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III. JURISPRUDENCE

ICCPR

- *Pinkney v. Canada* (27/1978) (R.7/27), ICCPR, A/37/40 (29 October 1981) 101 at paras. 10, 22 and 35.

...

10. From the information submitted to the Committee it appears that Mr. Pinkney was convicted by the County Court of British Columbia on a charge of extortion on 9 December 1976. The sentence of five years' imprisonment was pronounced on 7 January 1977. On 8 February 1977, he sought leave to appeal against his conviction and his sentence to the British Columbia Court of Appeal. He argued that he had not been able to make full answer and defence to the charge of extortion before the trial court because of alleged inability of the authorities to produce the missing briefcase. His appeal, however, was not heard until 34 months later. This delay, which the Government of British Columbia described as "unusual and unsatisfactory", was due to the fact that the trial transcripts were not produced until June 1979. Mr. Pinkney alleges that the delay in the hearing, due to the lack of the trial transcripts, was a deliberate attempt by the State party to block the exercise of his right of appeal. The State party rejects this allegation and submits that, notwithstanding the efforts of officials of the Ministry of the Attorney General of British Columbia to hasten the production of the trial transcripts, they were not completed until June 1979, "because of various administrative mishaps in the Official Reporters' Office". On 6 December 1979, that is 34 months after leave to appeal was applied for, the British Columbia Court of Appeal heard the application, granted leave to appeal and on the same day, after hearing Mr. Pinkney's legal counsel (i) dismissed the appeal against conviction, and (ii) adjourned the appeal against sentence *sine die*, to be heard at a time convenient for Mr. Pinkney's counsel.

...

22. ...[T]he Committee, having considered all the information relating to the delay of two and a half years in the production of the transcripts of the trial for the purposes of the appeal considers that the authorities of British Columbia must be considered objectively responsible. Even in the particular circumstances this delay appears excessive and might have been prejudicial to the effectiveness of the right to appeal...[T]he right under Article 14(3)(c) to be tried without undue delay should be applied in conjunction with the right under article 14(5) to review by a higher tribunal, and that consequently there was in this case a violation of both of these provisions taken together.

...

35. The Human Rights Committee...is of the view that the communication discloses a violation of article 14(3)(c) and (5) of the Covenant because the delay in producing the transcripts of the trial for the purpose of the appeal was incompatible with the right to be tried without undue delay.

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- *De Montejo v. Colombia* (R.15/64), ICCPR, A/37/40 (24 March 1982) 168 at paras.10.3, 10.4 and 11.

...
10.3. In the specific context of the present communication there is no information to show that article 14 (5) was derogated from in accordance with article 4 of the Covenant; therefore the Committee is of the view that the State party, by merely invoking the existence of a state of siege, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenant, the State party is on duty bound, when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned.

10.4. The Committee considers that the expression "according to law" in article 14 (5) of the Covenant is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined "according to law" is the modalities by which the review by a higher tribunal is to be carried out. It is true that the Spanish text of article 14 (5), which provides for the right to review, refers only to "*un delito*", while the English text refers to a "crime" and the French text refers to "*une infraction*". Nevertheless the Committee is of the view that the sentence of imprisonment imposed on Mrs. Consuelo Salgar de Montejo, even though for an offence defined as "*contravencion*" in domestic law, is serious enough, in all the circumstances, to require a review by a higher tribunal as provided for in article 14 (5) of the Covenant.

11. The Committee...is therefore of the view that the facts...disclose a violation of article 14(5) of the Covenant because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal.

- *Masiotti v. Uruguay* (R.6/25), ICCPR, A/37/40 (26 July 1982) 187 at paras. 12 and 13.

...
12. Graciela Baritussio was arrested in Uruguay on 3 September 1972, tried by a military judge on 5 February 1973 for 'complicity in a subversive association' and brought in April 1973 to the Punta Rieles prison where she served her two years prison sentence. On 15 August 1974 she was brought to the same military court as before in order to sign the documents for her provisional release. The decision granting her provisional release became enforceable and final in 1975. Graciela Baritussio, however, remained in detention. On 6

October 1977 she was transferred to another military establishment in the interior of the country which was being used as a prison for women detained under the security measures. On 8 August 1978 the governor of the establishment informed her that she was going to be released. Her release took place on 12 August 1978. Once the document for Graciela Baritussio's provisional release had been signed and after the decision became final and enforceable in 1975, her defence lawyer had made numerous representations to the military judges responsible for her case. He was informed that, if the prison authorities did not comply with the court's release order, the judges could do no more.

13. The Human Rights Committee...is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) disclose the following violations of the International Covenant on Civil and Political Rights,

...

In the case of Graciela Baritussio

> of article 9(1), because she was subjected to arbitrary detention under the "prompt security measures" until 12 August 1978 after having signed on 15 August 1974 the document for her provisional release;
>
> of article 9 (4) in conjunction with article 2 (3), because there was no competent court to which she could have appealed during her arbitrary detention.

- *Fanali v. Italy* (75/1980) (R.18/75), ICCPR, A/38/40 (31 March 1983) 160 at paras. 11.4-11.6, 11.8 and 12-14.

...

11.4 The State party upon ratification of the Covenant has made a reservation with regard to article 14 (5) which it has now invoked. The Committee, therefore, has to decide whether this reservation applies to the present case. The Italian reservation reads as follows:

> "Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers."

11.5 The author contests the applicability of the reservation in his case. He objects to its validity and furthermore argues, *inter alia*, that he cannot be classified under either of the

two categories referred to in the reservation.

11.6 In the Committee's view, there is no doubt about the international validity of the reservation, despite the alleged irregularity at the domestic level. On the other hand, its applicability to the present case depends on the wording of the reservation in its context, where regard must be had to its object and purpose. Since the two parties read it differently, it is for the Committee to decide this dispute.

...

11.8 ...[T]he Committee notes that the reservation only partly excludes article 14 (5) from the obligations undertaken by Italy. The question is whether it is applicable only to the two categories mentioned, and not to the "layman", Mr. Fanali. A close reading of the text shows that a narrow construction of the reservation would be contrary both to its wording and its purpose. The reservation refers not only to the relevant rules of the Constitution itself, but to "existing Italian provisions...in accordance with the Constitution", thus clearly extending its scope to the implementing laws enacted by the ordinary legislator. As shown by the Government in its submission, it was also the purpose of the reservation to exclude proceedings before the Constitutional Court instituted in connection with criminal charges against the President of the Republic and its Ministers from Italy's acceptance of article 14 (5). Even when proceedings are brought against "laymen", as they were in the present case, they must therefore be described in the terms of the reservation as "proceedings before the Constitutional Court in respect of charges brought against...Ministers". This follows from the connection between the cases, the charges against the Ministers were the cause and the *conditio sine qua non* for the other charges and for instituting proceedings against all defendants. It must follow that all of the proceedings were in this sense brought "in respect of charges" against Ministers, because they related to the same matter, which under Italian law only, that Court was competent to consider. On the background of the applicable Italian law this is not only a possible reading, but in the Committee's view the correct reading of the reservation.

12. For these reasons the Human Rights Committee concludes that Italy's reservation regarding article 14 (5) of the Covenant is applicable in the specific circumstances of the case.

...

13. ...It is true that article 2(3) provides generally that persons whose rights and freedoms, as recognized in the Covenant, are violated “shall have an effective remedy.” But this general right to a remedy is an accessory one, and cannot be invoked when the purported right to which it is linked is excluded by a reservation, as in the present case. Even had this not been so, the purported right, in the case of article 14 (5), consists itself of a remedy (appeal). Thus it is a form of *lex specialis* besides which it would have no meaning to apply the general right in article 2(3).

14. Accordingly, the Human Rights Committee...is of the view that the present case does not disclose any violation of the Covenant.

- *Pratt and Morgan v. Jamaica* (210/1986 and 225/1987), ICCPR, A/44/40 (6 April 1989) 222 at paras. 13.3-13.5 and 14.

...

13.3 ...[T]he Committee has noted that the delays in the judicial proceedings in the authors' cases constitute a violation of their rights to be heard within a reasonable time. The Committee first notes that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without undue delay. In this context the Committee recalls its general comment on article 14, which stipulates, *inter alia*, that "all stages [of judicial proceedings] should take place without undue delay, and that in order to make this right effective, a procedure must be available to ensure that the trial will proceed without undue delay, both in first instance and on appeal."

13.4 The State party has contended that the time span of three years and nine months between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgement was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement. The Committee considers that the responsibility for the delay of 45 months lies with the judicial authorities of Jamaica. This responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfillment of this responsibility excused by the absence of a request from the accused...

13.5. In the absence of a written judgement of the Court of Appeal, the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. In reaching this conclusion it matters not that in the event the Privy Council affirmed the conviction of the authors. The Committee notes that in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be.

...

14. The Human Rights Committee...is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

...

(b) Article 14, paragraph 3 (c) in conjunction with paragraph 5, because the authors were not tried without undue delay.

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- *Pinto v. Trinidad and Tobago* (232/1987), ICCPR, A/45/40 vol. II (20 July 1990) 69 at paras. 12.5 and 13.1.

...
12.5 ...[T]he Committee reiterates that it is axiomatic that legal representation must be made available in capital cases. a/ This does not only apply to an accused person at the trial in the court of first instance, but also in appellate proceedings. In the instant case, it is uncontested that counsel was assigned to the author for the appeal. What is at issue is whether the author had a right to object to the choice of court-appointed attorney, who had also, in his opinion, inadequately represented him at trial. It is uncontested that the author never saw or approved the grounds of appeal filed on his behalf, and that he was never provided with an opportunity to consult with his counsel on the preparation of the appeal. From the material before the Committee, it can be clearly inferred that the author did not wish his counsel to represent him beyond the first instance...In the circumstances, and bearing in mind that this is a case involving the death penalty, the State party should have accepted the author's arrangements for another attorney to represent him for purposes of the appeal, even if this would have entailed an adjournment of the proceedings. The Committee is of the opinion that legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice. This was not done in the author's case. To the extent that the author was denied effective representation during the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.
...
13.1 The Human Rights Committee...is of the view that the facts, as found by the Committee, disclose a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

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a/ See Communication No. 223/1987 (*Robinson v. Jamaica*), views adopted on 30 March 1989, para. 10.3.

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- *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at para. 11.4.

...
11.4 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the

court of first instance as well as to appellate proceedings...What is at issue is whether the author had a right to contest the choice of his court-appointed attorney, and whether he should have been afforded an opportunity to be present during the hearing of the appeal. The author's application for leave to appeal...indicated that that he wished to be present for the hearing of his appeal. However, the State party did not offer this opportunity, since legal aid counsel had been assigned to him. Subsequently, his counsel considered that there was no merit in the author's appeal and was not prepared to advance arguments in favour of it being granted, thus effectively leaving him without legal representation. In the circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

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Notes

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b/ See Communication No. 223/1987 (*Robinson v. Jamaica*), final views adopted on 30 March 1989, para.10.3.

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- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241(CCPR/C/41/D/253/1987) at para. 5.12.

...

5.12 However, because of the absence of a written judgement of the Court of Appeal, the author has, for almost five years since the dismissal of his appeal...been unable effectively to petition the Judicial Committee of the Privy Council...This in the Committee's opinion, entails a violation of article 14, paragraph 3(c), and article 14, paragraph 5. The Committee reaffirms that in all cases, and in particular in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of these judicial proceedings may turn out to be. e/

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Notes

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e/ See, for example, the final views of the Committee in Communications Nos. 210/1986 and 225/1987, para. 13.5, (Earl Pratt and Ivan Morgan), adopted on 6 April 1989.

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- *Henry v. Jamaica* (230/1987), ICCPR, A/47/40 (1 November 1991) 210

(CCPR/C/43/D/230/1987) at paras. 8.3-8.5 and 9.

...

8.3 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings. In Mr. Henry's case, it is uncontested that legal counsel was available to him for the appeal: the appeal form...reveals that the author did not wish to be represented before the Court of Appeal by a court-appointed lawyer, but by counsel of his own choice, whose services he had the mean to secure, and that he wished to attend the hearing of the appeal. What is at issue is whether the author had the right to be present during the appeal although he was represented by counsel, albeit by substitute counsel. The Committee considers that once the author opted for representation by counsel of his choice, any decision by this counsel relating to the conduct of the appeal, including a decision to send a substitute to the hearing and not to arrange for the author to be present, cannot be attributed to the State party but instead lies within the author's responsibility; in the circumstances, the latter cannot claim that the fact that he was absent during the hearing of the appeal constituted a violation of the Covenant. Accordingly, the Committee concludes that article 14, paragraph 3 (d), has not been violated.

8.4 It remains for the Committee to decide whether the failure of the Court of Appeal of Jamaica to issue a written judgement violated any of the author's rights under the Covenant. Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". In this context, the author has claimed that, because of the non-availability of the written judgement, he was denied the possibility of effectively appealing to the Judicial Committee of the Privy Council, which allegedly routinely dismisses petitions which are not accompanied by the written judgement of the lower court. In this connection, the Committee has examined the question whether article 14, paragraph 5 guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. The Committee observes that the Covenant does not require State parties to provide for several instances of appeal. However, the words "according to law" in article 14, paragraph 5, are to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them. Moreover, in order to enjoy the effective use of this right, the convicted person is entitled to have, within a reasonable time, access to written judgements, duly reasoned, for all instances of appeal. Thus, while Mr. Henry did exercise a right to appeal to a "higher tribunal" by having the judgement of the Portland Circuit Court reviewed by the Jamaican Court of Appeal, he still has a right to a higher appeal...because article 110 of the Jamaican Constitution provides for the possibility of appealing from a decision of the Jamaican Court of Appeal to the Judicial Committee of the Privy Council...The Committee therefore finds that Mr. Henry's right under article 14, paragraph 5, was violated by the

failure of the Court of Appeal to issue a written judgement.

8.5 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal." d/ In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee...is of the view that the facts before the Committee disclose a violation of article 14, paragraph 5, and consequently of article 6 of the Covenant.

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d/ See Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 7.

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***See also*:**

- *Reid v. Jamaica* (355/1989), ICCPR, A/49/40 vol. II (8 July 1994) 59 (CCPR/C/51/D/355/1989) at para. 14.4.

- *Little v. Jamaica* (283/1988), ICCPR, A/47/40 (1 November 1991) 268 (CCPR/C/43/D/283/1988) at paras. 8.4 and 8.5.

...

8.4 ...[T]he material before the Committee does not suffice for a finding of a violation of article 14, paragraph 3 (d), in respect of the conduct of the appeal: this provision does not entitle the accused to choose counsel provided to him free of charge, and while counsel must ensure effective representation in the interests of justice, there is no evidence that the author's counsel acted negligently in the conduct of the appeal itself.

8.5 ...Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law." In order to enjoy the effective exercise of this right, a convicted person is entitled to have, within a

reasonable time, access to written judgements, duly reasoned, for all instances of appeal. To the extent that the Jamaican Court of Appeal has not, more than five years after the dismissal of Mr. Little's appeal, issued a reasoned judgment, he has been denied the possibility of an effective appeal to the Judicial Committee of the Privy Council, and is a victim of a violation of article 14, paragraph 5, of the Covenant.

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at para. 6.8.

...
6.8 ...The Committee is...unable to conclude that the conduct of the appeal jeopardized the author's chances of an effective appeal to the Judicial Committee of the Privy Council, in violation of article 14, paragraph 5. In this context, the Committee notes that the Court of Appeal produced a written judgement within one month after dismissing the appeal; it also lacks evidence that such delays as were experienced by counsel in obtaining a copy of the written judgment must be attributed to the State party.

- *Martin v. Jamaica* (317/1988), ICCPR, A/48/40 vol. II (24 March 1993) 57 (CCPR/C/47/D/317/1988) at para. 12.4.

