the Supreme Court concerned the procedure, and the assessment of the sentence.

4.10 Referring to the Committee's jurisprudence, the State party submits that in cases where there has been a full review in the court of first appeal, a judgement must be considered as "duly reasoned" if it is sufficient to form the basis of a further appeal, that is, if the convicted person is provided with the necessary legal prerequisites for a further appeal.⁸ In the present case, the author had access to duly reasoned, written judgements from the District Court and Court of Appeal. His appeal to the Supreme Court concerned only the procedure and the assessment of the sentence, and the author has not claimed that these grounds were not substantially reviewed by the Supreme Court. Accordingly, the State party reiterates the conclusion of the Supreme Court, which found that the Agder appeals proceedings constituted a full review of the author's conviction and sentence under article 14, paragraph 5, of the Covenant.

⁶ Communications No. 842/1998, *Romanov v. Ukraine*, decision of admissibility adopted on 30 October 2003, para. 6.5 and No. 355/1989, *Reid v. Jamaica*, Views adopted on 8 July 1994, para. 14.3. The State party also refers to the Committee's general comment No. 32 on article 14, para. 48.

⁷ Communication No. 1542/2007, *Aboushanif v. Norway*, Views adopted on 17 July 2008, para. 7.

⁸ The State party refers to communications No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991, para. 8.4; No. 352/1989, *Douglas, Gentles and Kerr v. Jamaica*, Views adopted on 19 October 1993, para. 11.2; and No. 709/1996, *Bailey v. Jamaica*, Views adopted on 21 July 1999, para. 7.4.

Author's comments to the State party's observations

5.1 On 31 January 2011, the author submitted comments to the State party's observations. The author reiterates most of his allegations, stressing that he was deprived of the opportunity to effectively use the opportunity for appeal before the Supreme Court, as he was not provided with a reasoned judgement, and was thus deprived of the opportunity to submit counterarguments on appeal.

5.2 The author adds that the jury answered the five questions raised in the affirmative, and the Court of Appeal accepted these answers. No other reasoning was provided. However, the Court of Appeal, later in its judgement, gave a reason for the sentence, which does not encompass how the law was applied, or upon which facts the jury has based its findings. Therefore, the author reiterates that all his possibilities of appeal were lost, as he had no basis upon which he could file an appeal, which prompted the Supreme Court to reject his appeal. The author thus reiterates that the State party has breached article 14, paragraph 5, or, alternatively, article 14, paragraph 1, of the Covenant in his respect.

Additional observations from the State party

6.1 On 9 March 2011, the State party transmitted a copy of the European Court of Human Rights decision *Taxquet v. Belgium*,⁹ which concerned the interpretation of article 6§1 of the European Convention on Human Rights.¹⁰ The State party noted that its observations on the merits of the case dated 15 November 2010 preceded this decision, which confirms the State party's position. The State party refers to the European Court of Human Rights survey of Council of Europe States' practice, as seen in the *Taxquet* case, which found that "the general rule appears to be that reasons are not given for verdicts reached by traditional jury. This is the case for all the countries concerned, except Spain and Switzerland (canton of Geneva)".¹¹

6.2 The State party further refers to the determination by the European Court of Human Rights, in the same decision, that article 6 of the European Convention on Human Rights "does not require jurors to give reasons for their decision and that article 6 does not preclude a defendant from being tried by a lay jury, even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given [...]."¹² The Court further noted that article 6 of the European Convention required "an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness, and to enable the accused to understand the reasons for his conviction, [such as] directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced [...] and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based, or sufficiently offsetting the fact that no reasons are given for the jury's answers [...] Lastly, regard must be had to any avenues of appeal open to the accused."¹³

6.3 The State party therefore concludes that the above findings strengthen its position that article 14, paragraph 5, of the Covenant does not contain an obligation for States

⁹ European Court of Human Rights, Application No. 926/05 (Grand Chamber judgement), 16 November 2010.

¹⁰ Concerning the right to a fair trial.

¹¹ *Taxquet v. Belgium*, see note 9 above, para. 56.

¹² *Ibid.* para. 90.

¹³ *Ibid.* para. 92.

parties to ensure that grounds are given for a jury's verdict. The State party adds that article 14, paragraph 5, may also be read to encompass such procedural safeguards as those determined to be required under article 6 of the European Convention on Human Rights. In any event, such procedural safeguards were fully applied in the author's case.

Further submission from the State party

7. On 16 August 2012, the State party further referred the Committee to the decision *Shala v. Norway* of the European Court of Human Rights,¹⁴ in which the Court applied the same reasoning as in the *Taxquet* case when examining the Norwegian jury system, in particular. The European Court concluded that the jury's omission to provide a reasoning for its verdict did not render the trial unfair for the purposes of article 6, paragraph 1, of the European Convention on Human Rights.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 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.

8.3 The Committee observes that the State party has not challenged the admissibility of the communication. The Committee also notes that all admissibility criteria have been met, and thus decides to proceed to the examination of the communication on the merits, insofar as it appears to raise issues under article 14, paragraph 5, of the Covenant.

Consideration of the merits

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

9.2 The Committee notes the author's claim that his rights under article 14, paragraph 5, were violated because of the jury's failure to provide grounds for its decision in the Agder Court of Appeal judgement of 16 January 2009. As a result, the author claims that he was deprived of a duly reasoned written judgement. The Committee recalls that the right to have one's conviction and sentence reviewed by a higher tribunal imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.¹⁵ States parties may determine the modalities of such review by a higher tribunal, based on their legal traditions and applicable legislation, provided that such substantive review is undertaken.¹⁶

¹⁴ Application No. 1195/2010, 10 July 2012.

¹⁵ See general comment No. 32, note 6, para. 48; and, inter alia, *Aboushanif v. Norway*, note 7 above, para. 7.2.

¹⁶ General comment No. 32, *ibid.* para. 45.

9.3 In the present case, the Committee has to examine whether the proceedings before the Agder Court of Appeal on 16 January 2009 and its judgement were in accordance with the requirements of article 14, paragraph 5, of the Covenant. The Committee observes that the Sandefjord District Court found the author guilty on several counts under the Penal Code (*straffeloven*). The Court delivered a duly reasoned written judgement on 19 September 2008, which formed the basis of the author's appeal before the Agder Court of Appeal. Based on section 331 of the Criminal Procedure Act, he was afforded a completely new trial before the Agder Court of Appeal, in which the Court examined all aspects of the case, including the facts and applicable law. From the material before the Committee, it appears that: the Court was composed of three professional judges; the jury was established pursuant to the relevant rules of the Criminal Procedure Act, and was instructed by the President of the Court; the questions — which were drawn up in accordance with the law, read out in court and put to the jury — were precise and factually detailed; based on the jury's findings, which answered the questions in the affirmative, the Court of Appeal found the author guilty on several counts under the Penal Code; further to the jury's finding that the author was guilty, the Court of Appeal provided, within the framework of the jury's answers, a description of the facts and criminal offences at stake under the applicable law; the sentence was explained in the judgement on the basis of the applicable law; and the order to pay compensation encompassed a description of the relevant aggravating facts and the applicable law. The Committee further observes that the material before it does not indicate that the author was unable to submit a properly motivated appeal to the Supreme Court of Norway, which reviewed the judgement of the Agder Court of Appeal pursuant to article 306 of the Criminal Procedure Act on procedural grounds, and with respect to the sentence. Based on the above circumstances, the Committee cannot accept the author's argument that he was deprived of an opportunity to have his conviction and sentence reviewed by a higher tribunal.

10. The Committee therefore concludes that the facts before it do not show a violation of article 14, paragraph 5, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.