...
12.4 The author...alleges that his trial suffered from undue delay and that he was denied the right to have his conviction and sentence reviewed by a higher tribunal. The Committee observes that the author was convicted and sentenced by the Circuit Court of Kingston on 17 February 1981 and that his appeal was dismissed by the Court of Appeal on 11 November 1981. The Committee notes that the subsequent delay in obtaining a hearing before the Judicial Committee of the Privy Council, which dismissed special leave to appeal on 11 July 1988, is primarily attributable to the author, who did not file his petition to the Judicial Committee until after a warrant for his execution had been issued in 1988, six and a half years after the Court of Appeal's judgement. The Committee therefore concludes that the facts before it do not disclose a violation of article 14, paragraphs 3 (c) and 5, of the Covenant.

- *Collins v. Jamaica* (356/1989), ICCPR, A/48/40 vol. II (25 March 1993) 85 (CCPR/C/47/D/356/1989) at paras. 8.2 and 8.3.

...
8.2 As to the author's legal representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance be made available to a convicted prisoner

under sentence of death. This applies to all stages of the judicial proceedings. Counsel was entitled to recommend that an appeal should not proceed. But if the author insisted upon the appeal, counsel should have continued to represent him or, alternatively, Mr. Collins should have had the opportunity to retain counsel at his own expense. In this case, it is clear that legal assistance was assigned to Mr. Collins for the appeal. What is at issue is whether counsel had a right to effectively abandon the appeal without prior consultation with the author. Counsel indeed opined that there was no merit in the appeal, thus effectively leaving Mr. Collins without legal representation. 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.

8.3 Finally, because of the absence of a written judgement of the Court of Appeal, the author has been unable to effectively petition the Judicial Committee of the Privy Council. This, in the Committee's opinion, entails a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. The Committee reaffirms that in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be.c/

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c/ See views on Communication No. 253/1987 (*Paul Kelly v. Jamaica*), adopted on 8 April 1991, para. 5.12.

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- *Smith v. Jamaica* (282/1988), ICCPR, A/48/40 vol. II (31 March 1993) 28 (CCPR/C/47/D/282/1988) at para. 10.5.

...

10.5 ...Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". e/ For the effective exercise of this right, a convicted person must have the opportunity to obtain, within a reasonable time, access to duly reasoned judgements, for every available instance of appeal. The Committee observes that the Judicial Committee of the Privy Council dismissed the author's first petition for special leave to appeal because of the absence of a written judgement of the Jamaican Court of Appeal. It further observes that over four years after the dismissal of the author's appeal in September 1984 and his petitions for leave to appeal by the Judicial Committee in February and December 1987, no reasoned judgement had been issued, which once more deprived the author of the possibility to effectively

petition the Judicial Committee. The Committee therefore finds that Mr. Smith's rights under article 14, paragraph 3(c) and article 14, paragraph 5, of the Covenant, have been violated.

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e/ See Communication No. 230/1987 (*R. Henry v. Jamaica*), views adopted on 1 November 1991, para. 8.4.

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- *Gentles v. Jamaica* (352/1989), ICCPR, A/49/40 vol. II (19 October 1993) 42 (CCPR/C/49/D/352/1989) at para. 11.2.

...

11.2 It remains for the Committee to decide whether the failure of the State party to make legal aid available to the authors for purposes of a constitutional motion violated their rights under article 14, paragraph 5, of the Covenant. Article 14, paragraph 5, guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". In this context, the authors claim that, because of the nonavailability of legal aid, they are denied effective access to the Supreme (Constitutional) Court of Jamaica. In its previous jurisprudence, e/ the Committee had examined the question whether article 14, paragraph 5, guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. It observed that the Covenant does not require States parties to provide for several instances of appeal. It found, however, that the words "according to law" in article 14, paragraph 5, must be understood to mean that, if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them. The Committee observes that, in the instant case, the State party provided the authors with the necessary legal prerequisites for an appeal of the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. It further observes that Jamaican law also provides for the possibility of recourse to the Constitutional Court, which is not, as such, a part of the criminal appeal process. Thus, the Committee finds that the availability of legal aid for constitutional motions is not required under article 14, paragraph 5, of the Covenant. Accordingly, the Committee concludes that the authors' rights under this provision were not violated.

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e/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX. B, Communication No. 230/1987 (*Raphael Henry v. Jamaica*), para.

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8.4.

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- *Hamilton v. Jamaica* (333/1988), ICCPR, A/49/40 vol. II (23 March 1994) 37 (CCPR/C/50/D/333/1988) at paras. 8.3, 9.1 and 9.2.

...
8.3 ...[T]he absence of a reasoned judgement of the Court of Appeal is likely to prevent the author from successfully arguing his petition before the Judicial Committee although the availability of the judgement is not a precondition for lodging an application for special leave to appeal. The Committee is aware that the Judicial Committee has indicated that it can review an appeal even in the absence of a written judgement. But, as the Judicial Committee itself has noted in the recent judgement of *Earl Pratt and Ivan Morgan v. Attorney-General*, c/ it is in practice "necessary to have the reasons of the Court of Appeal 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". Under the Committee's jurisprudence, a remedy must be effective, as well as formally available. An appeal on the merits would thus necessarily require a written judgement. Accordingly, the Committee finds that it is unnecessary, in order to exhaust local remedies, to petition the Judicial Committee for special leave to appeal in the absence of a reasoned written judgement.
...
9.1 It remains for the Committee to decide whether the failure of the Jamaican Court of Appeal to issue a reasoned written judgement violated the author's rights under article 14, paragraphs 3 (c) and 5. Article 14, paragraph 5, guarantees the right of convicted persons to have the conviction and sentence reviewed by a "higher tribunal according to law". The Committee, having noted that the failure to issue a reasoned written judgement has effectively prevented the availability of a further remedy, also finds that the author's right, under article 14, paragraphs 3 (c) and 5, to be tried without undue delay and to have his sentence reviewed by a higher tribunal according to law, has been violated.

9.2 As the Committee observed in its General Comment 6(16), the provision that a sentence of death may only be imposed in accordance with the law and not contrary to the provisions of the Covenant, implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. In the instant case, since the final sentence of death was passed and an important

requirement under article 14 was not met, it must be concluded that the right protected under article 6 of the Covenant was violated.

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c/ Judicial Committee of the Privy Council, judgement of 2 November 1993, p. 8.

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- *Currie v. Jamaica* (377/1989), ICCPR, A/49/40 vol. II (29 March 1994) 73 (CCPR/C/50/D/377/1989) at paras. 13.4 and 13.5.

...

13.4 The determination of rights in proceedings in the Constitutional Court must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1. In this particular case, the Constitutional Court would be called on to determine whether the author's conviction in a criminal trial has violated the guarantees of a fair trial. In such cases, the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles in paragraph 3 (d) of article 14. It follows that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the regularities of his criminal trial in the Constitutional Court in a fair hearing, and is thus a violation of article 14, paragraph 1, *juncto* article 2, paragraph 3.

13.5 The author also claims that the failure of the Court of Appeal to issue a written judgement violates his right under article 14, paragraph 3 (c), to be tried without undue delay, and his right under article 14, paragraph 5, to have his conviction and sentence reviewed. The State party had not provided any information to show that the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on any grounds other than the absence of a written judgement of the Court of Appeal. In the circumstances, the Committee finds that the author has been barred from making effective use of the remedy of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without undue delay. c/ In this connection, the Committee refers to its earlier jurisprudence b/ and reaffirms that under article 14, paragraph 5, a convicted person is entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law. The Committee is of the opinion that the

failure of the Court of Appeal to issue a written judgement, 13 years after the dismissal of the appeal, constitutes a violation of article 14, paragraphs 3 (c) and 5.

Notes

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b/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40). annex XII.K, Communication No. 320/1988 (*Victor Francis v. Jamaica*), views adopted on 24 March 1993; *ibid*., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, Communication No. 283/1988 (*Ashton Little v. Jamaica*), views adopted on 1 November 1991; and *ibid*., annex IX.B, Communication No. 230/1987 (*Raphael Henry v. Jamaica*), views adopted on 1 November 1991.

c/ *Ibid*., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.f, Communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*), views adopted on 6 April 1989, paras. 13.3 to 13.5.

- *Berry v. Jamaica* (330/1988), ICCPR, A/49/40 vol. II (7 April 1994) 20 (CCPR/C/50/D/330/1988) at para. 11.6.

...

11.6 As to the author's claims under article 14, paragraph 3 (b), (d) and 5, concerning the conduct of his appeal, the Committee begins by noting that a lawyer was assigned to the author for purposes of his appeal, and that article 14, paragraph 3(d), does not entitle an accused to choose counsel provided to him free of charge. The Committee further notes that the author's claim that he did not have the opportunity to instruct counsel for the appeal prior to the hearing has not been contested by the State party. In Communication No. 248/1987 (*Glenford Campbell v. Jamaica*), b/ the Committee held that the combined effect of the lawyer's failure to raise objections at the trial in respect of the confessional evidence allegedly obtained through maltreatment, the consequences this failure had on the conduct of the appeal and the lack of an opportunity to instruct counsel for the appeal or to defend himself in person, amounted to a denial of effective representation in the judicial proceedings and non-compliance with the requirements of article 14, paragraph 3 (d), of the Covenant. The Committee notes, however, that in the present case the author would not have been allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial. In the circumstances, and taking into account that the author's appeal was in fact heard by the Court of Appeal, the Committee finds no violation of article 14, paragraphs 3 (b), (d) and 5, of the Covenant.

Notes

...
b/ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.D; views adopted on 30 March 1992 at the forty-fourth session, para. 6.6.

- *Reid v. Jamaica* (355/1989), ICCPR, A/49/40 vol. II (8 July 1994) 59 (CCPR/C/51/D/355/1989) at para. 14.3.

...
14.3 Concerning the proceedings before the Court of Appeal, the Committee recalls that article 14, paragraph 5, states that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. The Committee considers that, while the modalities of an appeal may differ among the domestic legal systems of States parties, under article 14, paragraph 5, a State party is under an obligation to substantially review the conviction and sentence. In the instant case, the Committee considers that the conditions of the dismissal of Mr. Reid's application for leave to appeal, without reasons given and in the absence of a written judgment, constitute a violation of the right guaranteed by article 14, paragraph 5, of the Covenant.

- *Champagnie v. Jamaica* (445/1991), ICCPR, A/49/40 vol. II (18 July 1994) 136 (CCPR/C/51/D/445/1991) at paras. 7.2-7.4 and 9.

...
7.2 The question before the Committee is whether the delay in the issuing and the inadequacy of the written judgment of the Court of Appeal of Jamaica deprived the authors of their right, under article 14, paragraph 3 (c), to be tried without undue delay, and of their right, under article 14, paragraph 5, to have conviction and sentence reviewed by a higher tribunal according to law. The Committee recalls that article 14, paragraph 3 (c), and article 14, paragraph 5, must be read together, so that the right to review of conviction and sentence must be made available without delay. b/ In this connection, the Committee refers to its earlier jurisprudence c/ and reaffirms that under article 14, paragraph 5, a convicted person is entitled to have, within reasonable time, access to written judgments, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law.

7.3 As regards the case before it, the Committee notes that the Court of Appeal dismissed the authors' appeal on 10 June 1981, but did not issue a written judgment until 17 July 1986, i.e. over five years later. Furthermore, it appears from the information before the Committee, which has remained uncontested, that it took another four years before the written judgment was made available to leading counsel in London, who was only then able to give his opinion on the merits of a petition for special leave to appeal to the Judicial Committee of the Privy Council. The Committee has also noted that, because of the considerable lapse of time that elapsed between the hearing of the appeal and delivery of the reasons for judgment, the Court of Appeal was unable to rely on its memory of the hearing of the appeal and had to confine its reasons to such notes as were made during the hearing of the appeal. In the circumstances, the Committee finds that it cannot be said that the authors benefitted from a proper review of their conviction and sentence, nor from timely access to the reasons for judgment, which would have enabled them to effectively exercise their right of appeal at all instances. The Committee therefore concludes that the rights of the authors under article 14, paragraphs 3 (c) and 5, of the Covenant, have been violated.

7.4 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". d/ In the present case, since the final sentence of death was passed without due respect for the requirements for a fair trial set out in article 14, paragraphs 3 (c) and 5, there has accordingly also been a violation of article 6 of the Covenant.

...

9. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to provide Messrs. Champagnie, Palmer and Chisholm with an effective right to appeal without undue delay in accordance with article 14, paragraphs 3 (c) and 5, of the Covenant, means that they did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the view that in the circumstances of the case, this entails their release. The State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

...

b/ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/44/40), annex X.F, Communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*), adopted on 6 April 1989, paras. 13.3-13.5.

c/ *Ibid*., Forty-seventh Session, Supplement No. 40 (A/47/40), annexes IX.B and J, Communications Nos. 230/1987 (*Raphael Henry v. Jamaica*) and 283/1988 (*Aston Little v. Jamaica*), views adopted on 1 November 1991; and ibid., Forth-eighth Session, Supplement No. 40 (A/48/40), annex XII.K, communication No. 320/1988 (*Victor Francis v. Jamaica*), views adopted on 24 March 1993.

d/ *Ibid*., Thirty-seventh Session, Supplement No. 40 (A/37/40) , annex V, General Comment 6 (16), para. 7.

- *Perera v. Australia* (536/1993), ICCPR, A/50/40 vol. II (28 March 1995) 158 (CCPR/C/53/D/536/1993) at para. 6.4.

...
6.4 With regard to the author's complaint about the review of his conviction, the Committee notes from the judgement of the Court of Criminal Appeal, dated 4 July 1986, that the Court did evaluate the evidence against the author and the judge's instructions to the jury with regard to the evidence. The Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

See also:

- *Rolando v. The Philippines* (1110/2002), ICCPR, A/60/40 vol. II (3 November 2004) 161 at para. 4.5.

- *Francis v. Jamaica* (606/1994), ICCPR, A/50/40 vol. II (25 July 1995) 130 (CCPR/C/54/D/606/1994) at para. 9.3.

...
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...

- *Stephens v. Jamaica* (373/1989), ICCPR, A/51/40 vol. II (18 October 1995) 1 (CCPR/C/55/D/373/1989) at para. 9.8.

...
9.8 ...[T]he author has alleged a violation of article 14, paragraphs 3(c) and (5), on account of the delay between his trial and his appeal. In this context, the Committee notes that during the preparation of the author's petition for special leave to appeal to the Judicial Committee of the Privy Council by a London lawyer, Mr. Stephens' legal aid representative for the trial was requested repeatedly but unsuccessfully to explain the delays between trial and the hearing of the appeal in December 1986. While a delay of almost two years and 10 months between trial and appeal in a capital case is regrettable and a matter of concern, the Committee cannot, on the basis of the material before it, conclude that this delay was primarily attributable to the State party, rather than to the author.

- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995) 35 (CCPR/C/50/D/459/1991) at para. 10.4.

...
10.4 Mr. Wright has claimed that his counsel did not consult with him beforehand about the appeal and that this indicates that he was not effectively represented. The Committee notes that Mr. Wright was represented at the appeal by the lawyer who defended him at trial, and that counsel filed and argued several grounds of appeal, challenging several decisions made by the judge, and questioning his directions to the jury. In these specific circumstances, the Committee finds that Mr. Wright's right to an effective representation on appeal has not been violated.

- *Lubuto v. Zambia* (390/1990), ICCPR, A/51/40 vol. II (31 October 1995) 11 (CCPR/C/55/D/390/1990) at paras. 7.3 and 9.

...
7.3 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by

article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3(c).
...
9. The Committee is of the view that Mr. Lubuto is entitled, under article 2, paragraph 3(a), of the Covenant to an appropriate and effective remedy, entailing a commutation of sentence.

- *E. Johnson v. Jamaica* (588/1994), ICCPR, A/51/40 vol. II (22 March 1996) 174 (CCPR/C/56/D/588/1994) at para. 8.8.

...
8.8 The author has alleged a violation of article 14, paragraphs 3 (c) and 5, because of an unreasonably long delay of 51 months between his conviction and the dismissal of his appeal. The State party has promised to investigate the reasons for this delay but failed to forward to the Committee its findings. In particular, it has not shown that the delay was attributable to the author or to his legal representative. Rather, author's counsel has provided information which indicates that the author sought actively to pursue his appeal, and that responsibility for the delay in hearing the appeal must be attributed to the State party. In the Committee's opinion, a delay of four years and three months in hearing an appeal in a capital case is, barring exceptional circumstances, unreasonably long and incompatible with article 14, paragraph 3 (c), of the Covenant. No exceptional circumstances which would justify the delay are discernible in the present case. Accordingly, there has been a violation of article 14, paragraphs 3 (c) and 5, inasmuch as the delay in making the trial transcript available to the author prevented him from having his appeal determined expeditiously.

- *Kulomin v. Hungary* (521/1992), ICCPR, A/51/40 vol. II (22 March 1996) 73 (CCPR/C/50/D/521/1992) at paras. 11.7 and 11.8.

...
11.7 As regards the appeal, the author has claimed that the Supreme Court increased his sentence for having acted with the objective of financial gain, whereas he had never been charged with robbery or theft. The Committee notes, however, that it appears from the court documents that the author was in fact charged with murder, committed with cruelty and out of financial gain. Although the Court of First Instance found him guilty only of murder committed with cruelty, the Supreme Court quashed the judgment and found the author guilty of murder committed with cruelty and out of financial gain. The Committee further

notes that the conviction and sentence imposed by the Supreme Court upon the author, was reviewed by the President of the Supreme Court. The Committee finds therefore that the facts before it do not show a violation of the Covenant with regard to the author's appeal.

11.8 The Committee takes this opportunity to reiterate that it is not for the Committee, but for the courts of the States parties concerned, to evaluate facts and evidence in a criminal case, and that the Committee cannot assess a person's guilt or innocence. This is so, unless it is manifest from the information before the Committee that the Courts' decisions were arbitrary or amounted to a denial of justice. In the present case, nothing in the written submissions before the Committee permits such a conclusion.

- *Fuenzalida v. Ecuador* (480/1991), ICCPR, A/51/50 vol. II (12 July 1996) 50 (CCPR/C/57/D/480/1991) at para. 9.6.

...
9.6 With regard to the information submitted by the author concerning delays in the judicial proceedings, in particular the fact that his appeal was not dealt with in the period provided for by law, and that, after waiting more than two and a half years for a decision on his appeal, he had to abandon this recourse in order to obtain conditional release, the Committee notes that the State party has not offered any explanation or sent copies of the relevant decisions. Referring to its prior jurisprudence, the Committee reiterates that, in accordance with article 14, paragraph 3 (c), of the Covenant, the State party has to ensure that there is no undue delay in the proceedings. The State party has not submitted any information that would justify the delays. The Committee concludes that there has been a violation of article 14, paragraph 3 (c), as well as of article 14, paragraph 5, since the author was obliged to abandon his appeal in exchange for conditional release.

- *Tomlin v. Jamaica* (589/1994), ICCPR, A/51/40 vol. II (16 July 1996) 191 (CCPR/C/57/D/589/1994) at para. 8.2.

...
8.2 With respect to the contention that the author was not provided with the opportunity of an effective appeal since the Court of Appeal did not re-examine witnesses and because counsel did not advance the proper grounds of appeal, the Committee observes that these allegations do not in themselves support the contention that the author did not have a review of his sentence by a higher tribunal according to law. The right to have a conviction reviewed by a higher tribunal is not violated if counsel for an appellant chooses, in the exercise of his professional judgement, to concentrate on one arguable ground of appeal rather than advance several grounds. In the present case, the Committee concludes that there

has been no violation of article 14, paragraph 5, of the Covenant.

- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/537/1993) at paras. 9.4 and 9.5.

...

9.4 As to the author's notification of the date of his appeal and his representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance be made available to convicted prisoners under sentence of death. This applies to all stages of the judicial process. In the author's case, the first issue to be determined is whether he was properly notified of the date of his appeal and could prepare his appeal with the lawyer assigned to represent him before the Court of Appeal. Mr. Kelly insists that he was not informed of the hearing of his appeal until after its dismissal, whereas the State party argues that the Registry of the Court of Appeal notified Mr. Kelly of the date of his appeal. While the State party is unable to pinpoint the exact date of the notification or to provide a copy of the notification letter, the Committee notes from the file that the lawyer assigned to the author for the appeal, Mr. D. Chuck, was notified of the date of the appeal. This lawyer, in turn, wrote to the author in prison on 24 February 1989, asking him whether he had anything further to convey in preparation of the appeal. Mr. Kelly contends that he had had no contacts with Mr. Chuck before the receipt of the letter on 1 March, but that he sent explanations to Mr. Chuck immediately thereafter. In these circumstances, the Committee concludes that the author was aware of the imminence of the hearing of his appeal.

9.5 The second issue to be determined is whether the author's legal aid lawyer for the appeal had a right to effectively abandon the appeal without prior consultation with the author. It is uncontested that Mr. Chuck did not inform the author that he would argue that there were no merits in the appeal, thereby effectively leaving Mr. Kelly without representation. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgment, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Kelly should have been informed that his legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him...In the present case, the Committee concludes that there has been a violation of article 14, paragraph 3 (d).

See also:

LEGAL RIGHTS - CRIMINAL - Right to Appeal

- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995) 35 (CCPR/C/50/D/459/1991) at para. 10.5.
- *Morrison and Graham v. Jamaica* (461/1991), ICCPR, A/51/40 vol. II (25 March 1996) 43 (CCPR/C/52/D/461/1991) at para. 10.5.
- *Burrell v. Jamaica* (546/1993), ICCPR, A/51/40 vol. II (18 July 1996) 121 (CCPR/C/53/D/546/1993) at paras. 9.3 and 9.4.
- *Price v. Jamaica* (572/1994), ICCPR, A/52/40 vol. II (6 November 1996) 153 (CCPR/C/58/D/572/1994) at paras. 9.2 and 9.3.
- *Jones v. Jamaica* (585/1994), ICCPR, A/53/40 vol. II (6 April 1998) 45 (CCPR/C/62/D/585/1994) at para. 9.5.
- *Daley v. Jamaica* (750/1997), ICCPR, A/53/40 vol. II (31 July 1998) 235 (CCPR/C/63/D/750/1997) at para. 7.5.
- *Morisson v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at para. 8.6.
- *Smith and Stewart v. Jamaica* (668/1995), ICCPR, A/54/40 vol. II (8 April 1999) 163 (CCPR/C/65/D/668/1995) at para. 7.3.
- *Gallimore v. Jamaica* (680/1996), ICCPR, A/54/40 vol. II (23 July 1999) 170 (CCPR/C/66/D/680/1996) at para. 7.4.

- *Henry and Douglas v. Jamaica* (571/1994), ICCPR, A/51/40 vol. II (25 July 1996) 155 (CCPR/C/57/D/571/1994) at para. 9.4.

...
9.4 Regarding the delay in the hearing of the appeal, and bearing in mind that this is a capital case, the Committee notes that a delay of 3 years and four and a half months between the conclusion of the trial on 13 June 1983 and the dismissal of the authors' appeal on 31 October 1986, is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay; the mere affirmation that the delay was not excessive does not suffice. The Committee accordingly concludes that there has been a violation of article 14, paragraphs 5 *juncto* 3 (c), of the Covenant.

- *Hill v. Spain* (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/526/1993) at para. 14.3.

...
14.3 The Committee...observes that in accordance with article 876 of the Spanish Code of Criminal Procedure, the authors' appeal was not effectively considered by the Court of Appeal, since no lawyer was available to submit any grounds of appeal. Consequently, the authors' right to have their conviction and sentence reviewed, as required by the Covenant,

was denied to them, contrary to article 14, paragraph 5, of the Covenant.

- *LaVende v. Trinidad and Tobago* (554/1993), ICCPR, A/53/40 vol. II (29 October 1997) 8 (CCPR/C/61/D/554/1993) at para. 5.8.

...
5.8 Regarding the claim under article 14, paragraph 3(d), the State party has not denied that the author was denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal proceedings. 7/ Section 109 of the Constitution of Trinidad and Tobago provides for appeals to the Judicial Committee of the Privy Council. It is uncontested that in the present case, the Ministry of National Security denied the author legal aid to petition the Judicial Committee in *forma pauperis*, thereby effectively denying him legal assistance for a further stage of appellate judicial proceedings which is provided for constitutionally; in the Committee's opinion, this denial constituted a violation of article 14, paragraph 3(d), whose guarantees apply to all stages of appellate remedies. As a result, his right, under article 14, paragraph 5, to have his conviction and sentence reviewed "by a higher tribunal according to law" was also violated, as the denial of legal aid for an appeal to the Judicial Committee effectively precluded the review of Mr. LaVende's conviction and sentence by that body.

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Notes

...
7/ See Views on Communication No. 230/1987 (*Raphael Henry v. Jamaica*), adopted 1 November 1991, paragraph 8.3.

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- *Thomas v. Jamaica* (532/1993), ICCPR, A/53/40 vol. II (3 November 1997) 1 (CCPR/C/61/D/532/1993) at para. 6.4.

...
6.4 The author claims that his right to appeal to the Court of Appeal of Jamaica was violated because neither he nor his counsel were provided with a copy of Mr. Benjamin's alleged confession statement which would exonerate the author. He also claims that the absence of legal aid prevented him from having further investigations carried out in relation to the alleged confession. In the absence of the document, he claims that he could not pursue his right under Section 29(1) of the Judicature (Appellate Jurisdiction) Act to have his case reviewed. The Committee notes that the State party has not explained why this alleged

statement was never made available to the author or to his counsel; it notes too that counsel states that the Deputy Director of Public Prosecutions informed him that the statement was considered by the Jamaica Privy Council on 2 August 1988, and considered that it did not warrant a reference to the Court of Appeal on Section 29 (1), and was not referred. The Committee is of the view that the failure to provide Mr. Thomas with legal aid in Jamaica has denied him the opportunity to have enquiries made about the matter and to pursue such legal remedies as may have been available to him in Jamaica in accordance with the Constitution or otherwise and that this amounts to a violation of article 14, paragraph 3(d), in conjunction with article 2, paragraph 3.

- *McLeod v. Jamaica* (734/1996), ICCPR, A/53/40 vol. II (31 March 1998) 213 (CCPR/C/62/D/734/1996) at paras. 6.5, 7 and 8.

...

6.5 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the author was denied an opportunity to appeal his case since his counsel did not inform him that he was not going to forward any grounds of appeal. This means that the final sentence of death in Mr. McLeod's case was passed without having met the requirements for a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

7. The Human Rights Committee...is of the view that the facts before it disclose violations of article 10, paragraph 1; and 14 paragraph 3(b) and (d), and consequently of article 6 of the Covenant.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing a new appeal or should the State party not be in a position to comply with this recommendation, his release.

For dissenting opinion in this context, see McLeod v. Jamaica (734/1996), ICCPR, A/53/40 vol. II (31 March 1998) 213 (CCPR/C/62/D/734/1996) at Individual Opinion by Mr. Martin Scheinin (dissenting in part), 219.

- *Domukovsky, Tsiklauri, Gelbekniani and Dokvadze v. Georgia* (623, 624, 626 and

627/1995), ICCPR, A/53/40 vol. II (6 April 1998) 95 (CCPR/C/62/D/623/1995) at para. 18.11.

...
18.11 The Committee notes from the information before it that the authors could not appeal their conviction and sentence, but that the law provides only for a judicial review, which apparently takes place without a hearing and is on matters of law only. The Committee is of the opinion that this kind of review falls short of the requirements of article 14, paragraph 5, of the Covenant, for a full evaluation of the evidence and the conduct of the trial and, consequently, that there was a violation of this provision in respect of each author.

- *Chadee et al. v. Trinidad and Tobago* (813/1998), ICCPR, A/53/40 vol. II (29 July 1998) 242 (CCPR/C/63/D/813/1998) at para. 10.2.

...
10.2 With regard to the authors' additional claim that their appeal has been expedited in order to ensure their execution, in violation of articles 6, 7, and 14 of the Covenant, the Committee has taken note of the statistics provided by both counsel and the State party in this respect. In this context, the Committee recalls that the State party is under an obligation, under article 14 (3)(c) and (5) of the Covenant, to ensure that appeals are heard without undue delay. The Committee should nevertheless examine whether the period of time between conviction and the hearing of the appeal is sufficient for the defence to prepare the appeal. After having examined the information before it, the Committee considers that it has not been shown that the period of time in the instant case was insufficient to prepare the appeal by defence counsel. The Committee concludes therefore that the facts before it do not show that articles 6, 7 and 14 have been violated in this respect.

- *Morisson v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at para. 8.5.

...
8.5 The Committee notes that the author's appeal was heard on 6 July 1987, two years and four months after his conviction, that, according to the State party, the written judgement was issued on 23 March 1989, and that the author did not receive a copy until 11 July 1990, almost three years after the hearing of the appeal. The Committee refers to its prior jurisprudence 64/ and reaffirms that under article 14, paragraph 5, a convicted person is

entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law and without undue delay. The Committee is of the opinion that the delay in hearing the appeal and in issuing a written judgement by the Court of Appeal and in providing the author with a copy, constitutes a violation of article 14, paragraphs 3(c) and 5.

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Notes

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64/ See, for example, the Committee's Views on communications Nos. 230/1987 (*Raphael Henry v. Jamaica*), and 283/1988 (*Aston Little v. Jamaica*), both adopted on 1 November 1991.

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- *Brown v. Jamaica* (775/1997), ICCPR, A/54/40 vol. II (23 March 1999) 260 (CCPR/C/65/D/775/1997) at paras. 6.9 and 6.11.

...

6.9 With regard to the author's claim that his appeal counsel never consulted with him before the hearing of the appeal, the Committee notes that a legal representative was assigned by the State party to represent the author, that counsel did argue grounds for appeal and that the Court of Appeal heard the appeal. The Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. 129/ In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

...

6.11 The author has complained about the length of the criminal procedure in his case, and the State party has explained that the delay was caused by the ordering of a retrial. The Committee notes that the author was arrested on 15 November 1991, and that the first trial against him occurred in October 1993, 23 months after his arrest. The Committee finds that, in the absence of a satisfactory explanation by the State party, a delay of 23 months in bringing the author to trial, considering that he was kept in detention, constitutes, in the circumstances of the instant case, a violation of the right contained in article 9, paragraph 3, of the Covenant to be entitled to trial within reasonable time or release, as well as of article 14, paragraph 3 (c). In respect to the alleged other delays in the criminal process, the Committee notes that the author's retrial was scheduled to begin on 23 November 1994, four months after the Court of Appeal's judgement, but that it was adjourned on several occasions upon request of the defence. In the circumstances, the Committee finds that the delay of one

year and nine months between the Court of Appeal's judgement and the beginning of the retrial cannot be solely attributed to the State party and that it does not disclose a violation of the Covenant.

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129/ See *inter alia*, the Committee's decision in Communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

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- *Lumley v. Jamaica* (662/1995), ICCPR, A/54/40 vol. II (31 March 1999) 142 (CCPR/C/65/D/662/1995) at paras. 7.2-7.5.

...

7.2 With regard to the author's complaint that he had no opportunity to examine witnesses on appeal, the Committee notes from the documents of the Court of Appeal that in the author's application for leave to appeal the question "Do you desire to apply for leave to call any witnesses on your appeal?" has been expressly answered by "No". The Committee considers therefore that the facts before it do not show a violation of article 14, paragraph 3(e).

7.3 It further appears from the documents that leave to appeal was refused by a single judge whose decision was confirmed by the Court of Appeal. The judge refused leave of appeal only after a review of the evidence presented during the trial and after an evaluation of the judge's instructions to the jury. While on the basis of article 14, paragraph 5, every convicted person has the right to his conviction and sentence being reviewed by a higher tribunal according to law, a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case. Thus, in the circumstances, the Committee finds that no violation of article 14, paragraph 5 occurred in this respect.

7.4 With regard to the author's complaint that he was not present at the hearing of his application for leave to appeal and that he does not know who represented him on appeal, the Committee notes that the State party has submitted that in general the Court of Appeal sends notices to all appellants informing them of the date of the hearing and of the name of their representative. In the instant case, however, the State party has failed to provide any specific information as to whether and when the author was so informed. In the circumstances, it is unclear whether the author was at all represented on appeal, and the

Committee therefore is of the opinion that the facts before it disclose a violation of article 14, paragraph 3(d) *juncto* paragraph 5.

7.5 With regard to the availability of the trial transcript, the Committee recalls that under article 14, paragraph 5 of the Covenant, the State party should provide the convicted person with access to the judgements and documents necessary to enjoy the effective exercise of the right to appeal. 55/ In the present case, since the transcript was not made available to the author the Committee finds that the facts before it disclose a violation of article 14, paragraph 5.

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Notes

...

55/ See for example, the Committee's views in communications Nos. 230/1987, *Henry v. Jamaica*, and 283/1988, *Aston Little v. Jamaica*, adopted on 1 November 1991.

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For dissenting opinion in this context, see Lumley v. Jamaica (662/1995), ICCPR, A/54/40 vol. II (31 March 1999) 142 (CCPR/C/65/D/662/1995) at Individual Opinion by Nisuke Ando and Maxwell Yalden (dissenting in part), 147.

- *Smith and Stewart v. Jamaica* (668/1995), ICCPR, A/54/40 vol. II (8 April 1999) 163 (CCPR/C/65/D/668/1995) at para. 7.4.

...

7.4 The authors have claimed that the period of 25 months which lapsed from their conviction to the dismissal of their appeal in the Court of Appeal constitutes a violation of article 14, paragraphs 3(c) and 5. The Committee reiterates that all guarantees under article 14 of the Covenant should be strictly observed in any criminal procedure, particularly in capital cases, and notes that the State party has merely argued that such a period does not amount to a violation of the Covenant, without offering any explanation for the delay. In the absence of any circumstances justifying the delay, the Committee finds that there has been a violation of article 14, paragraph 3(c), in conjunction with paragraph 5.

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Notes

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74/ See, *inter alia*, the Committee's Views in Communications No. 537/1993, *Paul Anthony Kelly v. Jamaica*, adopted on 17 July 1996, para. 9.5; 734/1997, *Anthony McLeod v. Jamaica*, adopted on 31 March 1998, para. 6.3; 750/1997, *Silbert Daley v. Jamaica*, adopted on 31 July 1998, para 7.5.

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LEGAL RIGHTS - CRIMINAL - Right to Appeal

See also:

- *Daley v. Jamaica* (750/1997), ICCPR, A/53/40 vol. II (31 July 1998) 235 (CCPR/C/63/D/750/1997) at para. 7.5.
- *Bennett v. Jamaica* (590/1994), ICCPR, A/54/55 vol. II (25 March 1999) 12 (CCPR/C/65/D/590/1994) at paras. 10.5 and 10.6.
- *Brown and Parish v. Jamaica* (665/1995), ICCPR, A/54/40 vol. II (29 July 1999) 157 (CCPR/C/66/D/665/1995) at paras. 9.4 and 9.5.

- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at paras. 7.2 and 7.4.

...

7.2 ...[A]s to the alleged violation of article 14, paragraphs 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that the new counsel in fact argued grounds of appeal on the author's behalf before the Court of Appeal. There is nothing in the file which suggests that counsel was exercising other than his professional judgement when choosing not to pursue certain grounds. Nor is there anything in the file to suggest that the State party denied the author and his counsel time to prepare the appeal or that it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. With reference to its prior jurisprudence, the Committee notes that it has found violations of the provisions in question in situations where counsel has abandoned all grounds of appeal and the court has not ascertained that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which counsel argued the appeal, but chose not to pursue certain grounds. The Committee concludes, therefore, that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

...

7.4 With regard to the alleged violation of article 14, paragraph 5, on the ground that the Court of Appeal did not issue a duly reasoned judgement, the Committee recalls its prior jurisprudence 91/ where it has held that in order to enjoy the right to have his conviction and sentence reviewed by a higher tribunal according to law, a convicted person is entitled to have, within a reasonable time, access to duly reasoned, written judgements. Even though article 14, paragraph 5, itself merely guarantees one instance of appeal, the Committee has interpreted the words "according to law" to mean that the right to duly reasoned, written judgements must apply to all instances of appeal provided in the domestic law. 92/ Consequently, the Committee has found violations in cases where no written judgement has been provided within a reasonable time. In the present case, the Committee notes that the author and his representatives were provided with the notes of the oral judgement delivered by the Court of Appeal on 20 March 1981, and finds that these notes, even if less elaborate than desirable, were sufficient to form the basis of a further appeal. Consequently, the

Committee finds that article 14, paragraph 5, was not violated on this ground.

Notes

...

91/ Communication No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991; Communication No. 283/1988, *Little v. Jamaica*, Views adopted on 1 November 1991.

92/ Communication No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991, para. 8.4.

See also:

- *Marshall v. Jamaica* (730/1996), ICCPR, A/54/55 vol. II (3 November 1998) 228 (CCPR/C/64/D/730/1996) at para. 6.5.
- *Bennett v. Jamaica* (590/1994), ICCPR, A/54/55 vol. II (25 March 1999) 12 (CCPR/C/65/D/590/1994) at para. 6.6.

- *Bryhn v. Norway* (789/1997), ICCPR, A/55/40 vol. II (29 October 1999) 183 at paras. 2.2, 2.3 and 7.2.

...

2.2 ...The Court, exercising discretionary powers, then passed a joint sentence combining the remaining time of the previous sentence and the imprisonment for the new offence, thus sentencing her to a term of imprisonment of one year and six months ...

2.3 The author appealed the sentence to the Borgarting Court of Appeal. With respect to cases concerning a maximum sentence of less than 6 years, the Criminal Procedure Act provides that the Court of Appeal may disallow the appeal if the court unanimously considers it obvious that the appeal will not succeed. On 26 January 1996, the three-judge Court unanimously decided that the appeal had no possibility of leading to a lesser sentence and summarily dismissed the appeal without a full hearing. The author requested the Court to reconsider its decision, invoking article 14(5) of the Covenant. On 26 March 1996, a differently constituted Court of Appeal decided by majority not to change the previous decision; part of the appellant's case concerned an alleged inconsistency between the Norwegian Criminal Procedure Act and article 14(5) of the Covenant. This second decision was in turn appealed to the Appeals Committee of the Supreme Court, which on 6 May 1996 held that none of the three points of law put forward on the author's behalf (including a breach of article 14(5) of the Covenant) was sustainable.

...

7.2 The Committee notes that the author of the present case appealed the judgement of first

instance only in respect of the sentence imposed. The Court of Appeal, sitting with three judges, in accordance with section 321 of the Criminal Procedure Act, reviewed the material that had been before the court of first instance, the judgement and the arguments advanced on behalf of the author as to the inappropriateness of the sentence, and concluded that the appeal had no possibility of leading to a reduced sentence. Moreover, the Court of Appeal again reviewed the elements of the case when reconsidering its earlier decision, and this second decision was subject to appeal to the Appeals Committee of the Supreme Court. Although the Committee is not bound by the consideration of the Norwegian parliament, and sustained by the Supreme Court, that the Norwegian Criminal Procedure Act is consistent with article 14(5) of the Covenant, the Committee considers that in the circumstances of the instant case, notwithstanding the absence of an oral hearing, the totality of the reviews by the Court of Appeal satisfied the requirements of article 14, paragraph 5.

- *Bech v. Norway* (882/1999), ICCPR A/55/40 vol. II (15 March 2000) 242 at paras. 2.1, 2.2, 2.4 and 4.2.

...

2.1 On 9 November 1995, the Oslo City Court found the author guilty of fraud and sentenced him to five years' imprisonment. The author appealed the judgement to the Borgarting High Court. A hearing was held from 15 January to 6 February 1997. Prior to the hearing, on 23 December 1996, the author was involved in a car accident...

2.2 Due to the author's state of health, the defence requested that the hearing of the appeal be postponed. On the first day of the hearing, on 15 January 1997, after consulting with the specialist treating the author as well as with his general practitioner, the Court rejected the request. It decided, however, that the hearings would be of shorter duration than usual, and that short breaks would be permitted at hourly intervals, and that an armchair would be made available to the author.

...

2.4 The next day, the author's condition deteriorated and on 17 January 1997, the Court decided to interrupt his testimony due to his condition. It was agreed that the author would see a doctor and do a blood test. The opinion by the National Institute of Forensic Toxicology of 21 January 1997 was that the blood test showed that it was likely that the author was influenced by the medication...[T]he Court rejected the author's appeal and sentenced him to five years' imprisonment.

...

4.2 The author's allegation of unfair trial is based on his claim that his medical condition impaired his functioning in such a way as to impede the presentation of his appeal. The

Committee notes that this claim was brought before the Courts, both at the time of the hearing and on appeal to the Supreme Court, and that the Courts rejected the author's claim after having heard medical expert testimony. The Committee recalls that it is generally not for the Committee but for the Courts of States parties to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, his claim that the Court's evaluation of his medical condition was arbitrary or amounted to a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at paras. 3.7, 3.8 and 10.5-10.8.

...

3.7 Counsel alleges a violation of article 14, paragraphs 1, 2, 3(b), 3(d) and 5, on the ground that defence counsel on appeal, Lord Gifford, made an erroneous submission that there was no arguable point in the author's case, and, contrary to the author's instructions, stated that the author had accepted this advice. 3/ Counsel argues that Lord Gifford thereby failed to make a case as to whether the cautioned statement was forged or not. It is submitted that Lord Gifford failed to inform the Court both that he had advised the author to obtain a handwriting expert to review the signatures on the disputed statement, and that the author wanted to obtain such an expert, but did not have the necessary funds. Furthermore, counsel argues that Lord Gifford failed to ask for an adjournment to enable funds to be raised.

3.8 Counsel also alleges a violation of article 14, paragraph 5, on the ground that the original of the written confession was not available to the author or his counsel before the petition for special leave to the Privy Council, and therefore it could not be properly reviewed by a handwriting expert assigned by counsel. It is submitted that the State party has an obligation to preserve evidence relied upon in a trial at least until appeals have been exhausted, and that this obligation has been breached in this case with the effect that the author was deprived of an opportunity to place new material before the court.

...

10.5 With regard to the alleged violation of article 14, paragraphs 1, 2, 3(b), 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that it is correct as stated by counsel that the Committee in its prior jurisprudence has found violations of article 14, paragraphs 3(d) and 5, in situations where counsel has abandoned all grounds of appeal and the court has not ascertained that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which the Court of Appeal, according to the material before the Committee, did ascertain that the applicant had been informed and accepted that there were no arguments to be made on his

behalf. In this regard, the Court of Appeal states:

> "Lord Gifford, QC informed the court that notwithstanding his best efforts he was still firmly of the view that there was nothing he could urge on behalf of the applicant and that he had further informed the applicant accordingly and that he had accepted the advice of counsel."

10.6 The Committee also notes that a letter of 27 December 1995 from Lord Gifford to the author's present counsel, which is appended to the author's original submission, implies that the Court of Appeal's judgment gave a correct account of the events, as he states that he, over a period of about a year, on several occasions discussed the case with the author and informed him that he could see no merit in the appeal unless they came up with new evidence. He also invited the author to get a second opinion. However, even if the situation, as alleged by the author, was that he had not accepted his counsel's advice, this cannot be attributed to the State party. Nor can the Committee find anything else in the material before it to suggest that the lawyer's conduct was incompatible with the interests of justice. In this regard, the Committee notes, as opposed to what has been claimed by the author, that a 10 month adjournment was given in order to obtain new evidence, but that the counsel failed to secure any new evidence in that period. In the view of the Committee, this again cannot be attributed to the State party, and it concludes that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

10.7 While recognizing that in order for the right to review of one's conviction to be effective, the State party must be under an obligation to preserve sufficient evidential material to allow for such a review, the Committee cannot see, as implied by counsel, that any failure to preserve evidential material until the completion of the appeals procedure constitutes a violation of article 14, paragraph 5. Article 14, paragraph 5, will, in the view of the Committee, only be violated where such failure prejudices the convict's right to a review, i.e. in situations where the evidence in question is indispensable to perform such a review. It follows that this is an issue which it is primarily for the appellate courts to consider.

10.8 In the present case, the State party's failure to preserve the original confession statement was made one of the grounds of appeal before the Judicial Committee of the Privy Council which, nevertheless, found that there was no merit in the appeal and dismissed it without giving further reasons. The Human Rights Committee is not in a position to re-evaluate the Judicial Committee's finding on this point, and finds that there was no violation of article 14, paragraph 5, in this respect.

Notes

...

3/ There is nothing in the file which indicates any earlier mention of such contrary instructions from the author.

- *Gomez v. Spain* (701/1996), ICCPR, A/55/40 vol. II (20 July 2000) 102 at paras. 3.1, 11.1 and 13.

...

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (*Juzgado de Instrucción*), who conducts all the pertinent investigations and, once he considers the case ready for the hearing, refers it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges is in charge of proceedings and hands down the sentence. Their decision is subject to judicial review proceedings only on very limited legal grounds. There is no possibility of a re-evaluation of the evidence by the Court of Cassation, as all factual determinations by the lower court are final. By contrast, those convicted of less serious crimes for which sentences of less than six years' imprisonment have been imposed have their cases investigated by a single judge (*Juzgado de Instrucción*) who, when the case is ready for the hearing, refers it to a single judge *ad quo* (*Juzgado de lo Penal*), whose decision may be appealed before the Provincial Court (*Audiencia Provincial*), thus ensuring an effective review not only of the application of the law, but also of the facts.

...

11.1 As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court on the basis of a procedure which his counsel, following the criteria laid down in article 876 *et seq,* of the Criminal Procedure Act, characterizes as an incomplete judicial review, the Committee takes note of the State party's claim that the Covenant does not require a judicial review to be called an appeal. The Committee nevertheless points out that, regardless of the name of the remedy in question, it must meet the requirements for which the Covenant provides. The information and documents submitted by the State party do not refute the author's complaint that his conviction and sentence were not fully reviewed. The Committee concludes that the lack of any possibility of fully reviewing the author's conviction and sentence..., the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met. The author was therefore denied the right to a review of his conviction and sentence, contrary to article 14, paragraph 5, of the Covenant.

...

13. ...[T]he author is entitled to an effective remedy. The author's conviction must be set

aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

See also:

- *Sineiro Fernández v. Spain* (1007/2001), ICCPR, A/58/40 vol. II (7 August 2003) 325 (CCPR/C/78/D/1007/2001) at paras. 7-9.

- *Thompson v. Saint Vincent and the Grenadines* (806/1998), ICCPR, A/56/40 vol. II (18 October 2000) 93 at paras. 2.1, 3.1, 8.2, 8.3 and 10.

...

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre Olliviere, a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January 1996...

...

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the convicted person the opportunity to make any comments on any information which the Governor-General may have received in this respect.1/ In this context, counsel argues that the death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment...

...

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6 (1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does

not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation or article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6 (2), 7, 14 (5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6 (1).
...
10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

1/ Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require.

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- *Sextus v. Trinidad and Tobago* (818/1998), ICCPR, A/56/40 vol. II (16 July 2001) 111 at paras. 2.1, 2.3, 7.3, 8 and 9.

...
2.1 On 21 September 1988, the author was arrested on suspicion of murdering his mother-in-law on the same day...
...
2.3 After a period of over 4 years and 7 months, on 14 March 1995, the Court of Appeal refused the author's application for leave to appeal.2/ On 10 October 1996, the Judicial Committee of the Privy Council in London rejected the author's application for special leave to appeal against conviction and sentence. In January 1997, the author's death sentence was

commuted to 75 years' imprisonment.

...

7.3 As to the claim of a delay of over four years and seven months between conviction and the judgment on appeal, the Committee ... recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c) and 5, read together, confer a right to a review of a decision at trial without delay. 24/ In Johnson v. Jamaica, 25/ the Committee established that, barring exceptional circumstances, a delay of four years and three months was unreasonably prolonged. In the present case, the State party has pointed again simply to the general situation, and implicitly accepted the excessiveness of the delay by explaining remedial measures taken to ensure appeals are now disposed of within a year. Accordingly, the Committee finds a violation of article 14, paragraphs 3 (c) and 5.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3,10, paragraph 1, and 14, paragraphs 3 (c) and 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Sextus with an effective remedy, including adequate compensation...

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Notes

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2/ On this date, after hearing argument, the Court refused leave to appeal and affirmed the conviction and sentence. The reasons for judgement (20 pages) were delivered shortly thereafter on 10 April 1995.

...

24/ *Lubuto v. Zambia* (Communication 390/1990) and *Neptune v. Trinidad and Tobago* (Communication 523/1992).

25/ Communication 588/1994.

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See also:

- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/908/2000) at para. 6.3

- *Mansaraj et al. v. Sierra Leone*, *Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone* (839/1998, 840/1998, 841/1998), ICCPR, A/56/40 vol. II (16 July 2001) 153 at paras. 2.1, 2.2, 5.6, 6.1 and 6.3.

...

LEGAL RIGHTS - CRIMINAL - Right to Appeal

2.1 The authors of the communications (submitted 12 and 13 October 1998), at the time of submission, were awaiting execution at one of the prisons in Freetown. The following 12 of the 18 authors were executed by firing squad on 19 October 1998: Gilbert Samuth Kandu-Bo; Khemalai Idrissa Keita; Tamba Gborie; Alfred Abu Sankoh (alias Zagalo); Hassan Karim Conteh; Daniel Kobina Anderson; John Amadu Sonica Conteh; Abu Bakarr Kamara; Abdul Karim Sesay; Kula Samba; Victor L. King; and Jim Kelly Jalloh.

2.2 The authors are all members or former members of the armed forces of the Republic of Sierra Leone. The authors were charged with, *inter alia*, treason and failure to suppress a mutiny, were convicted before a court martial in Freetown, and were sentenced to death on 12 October 1998.1/ There was no right of appeal.

...

5.6 The Committee notes the authors' contention that the State party has breached article 14, paragraph 5, of the Covenant in not providing for a right of appeal from a conviction by a court martial *a fortiori* in a capital case. The Committee notes that the State party has neither refuted nor confirmed the authors' allegation but observes that 12 of the authors were executed only several days after their conviction. The Committee considers, therefore, that the State party has violated article 14, paragraph 5, of the Covenant, and consequently also article 6, which protects the right to life, with respect to all 18 authors of the communication. The Committee's prior jurisprudence is clear that under article 6, paragraph 2, of the Covenant the death penalty can be imposed *inter alia* only, when all guarantees of a fair trial including the right to appeal have been observed.

6.1 The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Sierra Leone of articles 6 and 14, paragraph 5 of the Covenant.

...

6.3 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide, Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura, with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

Notes

1/ This is the only information provided by counsel on the convictions.

LEGAL RIGHTS - CRIMINAL - Right to Appeal

- *Boodlal Sooklal v. Trinidad and Tobago* (928/2000), ICCPR, A/57/40 vol. II (25 October 2001) 264 (CCPR/C/73/D/928/2000) at paras. 2.1-2.3, 4.10, 4.11, 5 and 6.

...
2.1 In May 1989, the author was arrested and charged with the offences of sexual intercourse and serious indecency with minors...

2.2 ...He was convicted and sentenced to 12 strokes with the birch, as well as 50 years of concurrent sentences, equivalent to a sentence of 20 years after remission.

2.3 The author lodged an appeal, which came up for hearing at the Court of Appeal on 19 November 1997. He did not receive any advice from his legal aid lawyer regarding this appeal, and did not meet with his lawyer prior to the hearing. During the proceedings, the author's lawyer, told the court that she could not find any grounds for pursuing the appeal. Consequently, leave to appeal was refused and the sentence was re-affirmed.
...
4.10 With regard to an alleged violation of article 14, paragraph 3 (d), the Committee notes that the State appointed defence counsel conceded that there were no grounds for appeal. The Committee, however, recalls its prior jurisprudence7/ and is of the view that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d), has been violated.

4.11 The Committee is of the view that the same facts as referred to in paragraph 4.10 do not raise a separate issue under article 14, paragraph 5 of the Covenant.

5. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Trinidad and Tobago of articles 9, paragraph 3, 14, paragraph 3 (c) and (d), and article 7 of the Covenant.

6. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing compensation and the opportunity to lodge a new appeal, or should this no longer be possible, to due consideration of granting him early release. The State party is under an obligation to ensure that similar violations do not occur in the future. If the corporal punishment imposed on the author has not been executed, the State party is under an

obligation not to execute the sentence.

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...

7/ In the following cases, the Committee decided that the withdrawal of an appeal without consultation, would amount to a violation of article 14, paragraph 3 (d) of the Covenant: *Collins v. Jamaica* (356/89), *Steadman v. Jamaica* (528/93), *Smith and Stewart v. Jamaica* (668/95), *Morrison and Graham v. Jamaica* (461/91), *Morrison v. Jamaica* (663/95), *McLeod v. Jamaica* (734/97), *Jones v. Jamaica* (585/94).

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- *Ashby v. Trinidad and Tobago* (580/1994), ICCPR, A/57/40 vol. II (21 March 2002) 12 (CCPR/C/74/D/580/1994) at paras. 10.5, 11 and 12.

...

10.5 Counsel...claims undue delay in the adjudication of Mr. Ashby's appeal. The Committee notes that the Port-of-Spain Assize Court found Mr. Ashby guilty of murder and sentenced him to death on 20 July 1989 and that the Court of Appeals affirmed the sentence on 20 January 1994. Mr. Ashby remained in detention during this time. The Committee notes the State party's explanation concerning the delay in the appeals proceedings against Mr. Ashby. The Committee finds that the State party did not submit that the delay in proceedings was dependent on any action by the accused nor was the non-fulfilment of this responsibility excused by the complexity of the case. Inadequate staffing or general administrative backlog is not sufficient justification in this regard.7/ In the absence of any satisfactory explanation from the State party, the Committee considers that the delay of some four and a half years was not compatible with the requirements of article 14, paragraphs 3 (c) and 5, of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 6, paragraphs 1 and 2 and 14, paragraphs 3 (c) and 5, of the Covenant.

...

12. Under article 2, paragraph 3, of the Covenant, Mr. Ashby would have been entitled to an effective remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.

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7/ Communication No. 390/1990, *Lubuto v. Zambia*, para 7.3.

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LEGAL RIGHTS - CRIMINAL - Right to Appeal

- *Wanza v. Trinidad and Tobago* (683/1996), ICCPR, A/57/40 vol. II (26 March 2002) 55 (CCPR/C/74/D/683/1996) at paras. 3.4, 7.3, 9.4, 10 and 11.

...

3.4 Counsel alleges a violation of article 14, paragraph 3 (c), *juncto* paragraph 5, because of the Court of Appeal's failure to hear Mr. Wanza's appeal within a reasonable time: it is submitted that a delay of almost five years for adjudicating an appeal against conviction and sentence in a capital case is wholly unacceptable. Reference is made to General Comment 13[21] of the Human Rights Committee.

...

7.3 With regard to the alleged delay in hearing the appeal, the State party argues that the period between the conviction and the hearing of the appeal was not unreasonable in the circumstances prevailing in the country at that time (following an attempted coup d'état). There had been an increase in the crime rate putting great pressure on the courts and leading to a backlog of cases. Difficulties were also experienced in the speedy preparation of a complete and accurate court record, causing delays. Since then, procedural reforms have been carried out to avoid such delays. Financial and other resources have been allocated to the judiciary and additional judges have been appointed both to the High Court and to the Court of Appeal. A computer aided transcription unit has been put in place to ensure the availability of a complete and accurate court record with the minimum of delay. As a result, appeals are now heard within one year of the conviction.

...

9.4 With regard to the delay of almost five years between the author's conviction and the determination of his appeal, the Committee has noted the State party's explanations in particular its statement that it has taken steps to remedy the situation. Nevertheless, the Committee wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe.5/ Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of almost five years between the author's conviction in February 1989 and the judgement of the Court of Appeal, dismissing his appeal, in January 1994, is incompatible with the requirements of article 14, paragraph 3(c) *juncto* article 14, paragraph 5 of the Covenant.

10. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 10, paragraph 1, and 14, paragraph 3 (c) *juncto* paragraph 5, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Wanza with an effective remedy, which includes consideration of early release.

Notes

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5/ See the Committee's Views in *Lubuto v. Zambia*, CCPR/C/55/D/390/1990, adopted on 31 October 1995, para. 7.3. See also the Committee's Views in *Sextus v. Trinidad & Tobago*, CCPR/C/72/D/818/1998, Views adopted on 16 July 2001, para. 7.3.

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- *Kennedy v. Trinidad and Tobago* (845/1998), ICCPR, A/57/40 vol. II (26 March 2002) 161 (CCPR/C/74/D/845/1998) at paras. 7.10, 8 and 9.

...

7.10 The author...claims that the absence of legal aid for the purpose of filing a constitutional motion amounts to a violation of article 14, paragraph 1, read together with article 2, paragraph 3. The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interests of justice so require (article 14(3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court, provided for under Section 14(1) of the Trinidadian Constitution, available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court, in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.

8. The Human Rights Committee...is of the view that the facts before it reveal violations by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10 paragraph 1, 14, paragraphs 3(c) and 5, and 14, paragraphs 1 and 3(d), the latter in conjunction with article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Rawle Kennedy with an effective remedy, including compensation and consideration of early release. The State party is under an obligation to take measures to prevent similar violations in the future.

- *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) (CCPR/C/74/D/677/1996) at paras. 2.1, 3.7, 9.4, 9.6, 9.7, 10 and 11.

...

LEGAL RIGHTS - CRIMINAL - Right to Appeal

2.1 On 28 May 1988, the author was detained by the police and taken to hospital. On 31 May 1988 he was discharged from the hospital and on 2 June 1988 he was formally charged with the murder of his cousin "Lucky" Teesdale on 27 May 1988. After a trial, which started on 6 October 1989, the author was convicted and sentenced to death on 2 November 1989 by the San Fernando Assizes Court. He applied for leave to appeal against conviction and sentence. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 22 March 1994, with reasons given on 26 October 1994. On 13 March 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. On 8 March 1996, a warrant for execution on 13 March was read out to the author. On 11 March, the author filed a constitutional motion to the High Court against the execution; the High Court granted a stay of execution. The Attorney General withdrew the case from the High Court and presented it before the Advisory Committee on the Power of Pardon. On 26 June, the author was informed that the President had commuted his death sentence to 75 years imprisonment with hard labour...

...

3.7 As regards the appeal, it is submitted that, in December 1993, the author was assigned a legal aid attorney whom he did not want to represent him, since that attorney was just out of law school and did not know the case at all. Although, reportedly, the author informed the legal aid authorities of his objections, counsel continued to represent him, but never consulted with him. The author had no opportunity to give instructions to his attorney and was not present at the appeal hearing. It is therefore submitted that the author has been deprived of an effective appeal in violation of article 14 (5).

...

9.4 With regard to the delays in hearing the author's appeal, the Committee notes that he was convicted on 2 November 1989 and that his appeal was dismissed on 22 March 1994. The Committee recalls that all stages of the procedure must take place 'without undue delay' within the meaning of article 14, paragraph 3 (c). Furthermore, the Committee recalls its previous jurisprudence that article 14, paragraph 3 (c), should be strictly observed in any criminal procedure. In the absence of an explanation by the State party, the Committee, therefore, finds that a delay of four years and five months between the conviction and the dismissal of his appeal constitutes a violation of article 14, paragraph 3 (c), of the Covenant in this regard.

...

9.6 The author further claims that at the Appeals Court he was assigned a legal aid attorney, whom he rejected as his representative. Article 14, paragraph 3 (d), stipulates the right to defend oneself in person or through legal assistance of his own choosing. However, the Committee recalls its previous jurisprudence that an accused is not entitled to choice of counsel if he is being provided with a legal aid lawyer, and is otherwise unable to afford legal representation. Therefore, the Committee finds that article 14, paragraph 3 (d), was not violated in the present case.

9.7 Furthermore, the author claims that he was deprived of an effective appeal because he was represented by an attorney who never consulted him and to whom the author could give no instructions. In this connection the Committee considers that appeals are argued on the basis of the record and that it is for the lawyer to use his professional judgement in advancing the grounds for appeal, and in deciding whether to seek instructions from the defendant. The State party cannot be held responsible for the fact that the legal aid attorney did not consult with the author. In the circumstances of the instant case, the Committee is not in a position to find a violation of article 14, paragraph 3 (d) and 5, with regard to the author's appeals hearing.

...

10. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 3 (b) and (c) of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, Mr. Teesdale is entitled to an effective remedy, including compensation and consideration by the appropriate authorities of a reduction in sentence. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Rogerson v. Australia* (802/1998), ICCPR, A/57/40 vol. II (3 April 2002) 150 (CCPR/C/74/D/805/1998) at para. 7.5.

...

7.5 As to the author's allegations of violations of article 14, paragraph 5, of the Covenant by the Northern Territory Court of Appeals and the High Court of Australia when reviewing his appeal of the finding of contempt, the Committee notes that this provision guarantees a right to an appeal 'according to law'. The Committee recalls its previous jurisprudence that a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review of the conviction and sentences and as long as the procedure allows for due consideration of the nature of the case.3/ Thus, in the circumstances, the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

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Notes

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3/ *Lumley v. Jamaica*, Case No. 662/1995, vies of 31 March 1999, para. 7.3.

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- *Ricketts v. Jamaica* (667/1995), ICCPR, A/57/40 vol. II (4 April 2002) 29

(CCPR/C/74/D/667/1995) at paras. 3.2 and 7.3.

...
3.2 ...[T]he author claims to be a victim of a violation of articles 14 (3) (b) and (d) of the Covenant. The author's right to a defence was not respected, in that the legal aid lawyer, who represented him before the Jamaican Court of Appeal never met him before the hearing, never contacted the former lawyer and therefore, did not provide the author with effective and adequate representation.
...
7.3 In respect of the author's claim that he was not adequately represented during the hearing of his appeal, the Committee notes that the legal aid lawyer who represented the author for his appeal, did not contact the author or the privately retained lawyer who represented him at the first instance court, before the hearing of the appeal. Nevertheless, although it is incumbent on the State party to provide effective legal aid representation, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there has been a miscarriage of justice. In the circumstances, the Committee is not able to find a violation of article 14 3 (b) and (d).

- *Francis et al. v. Trinidad and Tobago* (899/1999), ICCPR, A/57/40 vol. II (25 July 2002) 206 (CCPR/C/75/D/899/1999) at para. 5.5.

...
5.5 As to the claim of a delay of four years and three months between conviction and the judgement on appeal, the Committee notes that the authors lodged their application for leave to appeal in November 1994, and that the Court disposed of the appeal some five months later in March 1995. In the absence of any argument by the authors that responsibility for the delay in lodging the appeal could be imputed to the State party, the Committee is unable to find that there has been a violation of article 14, paragraphs 3 (c) and 5, of the Covenant.

- *Ruiz Agudo v. Spain* (864/1999), ICCPR, A/58/40 vol. II (31 October 2002) 134 (CCPR/C/76/D/864/1999) at paras. 2.1-2.3, 3.3 and 9.3.

...
2.1 From 1971 to 1983, Alfonso Ruiz Agudo held the post of Director of the Caja Rural Provincial in the small town of Cehegín (Murcia), where he was responsible for customer relations. In the period from 1981 to 1983, 75 fictitious loan policies, which duplicated an equal number of real loans, were transacted in the office of the Cehegín bank. In other words, there were bank customers who signed blank loan forms that were later completed in duplicate.

2.2 The Caja Rural Provincial was taken over by the Caja de Ahorros de Murcia, and both banks appeared in the criminal proceedings opened against Alfonso Ruiz Agudo and others as private complainant or injured party. Alfonso Ruiz Agudo's counsel immediately asked for the original files of the accounts, which the author kept at the Cehegín bank and where, according to the complainant, the money from the fictitious loans was deposited, to be produced at the proceedings. According to the author of the communication, these files would have shown that the money went not to Alfonso Ruiz Agudo but to other persons. The bank submitted a computerized version of the files.

2.3 Counsel maintains that, although proceedings were initiated against his client in 1983, no judgement was handed down until 1994. The judgement was eventually passed by the judge of the No. 1 Criminal Court of Murcia, sentencing the author to a custodial penalty of two years, four months and one day of ordinary imprisonment with a fine for an offence of fraud, and to a further identical penalty for the offence of falsifying a commercial document.

...

3.3 He also points out that there was no verbatim record of the statements of witnesses, experts, parties and counsel but only a summary drawn up by the clerk of the court, so that the proceedings, according to the author, lacked essential guarantees. Moreover, the accusing parties were at a clear advantage in the proceedings. He mentions article 790, paragraph 1, of the Criminal Procedure Act, maintaining that the rules of summary proceedings infringe the basic principle of equality of arms in judicial proceedings.

...

9.3 With regard to the absence of a verbatim record of the trial, the Committee finds that the author has not demonstrated in what way he was caused harm by the absence of such a document. Consequently, the Committee considers that there was no violation either of article 14, paragraph 1, or of the right of appeal provided for in article 14, paragraph 5.

- *Gelazauskas v. Lithuania* (836/1998), ICCPR, A/58/40 vol. II (17 March 2003) 104 (CCPR/C/77/D/836/1998) at paras. 2.1, 2.2, 3.1, 4.3, 4.4, 7.1-7.6, 8 and 9.

...

2.1 On 4 May 1994, the author was sentenced, together with a co-defendant, to 13 years imprisonment for the murder, on 20 March 1993, of Mr. Michailas Litvinenka...

2.2 Applications for cassation motions were made on behalf of the author on four occasions but a review of his case was always denied. On 28 September 1995, the author's mother made an application for cassation motion1/. On the same day, the author's counsel made a similar application for cassation motion, which was rejected by the chairman of the Division of Criminal Cases of the Supreme Court on 8 December 1995. On 2 April 1996, the author's counsel made another application for cassation motion, which was also rejected by the

chairman of the Supreme Court. Finally, on 15 April 1996, the author's counsel made a last application for cassation motion which was rejected on 12 June 1996.

...

3.1 The author first alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he had no possibility to make an appeal against the judgement of 4 May 1994. In this case, the court of first instance was the Supreme Court and, under the State party's legislation, its judgments are not subject to appeal. Such a judgement may be reviewed by an application for cassation motion to the Supreme Court but a review of the judgment is dependent on the discretion of the chairman of the Supreme Court or of the Division of Criminal Cases of the Supreme Court. All attempts to bring such an application have failed.

...

4.3 At the time of the sentence, a two-tier court system - local courts and the Supreme Court - was in force in the State party. Both courts could function as first instance courts and, in accordance with the Code of Criminal Procedure valid at that time, there were two types of appeal possible:

- Court sentences that were not yet in force could be appealed in cassation to the Supreme Court within 7 days after the announcement of the sentence. Nevertheless, sentences of the Supreme Court taken in first instance were final and not susceptible to appeal in cassation.

- Sentences of local courts and of the Supreme Court could, after having come into force, be challenged by "supervisory protest" within one year of the coming into force. Only the Chairperson of the Supreme Court, the Prosecutor-General and their deputies had a right of submission of this "supervisory protest". A sentenced person or his counsel only had the right to address these persons with a request that they submit a "supervisory protest". If such a request was made, the "Presidium" of the Supreme Court would hear the case and decide whether to dismiss the protest, dismiss the criminal case and acquit the person, return the case to the first instance, or take another decision.

4.4 This procedure was applicable until 1 January 1995. Nevertheless, in the present case, neither the author, nor his counsel made a request for the submission of a "supervisory protest" after the sentence came into force for the author.

...

7.1 Regarding the submission of a "supervisory protest", the Committee notes the State party's contention that the author had, between 4 May 1994 and 1 January 1995, a "right to address the Chairperson of the Supreme Court of Lithuania, the Prosecutor-General and their deputies with a request to submit a supervisory protest", that this possibility constitutes a right to review in the sense of article 14, paragraph 5, of the Covenant, and that the author did not use this right. The Committee also notes the author's contention that the decision to

submit a "supervisory protest" is an exceptional right depending on the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court in first instance.

7.2 In the present case, the Committee notes that, according to the wording of the last sentence of the judgment of 4 May 1994, "[t]he verdict is final and could not be protested or cassation appealed". It also notes that it is not contested by the State party that the submission of a "supervisory protest" constitutes an extraordinary remedy depending on the discretionary powers of the Chairperson of the Supreme Court, the Prosecutor-General or their deputies. The Committee is therefore of the opinion that, in the circumstances, such a possibility is not a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant. Moreover, recalling its decision in case No. 701/1996 4/, the Committee observes that article 14, paragraph 5, implies the right to a review of law and facts by a higher tribunal. The Committee considers that the request for the submission of a "supervisory protest" does not constitute a right to have one's sentence and conviction reviewed by a higher tribunal under article 14, paragraph 5, of the Covenant.

7.3 Regarding the submission of a cassation motion, the Committee notes the State party's contention that, between 1 July 1994 and 4 May 1995, it was possible for the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to entertain a cassation motion at the request of the author, that this possibility constitutes a right to review in the sense of article 14, paragraph 5 of the Covenant, and that the author did not use this right within the time limit of one year from the date the judgement entered into force, that is before 4 May 1995, in accordance with article 419 of the State party's Code of Criminal Procedure. The Committee on the other hand also notes the author's contention that the decision to submit a cassation motion, similarly to that of submitting a "supervisory protest", is an extraordinary right at the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court at first instance. The Committee further notes the author's contention that the delay of one year referred to by the State party only concerns cassation motions aiming at worsening the situation of the accused.

7.4 The Committee notes that the State party has not provided any comment on the author's arguments related to the prerogatives of the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts on the submission of a cassation motion and the time limit to submit an application for a cassation motion. In this regard, the Committee refers to two letters, transmitted by the author, dated 28 December 1998 (from the Chairman of the Division of the Criminal Cases of the Supreme Court) and 5 April 1996 (from the Chairman of the Supreme Court), both rejecting the application for a cassation motion on the grounds, respectively, that "the motives of [the] cassation complaint [...] are denied by evidence,

[which] were examined in court and considered in the verdict" and that "[the State party's legislation] does not provide [that the Supreme Court] is a cassation instance for verdicts [...] adopted by itself. Verdicts of [the Supreme Court] are final and are not appealable." The Committee notes that these letters do not refer to a time limit.

7.5 The Committee, taking into account the author's observations with regard to the extraordinary character and the discretionary nature of the submission of a cassation motion, the absence of response from the State party thereupon, and the form and content of the letters rejecting the applications for a cassation motion, considers that the material before it sufficiently demonstrates that, in the circumstances of the case, the applications made by the author for a cassation motion, even if they had been made before 4 May 1995 as argued by the State party, do not constitute a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant.

7.6 Moreover, the Committee, recalling its reasoning under paragraph 7.2 above, is of the opinion that this remedy does not constitute a right of review in the sense of article 14, paragraph 5, of the Covenant because the cassation motion cannot be submitted to a higher tribunal as it is required under the said provision.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author(s) with an effective remedy, including the opportunity to lodge a new appeal, or should this no longer be possible, to give due consideration of granting him release. The State party is also under an obligation to prevent similar violations in the future.

...

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Notes

1/ The author claims that he has not received any answer on this application.

...

4/ *Cesario Gómez Vásquez v. Spain*, Case No. 701/1996, Views adopted on 20 July 2000.

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- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/908/2000) at paras. 2.1, 2.2, 3.6 and 6.6.

...

LEGAL RIGHTS - CRIMINAL - Right to Appeal

2.1 On 17 March 1986, the author was arrested for murder alleged to have been committed on 28 February 1986 and was subsequently charged with murder. Following a Preliminary Enquiry conducted before a Magistrate's Court, the trial took place before the High Court of Justice of San Fernando between 22 June 1988 and 4 July 1988, and the author was convicted of murder and sentenced to death. On 4 January 1994, the death sentence was commuted to life imprisonment for the rest of his "natural life".

2.2 On 26 April 1994, the Court of Appeal of the Republic of Trinidad and Tobago dismissed his appeal against his conviction and sentence. The author was represented by court-appointed counsel during his trial and appeal. On 21 March 1997, the author lodged a petition for special leave to appeal to the Judicial Committee of the Privy Council in London. Leave was granted. The appeal was heard but was dismissed on 17 December 1998.

...

3.6 ...[T]he author claims a violation of article 14, read together with article 2, paragraph 3 of the Covenant because a subsequent constitutional challenge to the High Court in relation to the length of the term imposed was not open to him as legal aid is not provided for such motions and the costs involved are beyond the means of the author. He states that an originating motion pursuant to article 14(1) of the Constitution, could have been lodged on the basis that his life imprisonment for the rest of his "natural life" is arbitrary and cruel. However, because of the lack of legal aid for Constitutional Motions, the author claims that he is effectively barred from exercising his constitutional right to seek redress for the violation of his rights. He cites the Human Rights Committee's decision in *Currie v. Jamaica*4/ for the proposition that remedies in the Constitutional Court should be available and effective and in the context of a review of irregularities in a criminal trial legal assistance should be provided to those who have not the means to take such an action. He also cites jurisprudence from the European Court of Human Rights5/ for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants.

...

6.6 As to the claim that he was denied access to the courts in not being provided with legal aid to make a constitutional challenge on the issue of the length of the sentence imposed upon commutation, the Committee recalls its prior jurisprudence12/ that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interest of justice so require. The Committee is therefore of the view that the State party is not expressly required to provide legal aid outside the context of a criminal trial. As the author's claim relates to the commutation of his sentence rather than the fairness of the trial itself, the Committee cannot find that there has been a violation of article 14, paragraph 1, of the Covenant, in this respect.

...

Notes

...

4/ Communication No. 377/1989, Views adopted on 29 March 1994, where the Committee found that "where a convicted person seeking constitutional review of the irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court and a fair hearing, and is thus a violation of article 14, paragraph 1, juncto article 2, paragraph 3."

5/ *Golder v. UK* [1975] 1 EHRR 524, and *Airey v. Ireland* [1979] 2 EHRR 305.

...

9/ *Lubuto v. Zambia*, Case No. 390/1990, Views adopted on 31 October 1995 and *Neptune v. Trinidad and Tobago*, [Case No. 523/1992, Views adopted on 16 July 1996].

...

12/ *Kennedy v. Trinidad and Tobago*, [Case No. 845/1998, Views adopted on 26 March 2002].

- *Estevill v. Spain* (1004/2001), ICCPR, A/58/40 vol. II (25 March 2003) 552 (CCPR/C/77/D/1004/2001) at paras. 2.1, 2.2 and 6.2.

...

2.1 On 4 July 1996, the Supreme Court sentenced Mr. Pascual Estevill, a member of the General Council of the Judiciary, to six years' suspension from the exercise of judicial functions for breach of public trust in combination with two offences of unlawful detention.

2.2 The author submitted an application for *amparo* to the Constitutional Court, claiming violation of his right to effective legal protection and infringement of his right to due process, insofar as the judgement handed down by the Supreme Court, acting as court of first instance, denied the author access to other remedies. His application was turned down on 17 March 1997.

...

6.2 The only complaint by the author is related to article 14, paragraph 5, of the Covenant, which stipulates that "Everyone convicted of a crime shall have the right to his conviction and sentenced being reviewed by higher tribunal." The Committee notes that the State party's legal system would have granted the right of appeal if the author had been tried by the High Court of Catalonia. However, it was the author himself who repeatedly insisted that he be tried directly by the Supreme Court. Bearing in mind that the author is a former judge with a great deal of experience, the Committee considers that, by insisting on being tried only

by the Supreme Court, the author has renounced his right of appeal. The Committee considers that, in the circumstances, the allegation by the author constitutes an abuse of the right to submit communications, in accordance with article 3 of the Optional Protocol.
...

- *Weiss v. Austria* (1086/2002), ICCPR, A/58/40 vol. II (3 April 2003) 375 (CCPR/C/77/D/1086/2002) at paras. 2.1-2.3, 2.8, 2.11-2.14, 2.16, 9.3, 9.6 and 10.1.

...
2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him *in absentia* on 18 February 2000 to 845 years' imprisonment (with possibility to reduce it, in the event of good behaviour, to 711 years(sic)) and pecuniary penalties in excess of US$ 248 million.

2.2 The author's counsel lodged a notice of appeal within the ten-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.1/

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention...
...
2.8 On 8 May 2002, the Upper Regional Court...found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.3/
...
2.11 On 24 May, the author...petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending

decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States...Secondly, on 17 May 2002, he had lodged a "negative competence challenge"...to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.
...
2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.
...
9.3 As to the author's claim that by operation of the “fugitive disentitlement” doctrine he was denied a full appeal, the Committee notes that, on the information before it, it appears that the author - by virtue of being extradited on fewer than all the charges for which he was initially sentenced - will, according to the rule of specialty, be re-sentenced. According to

information supplied to the State party, such a re-sentencing would entitle the author fully to appeal his conviction and sentence. The Committee thus need not consider whether the "fugitive disentitlement" doctrine is compatible with article 14, paragraph 5, or whether extradition to a jurisdiction where an appeal had been so denied gives rise to an issue under the Covenant in respect of the State party.

...

9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself, after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgment of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgment of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant...

Notes

1/ The author relies for this proposition on a decision of another United States District Court in *United States v Bakhtiar* 964 F Supp 112. That case held that, when a person was extradited on fewer charges than s/he had been convicted of, the original conviction and sentence remained intact, but an application for *habeas corpus* would lie against the executive once sentence had been served in respect of the extraditable offences...

...

3/ The author provides the terms of the Treaty which provide: "Convictions in absentia.

"If the person sought has been found guilty in absentia, the executive authority of the

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Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

- *Reece v. Jamaica* (796/1998), ICCPR, A/58/40 vol. II (14 July 2003) 61 (CCPR/C/78/D/796/1998) at paras. 2.1 and 7.4.

...
2.1 The author was arrested on 13 January 1983, and charged with two counts of murder with respect to events that occurred on 11 January 1983. At the preliminary hearing, he was assigned a legal aid trial lawyer. At trial before the Clarendon Circuit Court, from 20 to 27 September 1983, the author pleaded not guilty to both counts but admitted to having been at the scene of the murders when they took place. He was convicted by jury on both counts and sentenced to death.
...
7.4 As to the claim of a violation of article 14, paragraphs 3 (b) and 5, concerning the preparation and conduct of the appeal, the Committee notes that the author signed the application for leave to appeal which detailed the grounds of appeal and is therefore not in a position to claim he was unable to instruct his appellate lawyer. Moreover, the Committee recalls its jurisprudence...that a State party cannot generally be held responsible for the conduct of a lawyer in court. In this case, the Committee does not discern any exceptional matter in the manner the appeal was conducted that would warrant departure from this approach. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

- *Shukuru Juma v. Australia* (984/2001), ICCPR, A/58/40 vol. II (28 July 2003) 521 (CCPR/C/78/D/984/2001) at paras. 2.1-2.3 and 7.5.

...
2.1 On 2 February 1997, the author was arrested and brought to Dutton Police Station where he was charged with murder. On 25 November 1998, he was convicted of murder and on 26 November 1998 sentenced to life imprisonment. He appealed against his conviction and applied for an extension of time for the filing of the appeal to the Court of Appeal. Both his appeal and request for an extension of time were dismissed on 16 July 1999. The author then sought special leave to appeal from the High Court of Australia. On 24 November 2000, the High Court dismissed his application.

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2.2 From the time of his arrest to the final appeal of his case the author was not provided with interpretation facilities, despite his requests for an interpreter at each stage of the proceedings. He claims that he requested the assistance of an interpreter prior to the interview with the police, and that he requested interpretation from his lawyer during the trial at first instance. During the Court of Appeal hearing, the author was provided access to an interpreter to conduct interpretation by telephone conference. However, the author refused this facility as the interpreter was not in the courtroom and he believed that he could not trust him/her. He states that he refused to talk to the interpreter, as "the police had forced me against my will to give a record of interview and I was assaulted by...[a Detective] of the Queensland police".1/

2.3 In his application for special leave to appeal to the High Court, the author alleged that he was "forced" to accept a legal aid lawyer who was only assigned to his case on the morning of the appeal, and was, therefore, unfamiliar with it. In addition, the lawyer refused to refer to the points of law raised in the application prepared by the author. Also during the hearing, the author alleges that one of the judges asked on three occasions where the interpreter was but his counsel merely responded that he knew the case.

...

7.5 With respect to the issue of a violation of article 14, paragraph 5, the Committee observes that it is not clear from the author's submission on what grounds he makes such a claim. This article protects his right to have his conviction and sentence reviewed by a higher tribunal. It appears that his claim relates to the dismissal by the High Court of his application for special leave to appeal as well as the fact that he was allegedly "forced" to accept a legal aid lawyer who was entrusted to his case only the day before his application to the High Court and during the hearing his lawyer allegedly failed to bring up the arguments outlined in the author's application. The Committees notes that the mere dismissal of a request for special leave to appeal is not sufficient to demonstrate that there has been a violation of article 14, paragraph 5. It recalls18/ that this article does not require an appellate court to proceed to a factual retrial, "but that it conduct an evaluation of the evidence presented at the trial and of the conduct of the trial". The Committee notes from the judgment of the Court of Appeal that it did evaluate the evidence against the author and specifically dealt with the author's main claim that he should have been provided with an interpreter. The High Court also examined this claim and rejected it. The Committee also observes that the complaints made against counsel do not support the allegation of a violation of article 14, paragraph 5. It, therefore, finds this part of the communication inadmissible on the grounds of insufficient substantiation, under article 2 of the Optional Protocol.

...

Notes

1/ No further information on this point is provided and the author does not specifically state

it as a claim.

...

18/ *Perera v. Australia*, Communication No. 536/1993, Inadmissibility Decision adopted on 28 March 1995.

_____

- *Semey v. Spain* (986/2001), ICCPR, A/58/40 vol. II (30 July 2003) 303 (CCPR/C/78/D/986/2001) at paras. 2.7, 9.1 and 9.2.

...

2.7 The author applied to the Supreme Court for judicial review of his case, but the Court limited itself to pronouncing on the grounds for review and upheld the sentence of the lower Court; at no time did it review the evidence on which the Provincial Court said it had based its guilty verdict. He also submitted an appeal to the Constitutional Court which was not entertained because it had been submitted too late, i.e. not when the Supreme Court handed down its decision.

...

9.1 The Committee takes note of the author's arguments regarding a possible violation of article 14, paragraph 5, of the Covenant in that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to convict him. The Committee also notes that, according to the State party, the Supreme Court did review the sentencing court's weighing-up of the evidence. Despite the State party's position to the effect that the evidence was re-evaluated in the context of the judicial review, and on the basis of the information and papers which the Committee has received, the Committee reiterates its Views expressed in the *Cesáreo Gómez Vázquez* case and considers that the review was incomplete for the purposes of article 14, paragraph 5, of the Covenant. The 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 as found by the Committee reveal a violation of article 14, paragraph 5, of the Covenant in respect of Joseph Semey.

9.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author should be entitled to have his conviction reviewed in conformity with the requirements of article 14, paragraph 5, of the Covenant. The State party is under an obligation to prevent similar violations in the future.

- *Judge v. Canada* (829/1998), ICCPR, A/58/40 vol. II (5 August 2003) 76 (CCPR/C/78/D/829/1998) at paras. 2.1-2.8, 7.7, 10.8, 10.9, 11 and 12.

...

LEGAL RIGHTS - CRIMINAL - Right to Appeal

2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.1/

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.2/

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.3/

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the refusal to grant leave.

2.7 The author then petitioned the Superior Court of Quebec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Quebec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.
...

7.7 As regards the author's claim under article 14, paragraph 5, of the Covenant, and that Canada violated article 6 by deporting him, the Committee observed that the author had the *right* under Pennsylvanian law to a full appeal against his conviction and sentence. Furthermore, the Committee noted that, according to the documents provided by the parties, while the extent of the appeal was limited after the author had become a fugitive, his conviction and sentence were reviewed by the Supreme Court of Pennsylvania, which has a statutory obligation to review all death penalty cases. According to these documents, the author was represented by counsel and the Court reviewed the evidence and law as well as the elements required to sustain a first-degree murder conviction and capital punishment. In these particular circumstances, the Committee found that the author had not substantiated, for purposes of admissibility, his claim that his right under article 14, paragraph 5, was violated and that, therefore, his deportation from Canada entailed a violation by Canada of article 6 of the Covenant.

...

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Quebec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Quebec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons...the Court of Appeal could have reviewed the judgment on the merits.

10.9 The Committee recalls its decision in *A. R. J. v. Australia*37/, a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was

sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights - the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a State where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author.

Notes

1/ The author states that the mode of execution was subsequently changed to execution by lethal injection.

2/ As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

3/ As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50(1)(a) of the Immigration Act. An extradition request was never received.

...

37/ [*A. R. J. v. Australia*, Communication No. 692/1996, Views adopted on 28 July 1997].

For dissenting opinions in this context, see Judge v. Canada (829/1998), ICCPR, A/58/40 vol. II (5

August 2003) 76 (CCPR/C/78/D/829/1998) at Individual Opinion by Mrs. Christine Chanet, 99 and Individual Opinion by Mr. Hipóito Solari-Yrigoyen, 101.

- *Piscioneri v. Spain* (956/2000), ICCPR, A/58/40 vol. II (7 August 2003) 493 (CCPR/C/78/D/956/2000) at para. 6.7.

  ...
  6.7 In relation to the author's complaint concerning article 14, paragraph 5, although in his document dated 8 June 2001 the author states that his application for reconsideration of the judgement (*casación*) against him for trafficking in hashish was dismissed, the Committee notes that both in the supplement to his initial communication and in his comments on the observations by the State party, he confines himself to claiming that the violation of the article in question consisted of a refusal by the Constitutional Court to interrupt the judicial review proceedings (*casación*) he had initiated. The mere suspension of an on-going proceeding cannot be considered, in the Committee's opinion, to be within the scope of the right protected in paragraph 5 of article 14 of the Covenant, which only refers to the right to a revision by a higher tribunal. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.
  ...

- *Romanov v. Ukraine* (842/1998), ICCPR, A/59/40 vol. II (30 October 2003) 407 (CCPR/C/79/D/842/1998) at paras. 3.1 and 6.5.

  ...
  3.1 The author contends that he was wrongly convicted of attempted murder, because he did not know that the clopheline given to the victim was life threatening, and did not know what he was doing at the time he struck the victim over the head. He disputes the Courts' findings of evidence, particularly the reliance on his accomplice's testimony, and states that he was not afforded a fair trial. He contends that the Court did not presume him innocent until proven guilty. He also claims that his arguments about the relevant evidence, and what really occurred in Maksimenko's apartment, were not considered by the Supreme Court of Ukraine, and that his right to have his conviction reviewed by a higher tribunal according to law was therefore violated. He claims that, given the circumstances, the State party violated articles 2, 7, 9 and 14 of the Covenant. He does not however link specific and concrete actions of the State party to the particular alleged violations of the Covenant.
  ...
  6.5 In relation to the author's right to have his conviction and sentence reviewed by a higher tribunal according to law, as provided for in article 14(5), the Committee notes that an appellate procedure should, consistent with the Committee's jurisprudence, entail a full

review of the conviction and sentence, together with a due consideration of the case at first instance. In this regard, the Committee notes that, from the material provided, Ukrainian law requires the appeal court to consider all relevant evidence and arguments. It further appears from the judgment of the Ukrainian Supreme Court that it did consider the author's arguments, particularly in relation to his accomplice's evidence, and that it considered the author's version of events. The Supreme Court found, based on its review of the decision at first instance, that there was no basis to allow the appeal. In light of the above, the Committee considers that the author has not substantiated his claims under article 14(5), and that it is therefore inadmissible pursuant to article 2 of the Optional Protocol.

- *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at para. 6.5.

...
6.5 The Committee has noted that the author's husband was unable to appeal his conviction and sentence by way of an ordinary appeal, because the law provides that a review of judgements of the Military Chamber of the Supreme Court is at the discretion of a limited number of high-level judicial officers. Such review, if granted, takes place without a hearing and is allowed on questions of law only. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, as long as the procedure allows for due consideration of the nature of the case.5/ In the absence of any explanation from the State party in this regard, the Committee is of the opinion that the above-mentioned review of judgements of the Military Chamber of the Supreme Court, falls short of the requirements of article 14, paragraph 5, of the Covenant, and, consequently, that there has been a violation of this provision in Mr. Saidov's case. 6/

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Notes

...

5/ See *Reid v. Jamaica*, communication No. 355/1989, para. 14.3, and *Lumley v. Jamaica*, communication No. 662/1995, para. 7.3.

6/ See *Domukovsky et al. v. Georgia*, communications Nos. 623-627/1995.

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- *Nallaratnam v. Sri Lanka* (1033/2001), ICCPR, A/59/40 vol. II (21 July 2004) 246 at paras. 7.3, 7.5 and 7.6.

...

7.3 As to the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in case No. 6825/1994, which has remained unexplained by the State party, the Committee notes...that more than two years of this period, from 3 January 1998 to 28 January 2000, relate to the time after the entry into force of the Optional Protocol. The Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c), and 5, read together, confer a right to review of a decision at trial without delay 16/. In the circumstances, the Committee considers that the delay in the instant case violates the author's right to review without delay and consequently finds a violation of article 14, paragraphs 3 (c), and 5 of the Covenant.

...

7.5 The Human Rights Committee...is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.

7.6 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

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Notes

...

16/ *Lubuto v. Zambia*, case No. 390/1990, Views adopted on 31 October 1995; *Neptune v. Trinidad and Tobago*, case No. 523/1992, Views adopted on 16 July 1996; *Sam Thomas v. Jamaica*, case No. 614/95, Views adopted on 31 March 1999; *Clifford McLawrence v. Jamaica*, case No. 702/96, Views adopted on 18 July 1997; *Johnson v. Jamaica*, case No. 588/1994, Views adopted on 22 March 1996.

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- *Girjadat Siewpersaud et al. v. Trinidad and Tobago* (938/2000), ICCPR, A/59/40 vol. II (29 July 2004) 132 at para. 6.2.

...

6.2 As to the claim of a delay of 4 years and 10 months between conviction and dismissal of the appeal, counsel has invoked article 9, paragraph 3, but as the issues raised clearly relate to article 14, paragraph 3 (c) and 5, the Committee will examine them under that article. The Committee considers that a delay of 4 years and 10 months between the conclusion of the trial on 19 January 1988 and the dismissal of the authors' appeal on 29 March 1993 is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay. The Committee accordingly concludes

that there has been a violation of article 14, paragraph 5 in conjunction with paragraph 3 (c), of the Covenant.

- *Van Hulst v. The Netherlands* (903/2000), ICCPR, A/60/40 vol. II (1 November 2004) 29 at paras. 6.4 and 6.5.

...
6.4 With regard to the author's claim that his right under article 14, paragraph 5, to have his conviction and sentence reviewed by a higher tribunal was violated, because the judgements other than that of 16 April 1996 by the Supreme Court did not give sufficient reasons for the courts' dismissal of his defence challenging the lawfulness of the evidence obtained, the Committee recalls that, where domestic law provides for several instances of appeal, a convicted person must have effective access to all of them. To ensure the effective use of this right, the convicted person is entitled to have access to duly reasoned, written judgements in the trial court and at least in the court of first appeal.

6.5 The Committee notes that the judgements of the 's-Hertogenbosch District and Appeal Courts, as well as the judgement of the Supreme Court dated 30 November 1993 and the judgement of the Arnhem Court of Appeal, do give reasons for the dismissal of the author's defence. It recalls that it is generally for the national tribunals, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it can be ascertained that the proceedings before these tribunals were clearly arbitrary or amounted to a denial of justice. The Committee considers that the author has not substantiated, for purposes of admissibility, that the reasons given by the Dutch courts for rejecting his challenge to the admissibility of the prosecution's case were arbitrary or amounted to a denial of justice. It must therefore follow that this part of the communication is inadmissible under article 2 of the Optional Protocol.

- *Alba Cabriada v. Spain* (1101/2002), ICCPR, A/60/40 vol. II (1 November 2004) 144 at paras. 2.1-2.3, 7.2, 7.3, 8 and 9.

....
2.1 On 4 April 1997 the Cádiz Provincial Court sentenced the author for an offence against public health to 10 years and 1 day in prison, suspension from public office, and payment of a fine of 120 million pesetas. The judgement stated that the author had been under surveillance by agents of the narcotics squad for alleged participation in the distribution of narcotic substances. The author was arrested together with an Irish citizen, from whom 2,996 tablets were confiscated containing a substance that proved to be an amphetamine derivative known as MDA. The judgement stated that the author was an intermediary for the

Irish citizen in the distribution of drugs to third parties.

2.2 The author filed an application with the Supreme Court for judicial review and annulment, alleging violation of his right to the presumption of innocence and errors in the appraisal of evidence...

2.3 In a judgement dated 27 January 1999, the Supreme Court rejected the application for annulment. Regarding the alleged violation of the presumption of innocence, the Court stated that it only had a duty to consider whether there was multiple, duly verified, concomitant, mutually corroborative evidence, and that the reasoning in the court's conclusions and deductions was based on logic and experience, in order to ascertain that the logical inference made by the trial court is not irrational, capricious, absurd or extravagant, but is in accordance with the rules of logic and standards of experience. The Court stated that it was strictly prohibited from reappraising the facts that the court of first instance had considered as evidence, since, by law, the appraisal function fell within the exclusive competence of the sentencing court. With respect to the alleged error of fact in appraising the evidence, the Supreme Court stated that the Ministry of Health and Consumer Affairs had initially identified the seized substance as MDMA, but that it had turned out to be MDEA or MDA, both amphetamine derivatives.

...

7.2 The Committee observes that neither the author nor the State party has disputed the facts related in connection with the alleged violation of article 14, paragraph 5, of the Covenant. The Committee observes that the Supreme Court expressly stated that it was not competent to reappraise the facts forming the basis for the conviction of the author, a function which the Court considered the exclusive and sole prerogative of the court of first instance. Further, the Supreme Court considered whether or not the presumption of innocence of the author had been violated, and ascertained that there was evidence of his guilt, that the evidence was multiple, concomitant and mutually corroborative, and that the reasoning used by the sentencing court to deduce the liability of the author on the basis of the evidence was not arbitrary, since it was based on logic and experience. It is in this context that the Committee must consider whether the review carried out by the Supreme Court is compatible with the provisions of article 14, paragraph 5, of the Covenant.

7.3 The Committee notes the comments made by the State party about the nature of the Spanish remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases (701/1996; 986/2001; 1007/2001), such limited review by a higher tribunal is not in accordance with the requirements of article 14, paragraph 5. Therefore, in the light of the limited scope of review applied by the Supreme Court in the author's case, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

8. Accordingly, the Human Rights Committee is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

- *Terrón v. Spain* (1073/2002), ICCPR, A/60/40 vol. II (5 November 2004) 111 at paras. 2.1, 7.1-7.4, 8 and 9.

...
2.1 The author was a member of the Regional Assembly (*Cortes*) of Castilla-La Mancha. He was tried by the Supreme Court for forging of a private document and sentenced on 6 October 1994 to two years' imprisonment and 100,000 pesetas in compensation.
...
7.1 The Committee must decide whether the author's conviction at first instance by the Supreme Court with no possibility of review of the conviction and sentence constitutes a violation of article 14, paragraph 5, of the Covenant.

7.2 The State party contends that in the case of minor offences, the requirement of review by a higher tribunal is not applicable. The Committee recalls that the right set out in article 14, paragraph 5, refers to all individuals convicted for an offence. It is true that the Spanish text of article 14, paragraph 5, refers to "*un delito*", while the English text refers to a "*crime*" and the French text refers to "*une infraction*". Nevertheless the Committee is of the view that the sentence imposed on the author is serious enough in any circumstances to justify review by a higher tribunal.

7.3 The State party claims that the author at no time objected to being subject to the jurisdiction of the Supreme Court; it was only when found guilty that he contested the lack of the possibility of a second hearing. The Committee cannot accept this argument since the author's being tried by the Supreme Court did not depend on his wishes but was established by the criminal procedure of the State party.

7.4 The State party contends that in situations such as the author's, if an individual is tried by the highest ordinary criminal court, the guarantee set out in article 14, paragraph 5, of the Covenant does not apply; the absence of a right to review by a higher tribunal is offset by the fact of being tried by the highest court, and this situation is common in many States parties to the Covenant. Article 14, paragraph 5, of the Covenant stipulates that everyone convicted

of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that "according to law" is not intended to mean that the very existence of a right to review is left to the discretion of the States parties. Although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including adequate compensation.

- *Martínez v. Spain* (1104/2002), ICCPR, A/60/40 vol. II (29 March 2005) 150 at paras. 2.1-2.3, 3 and 7-9.

...

2.1 The author was a warrant officer in the Spanish army. He was sentenced by the Second Territorial Military Court on 26 March 1999, for the offence of disobedience, to 10 months' imprisonment, to suspension from official duties, and to suspension of voting rights. The author fractured his right hand in October 1995 and was placed on medical leave. In February 1996 he was ordered on three occasions to take a psychological and physical examination, but did not comply until the third time. On 1 March 1996 he was declared medically fit for duty and was told to report immediately to his military unit. Instead of complying, the author sent a number of documents certifying his temporary incapacity for duty. In late March 1996 he was again ordered to report for duty and again failed to appear, submitting instead a certificate of temporary incapacity.

2.2 The author filed an application for judicial review and annulment with the Fifth Chamber of the Supreme Court, convening as a military chamber. In the application the author referred to article 14, paragraph 5, of the Covenant. In a judgement of 29 December 1999, the Fifth Chamber rejected the appeal. Pursuant to article 325 of the Military Proceedings Act, which refers to articles 741 *et seq*. of the Criminal Procedure Act, the

Chamber confined itself to hearing the arguments put forward in the appeal to decide whether or not they were well founded.

2.3 The author applied to the Constitutional Court for *amparo*, claiming violation of his right to review by a second court. In the application the author alleged that the Military Proceedings Act prohibited the Fifth Chamber of the Court from acting as a genuine court of appeal, in the sense of having full powers to review all past proceedings. He also referred to the Views of the Committee in the *Gómez Vásquez* case.1/ In a judgement of 9 May 2001, the Constitutional Court rejected the appeal.

...

3. The author claims that his right to have his conviction and sentence reviewed by a higher court was violated. He argues that, owing to the special nature of the appeal process, the Chamber may not hear or review the entire proceedings of the court of first instance, but only analyse the grounds referred to by the applicant to decide whether or not they are in conformity with the law. The author asserts that the Chamber may rule only on irregularities in the judgement, and may not deal fully with the "rights" [*sic*] involved, but must confine itself to examining the applicant's arguments to determine whether or not they are well founded. The author maintains that there is no review by a higher tribunal, as provided for by article 14, paragraph 5, of the Covenant.

...

7. The Committee notes that the main issue in the penal case against the author was the assessment of his capacity to perform military duty, and that means an assessment of facts. The Committee further notes the comments made by the State party concerning the nature of the remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases,3/ such limited review by a higher tribunal does not meet the requirements of article 14, paragraph 5. Therefore, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

8. Accordingly, the Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

Notes

1/ Communication No. 701/1996, *Gómez Vásquez v. Spain*, decision of 20 July 2000.

...
3/ Communication No. 701/1996, *Gómez Vásquez v. Spain*, decision of 20 July 2000; communication No. 986/2001, *Semey v. Spain*, decision of 30 July 2003; communication No. 1007/2001, *Sineiro Fernández v. Spain*, decision of 7 August 2003; communication No. 1101/2002, *Alba Cabriada v. Spain*, decision of 1 November 2004.

- *Khalilov v. Tajikistan* (973/2001), ICCPR, A/60/40 vol. II (30 March 2005) 74 at paras. 7.5 and 7.6.

...
7.5 The author claimed that her son's right to have his death sentence reviewed by a higher tribunal according to law was violated. From the documents before the Committee, it transpires that on 8 November 2000, the author's son was sentenced to death at first instance by the Supreme Court. The judgement mentions that it is final and not subject to any further cassation appeal. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, 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 case7/. In the absence of any pertinent explanation from the State party, the Committee considers that the absence of a possibility to appeal to a higher judicial instance judgements of the Supreme Court handed down at first instance, falls short of the requirements of article 14, paragraph 5, and, consequently, that there has been a violation of this provision 8/.

7.6 With regard to the author's claim under article 6, paragraph 1, of the Covenant, the Committee recalls that that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant 9/. In the current case, the sentence of death of the author's son was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

Notes

...
7/ See *Domukovsky and al. v. Georgia*, communications No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

8/ See for example *Aliev v. Ukraine,* communication No. 781/1997, Views adopted on 7 August 2003, *Robinson v. Jamaica,* communication No. 223/1987, Views adopted on 30

March 1989, *Brown v. Jamaica,* communication No. 775/1997, Views adopted on 23 March 1999.

9/ See Conroy *Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, *Clarence Marshall v. Jamaica,* communication No. 730/1996, Views adopted on 3 November 1998, *Kurbanov v. Tajikistan*, communication No. 1096/2002, Views adopted on 6 November 2003, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

- *Ratiani v. Georgia* (975/2001), ICCPR, A/60/40 vol. II (21 July 2005) 82 at paras. 2.2, 2.5, 5.2, 11.2, 11.3, 12 and 13.

...

2.2 On 30 August 1995, following an apparent assassination attempt on President Shevardnadze the previous day, the author was arrested together with 10 others. There was no warrant for his arrest. He was charged with attempting to overthrow the government (high treason), attempted terrorism, and participating in an organization acting against the State. On the day of his arrest, representatives of the Security Service made statements on television and in the press to the effect that the author and the others arrested were "terrorists" and supporters of former President Gamsakhurdia.

2.5 ...On 21 April 1997, he was found guilty and sentenced to seven years imprisonment. He claims that he was denied the right to appeal from this decision.

...

5.2 In February 1998, following his conviction by the Supreme Court, which was not subject to appeal, the author wrote to the newly appointed office of the Public Defender for assistance, seeking to have his conviction reviewed. The letter was forwarded to the Presidium of the Supreme Court, which on 16 June 1998 rejected his request. On 25 January 1999 the Public Defender forwarded another letter to the Presidium of the Supreme Court on the author's behalf. The author states that, under Georgian law, the Presidium of the Supreme Court was required to comment on the Public Defender's statements within two months. When no response was received by May, the author went on a hunger strike, requesting an answer. The author states that on 14 May 1999, the Supreme Court reviewed his conviction in closed session, and decided to reduce his sentence to reflect the precise amount of time he had already spent in prison. The author adds that he was not, as the State party contended, released from the Courtroom, as he was not present in Court, but was released the following day.

...

11.2 As to the claim that the author was unable to appeal his conviction by the Supreme

Court, the Committee recalls its jurisprudence that article 14, paragraph 5, requires there to be an available appellate procedure which should entail a full review of the conviction and sentence, together with a due consideration of the case at first instance 5/. In the present case, three review procedures have been referred to by the author, and the Committee must consider whether any of them satisfies the requirements of article 14, paragraph 5. Firstly, the author stated that he complained about his conviction to the Office of the Public Defender, who, it appears, reviewed the author's case, and prepared a recommendation to the Presidium of the Supreme Court. It transpires that, as a result of this process, the Presidium of the Supreme Court reviewed the author's case and ultimately revised his sentence, whereupon he was released from imprisonment. The State party notes that, under Georgian law then in force (2001), it was not possible to file an appeal against a decision of the Collegium of the Supreme Court, which convicted the author, but that, based on the author's "supervisory complaint", the Presidium of the Supreme Court reviewed the author's case and commuted his sentence. The Committee notes that the State party itself does not refer to this process as being equivalent to a right of appeal; rather, it is referred to merely as a "supervisory complaint". The Committee recalls its previous jurisprudence that a request for a "supervisory" review which amounts to a discretionary review, and which offers only the possibility of an extraordinary remedy, does not constitute a right to have one's conviction and sentence reviewed by a higher tribunal according to law. From the material before the Committee, it appears that the supervisory complaint process in this instance is of such a nature. Accordingly, based on the information before it, the Committee considers that this process does not amount to a right of appeal for the purpose of article 14, paragraph 5, of the Covenant 6/.

11.3 Secondly, the State party submits that the author could apply to the Supreme Court for a review of his case, through the Prosecutor General, if he could identify new circumstances which called into question the correctness of the original decision. However, the Committee does not consider that such a process meets the requirements of article 14, paragraph 5; the right of appeal entails a full review by a higher tribunal of the existing conviction and sentence at first instance. The possibility of applying to a Court to review a conviction on the basis of new evidence is by definition something other than a review of an existing conviction, as an existing conviction is based on evidence which existed at the time it was handed down. Similarly, the Committee considers that the possibility of applying for rehabilitation cannot in principle be considered an appeal of an earlier conviction, for the purposes of article 14, paragraph 5. Accordingly, the Committee considers that the review mechanisms invoked in this case do not meet the requirements of article 14, paragraph 5, and that the State party violated the author's right to have his conviction and sentence reviewed by a higher tribunal according to law.

12. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

LEGAL RIGHTS - CRIMINAL - Right to Appeal

13. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an appropriate remedy. The State party is under an obligation to grant the author appropriate compensation, and to take effective measures to ensure that similar violations do not reoccur in the future.

Notes

...

5/ See for example communication No. 842/1998, *Romanov v. Ukraine*, Views adopted 30 October 2003.

6/ See communication No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted 17 March 2003. Note also that the European Court of Human Rights has determined that a 'supervisory' appeal of this nature does not constitute an 'effective remedy' for its admissibility requirements, due to its discretionary nature; see *Tumilovich v. Russia*, No. 47033/99, 22 June 1999 (dec); and *Pitkevich v. Russia*, No. 47936/99, 8 February 2001 (dec).

- *Gomariz v. Spain* (1095/2002), ICCPR, A/60/40 vol. II (22 July 2005) 134 at paras. 2.1-2.3, 7.1, 8 and 9.

...

2.1 The author worked in sales promotion for the company Coloniales Pellicer S.A. in Murcia. On 20 January 1989, the author signed a private document acknowledging a debt to the company. Having signed the document, the author continued working for the company until May 1990, when he was dismissed. The author and the company signed a conciliation agreement before labour court No. 4 in Murcia, terminating the employment contract, and the money owed to the author in terms of salary and redundancy pay was deducted from the total debt he had acknowledged in January 1989.

2.2 The company lodged a complaint against the author for misappropriation. On 16 May 1996, the judge of criminal court No. 2 in Murcia acquitted the author. The company lodged an appeal. On 16 September 1996, the Provincial High Court sentenced the author to five months' imprisonment for misappropriation, disqualified him from public employment or office, suspended his right to vote and ordered him to pay costs.

2.3 The author lodged an *amparo* application before the Constitutional Court, which was rejected on 29 January 1997. In the application, the author alleged both violation of his right not to be compelled to testify against himself, given that the only evidence on which he was

convicted was his acknowledgement of a debt to the company, and violation of his right to be tried without undue delay. Although the author had made this last claim at the beginning of the oral proceedings, in accordance with the rules governing criminal procedure, the Constitutional Court ruled that the author's claim had been lodged out of time, when the delays had ended. As to the alleged violation of the right not to confess guilt, it is clear from the Constitutional Court ruling submitted by the author that the Court concluded that the probative force of the acknowledgement of the debt had in no way affected his right not to confess guilt, given that the acknowledgment had taken place prior to the trial, and that the author did not claim to have been coerced in any way into acknowledging the debt.

...

7.1 Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that that expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties. On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out.6/ Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, as happened in the author's case, but also that the conviction will undergo a second review, which was not the case for the author. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court, in the absence of a reservation by the State party. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including the review of his conviction by a higher tribunal.

Notes

...

6/ Communication No. 1073/2002, *Terrón v. Spain*, decision of 5 November 2004, para. 7.4; communication No. 64/1979, *Salgar de Montejo v. Colombia*, decision of 24 March 1982, para. 10.4.

For dissenting opinions in this context, see Gomariz v. Spain (1095/2002), ICCPR, A/60/40 vol. II (22 July 2005) 134 at Individual Opinion of Ms. Elisabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty, 141, and Individual Opinion of Ms. Ruth Wedgwood, 142-143.

LEGAL RIGHTS - CRIMINAL - Right to Appeal

- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at paras. 7.4, 7.6 and 8.

  ...
  7.4 In relation to the alleged undue delays in the proceedings, the Committee notes that the Supreme Court delivered its judgement of 10 February 2003, that is over 41 months after the appeal was lodged on 3 September 1999, complemented by appeal briefs, the last of which is dated 25 May 2000. There was thus a delay of two years and eight months between the last appeal brief and the Supreme Court's judgement. Altogether, there was a delay of six and a half years between the author's arrest and the judgement of the Supreme Court. On the strength of the material before the Committee, these delays cannot be attributed to the author's appeals. In the absence of any pertinent explanation from the State party, the Committee concludes that there has been a violation of article 14, paragraph 3(c).
  ...
  7.6 On the alleged violation of article 14, paragraph 5, the Committee notes that the author complained that the Supreme Court had denied his appeal, which he maintains contained questions of law, without examining the substance of the case, on the ground that this court only reviews questions of law. He does not complain that his sentence was not reviewed by a higher tribunal. Moreover, it transpires from the facts that the Trial Court conviction of the author was reviewed by the Court of Appeal, which is a higher tribunal within the meaning of article 14, paragraph 5. The Committee observes that this article does not guarantee review by more than one tribunal. Consequently, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 5, of the Covenant.
  ...
  8. The Human Rights Committee... is of the view that the facts before it disclose a violation of articles 14, paragraphs 1 and 3 (c) and (e); 9, paragraph 1; and 7 of the International Covenant on Civil and Political Rights.

- *Cox. v. Canada* (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at para. 17.2. For text of Communication, see **LIFE - RIGHT TO** - DEATH PENALTY.

For dissenting opinion in this context generally, see

- *Lovell v. Australia* (920/2000), ICCPR, A/59/40 vol. II (24 March 2004) 101, Individual Opinion of Mr. Hipólito Solari Yrigoyen, at 116.